



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

### Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

### About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>





BE  
Aik  
XCP

)

*J. B. Leakey  
Chicago*

THE  
**PRACTICE OF THE LAW**  
IN  
ALL ITS DEPARTMENTS;  
WITH A VIEW OF  
**RIGHTS, INJURIES, AND REMEDIES,**  
AS AMELIORATED BY RECENT STATUTES, RULES, AND DECISIONS;

SHewing  
THE BEST MODES OF CREATING, PERFECTING, SECURING, AND TRANSFERRING RIGHTS;  
AND  
THE BEST REMEDIES FOR EVERY INJURY, AS WELL BY ACTS OF PARTIES THEMSELVES,  
AS BY LEGAL PROCEEDINGS; AND EITHER TO PREVENT OR REMOVE INJURIES;  
OR TO ENFORCE SPECIFIC RELIEF, PERFORMANCE, OR COMPENSATION:

AND  
**THE PRACTICE**  
IN ARBITRATIONS; BEFORE JUSTICES; IN COURTS OF COMMON LAW;  
EQUITY; ECCLESIASTICAL AND SPIRITUAL; ADMIRALTY;  
PRIZE; COURT OF BANKRUPTCY; AND COURTS OF  
ERROR AND APPEAL.

WITH NEW PRACTICAL FORMS.  
INTENDED AS  
**A COURT AND CIRCUIT COMPANION.**

—  
IN THREE VOLUMES.  
VOL. III.—PART I.

—  
BY **J. CHITTY, ESQ.**  
BARRISTER, OF THE MIDDLE TEMPLE.

---

LONDON:  
S. SWEET, CHANCERY LANE; STEVENS AND SONS, 39, BELL YARD;  
AND A. MAXWELL, 32, BELL YARD;  
New Booksellers and Publishers:  
MILLIKEN AND SON, GRAFTON STREET, DUBLIN.

1835

**LONDON :**  
**C. ROWORTH AND SONS, BELL YARD,**  
**FLEET STREET.**

## PREFACE

TO

### THE FIFTH PART.

---

THIS and the next part will conclude my entire undertaking. They principally relate to the *Practice* of the Three *Superior* Courts of *Law*, though incidentally to much of the practice of other Courts. It would have been a vain and futile attempt to endeavour to compete with the admirable work of Mr. Tidd, (the most useful offered to the Profession since the first publication of Blackstone's Commentaries,) or that of my son, whose recent publication, with his Collection of Forms, are worthy of his assiduity and intelligence. I have therefore endeavoured to take a *different view* of the subject, by examining the *principles* on which most of the rules are founded, *conjointly with the rules themselves*, by which association the rules will be better understood and more deeply impressed upon the memory. (a)

---

(a) We all confess, but few adequately perceive, why it is *so difficult* to recollect a *dry rule of practice*, and we incorrectly impute to a defect of memory what in reality is attributable to our *never having adequately known* the subject; the simple truth is, that *reason* or *principle* is the appropriate food of the *mind*, and it follows that no position is received with adequate appetite, unless it be associated with the reason upon which it is founded. The *attention* is not sufficiently excited, and consequently the *perception* of the rule is imperfect, and the image is so indistinctly and faintly impressed on the memory that it is soon forgotten; but when the mind is gratified by perceiving the *reason* of a

I have also not confined my attention to the mere statement of the several modes of proceeding, but have attempted to shew which is *preferable*, and why. As an instance of the manner of treating the subjects, the reader is referred to the consideration of the mode of obtaining *instructions* to *sue* or to *defend*, discussed in page 117 to 125. The observance of the precautionary measures there recommended, would, I trust, prevent many disastrous nonsuits and insufficient defences, at present too frequently occurring, from the want of adequate attention in the earliest stages of litigation.

Numerous *precedents* will be found in the notes, some entirely new, and others with suggestions for improvement in practice. I have considered it important at least that students, if not practitioners, should have the *forms before them* at the *same time* when they are examining the *parts* and *requisites*, and therefore I have adopted this mode of printing the precedents in preference to collecting them in a separate volume.

The *Table of Contents* immediately following these observations will shew the outline of this part in analytical order, and will serve as a *temporary Index* until the concluding part has been published; and at

---

rule it is never forgotten, because all the powers of the mind are then duly and constantly exercised in perpetuating the full knowledge and recollection of the rule. In my Treatise on *Medical Jurisprudence*, page 322 to 333, I have attempted to explain the modes of impressing and perpetuating the knowledge of any subject by the conjoint use of all the mental faculties, but principally by enjoining to all *legal students* the paramount importance of being in full possession of the *principles* and *reasons* on which each rule is founded before they pass on to the examination of another,

the head of each Chapter will be found an analytical table of its subjects.

In the four *earliest Chapters*, subjects of *general importance* are first considered; as—*First*, The six several branch jurisdictions of each Court, and which should be resorted to; as either the Court *in Banc*, in which usually four judges preside; the *Practice Court*; the jurisdiction and practice before a *single Judge at Chambers*; the jurisdiction and practice before the *Master and Prothonotary*; the jurisdiction and practice before a Judge at *Nisi Prius*; and the new jurisdiction and practice before the *Sheriff* of each county. *Secondly*, Is fully considered the several authorities on or by which the practice of the Courts stands or is regulated, as *Statutes, Rules, Usages and Decisions*, with a comparative view of the different effect of each. *Thirdly*, The present altered law relating to the *Terms and Vacations*, and all regulations respecting *time*. *Fourthly*, Are stated all the advisable *preliminary steps* antecedent to the actual commencement of an action or defence.

The *fifth Chapter* states all the Parts and Requisites of *Process in general*, as founded on the Uniformity of Process Act, 2 W. 4, c. 39, and this on a plan entirely new, and which it is hoped will meet with approbation.

In the next Chapters successively *each* description of process, with its *peculiar requisites* and incidents, are *separately* examined, viz. Writs of *Summons, Distringas, Capias, Detainer, Summons* against a *Member of Parliament* when a trader, and all the incident proceedings relating to each, until appearance or bail above; and, lastly, are considered Proceedings to *Out-*

*lawry* and to prevent the operation of a statute of *Limitations*.

The present part has purposely been closed with the subject of process, as at present established, so as to enable the author to introduce, at the *commencement* of the *next part*, a chapter relating to the expected *New Law* and *Proceedings qualifying* the right of *Arrest*, should any enactment on that subject be passed.

Afterwards will be considered all the rest of the proceedings in an action to its conclusion, and in particular will be given a very full chapter on *Affidavits*, *Motions*, and *Rules*, and another on *Nisi Prius Briefs*, with precedents and considerations of the best modes of *arguing* the former and of *conducting the trial* of an action, as well on behalf of a plaintiff as a defendant.

Throughout this volume it will be found that I have anxiously attempted to decry the injurious policy, so degradingly adopted by some practitioners, of taking advantage of *trifling irregularities* and *unworthy objections*; and I have endeavoured to advocate, on every occasion, that course of *liberal conduct* which should ever be pursued by the members of an highly honourable and justly influential profession.

J. C.

Chambers, 6, Chancery Lane,  
4th April, 1835.



# TABLE OF CONTENTS

OF

## PART V.

### CHAPTER I.

#### IN WHAT BRANCH OF EACH COURT TO PROCEED.

	Page
Recapitulation of previous subjects .....	1
Subjects remaining to be considered .....	2
Subjects of this chapter .....	<i>id.</i>
<i>Enumeration of the six branches of jurisdiction of each Court</i> .....	<i>id.</i>
<i>First, The jurisdiction and practice of the Court in Banc</i> .....	4
1. In general .....	<i>id.</i>
2. What acts must be in banc, and course of proceeding .....	5
3. What relationship or interest precludes a judge from acting .....	9
4. Necessity for concurrence of a majority of the judges .....	10
5. Limits of jurisdiction of judges .....	11
<i>Second, The jurisdiction of a Judge in Practice Court</i> .....	<i>id.</i>
1. Jurisdiction of, in general .....	<i>id.</i>
2. Where holden .....	15
3. Operation of 1 W. 4, c. 70 .....	<i>id.</i>
4. The extent of jurisdiction of Practice Court of K. B. ....	<i>id.</i>
5. Common paper and peremptory paper of this Court .....	17
6. Limited expediency of this Court .....	<i>id.</i>
<i>Third, The jurisdiction of a single Judge at chambers either in vacation or term</i> ..	19
1. In general .....	<i>id.</i>
2. His jurisdiction at Common Law .....	<i>id.</i>
3. By different statutes .....	20
4. By any judge of another Court .....	22
5. When a judge at chambers cannot act in term or vacation .....	24
6. Jurisdiction of a single judge during term .....	<i>id.</i>
7. Hours of attendance at chambers .....	27
8. Business of term transferred to a judge after term .....	<i>id.</i>
9. Judge's power at chambers to allow costs .....	29
Reasons for or against allowing costs .....	31
10. When a judge's order is beyond his jurisdiction or objectionable, how to proceed .....	32
11. Judge's order, how enforced .....	33
12. Motions to Court to set aside a judge's order .....	<i>id.</i>
13. When a judge's order is final .....	35
<i>Fourth, Jurisdiction or authority of the Master of King's Bench on the civil side, and of the Master on crown side, and of Prothonotary of Common Pleas, and Master of Exchequer</i> .....	36
1. Master on civil or plea side .....	<i>id.</i>
2. Master on crown side .....	38
3. Prothonotaries in Common Pleas .....	<i>id.</i>
4. Master in Exchequer .....	39

	Page.
CHAP. I. <i>In what branch of each Court to proceed—continued.</i>	
<i>Fifth, Of the jurisdiction and practice of a Judge at Nisi Prius in term or vacation in London or Middlesex, and on the Circuit</i> .....	39
1. In London and Middlesex in and after term .....	<i>id.</i>
2. No power of the Court or a judge at chambers to interfere with cause list of another judge, or the finding of jury .....	<i>id.</i>
3. On the circuit, his different powers .....	41
Amendments on the circuit .....	42
Practice of Summons and Order on circuit .....	45
<i>Sixth, Jurisdiction and practice of the Sheriff and his deputies</i> .....	46
Sheriff's power as a judicial officer .....	<i>id.</i>
To appoint a deputy with an office in London .....	47
Notification of appointment of sheriff .....	48
Transfer of process and prisoners .....	<i>id.</i>
Functions of sheriff in fact executed by deputy .....	<i>id.</i>

## CHAPTER II.

### BY WHAT AUTHORITY THE PRACTICE OF THE COURTS IS REGULATED AND WHY THE REGULATIONS OUGHT TO BE STRICTLY OBSERVED, AND CONSEQUENCES OF DEVIATIONS, &c.

1. Introductory observations on the SEVERAL AUTHORITIES upon which the practice and pleading of each Court stand .....	49
Upon what authority the practice stood before the statute 1 W. 4, c. 70 ....	50
Practice how regulated by <i>Statutes</i> .....	<i>id.</i>
Why inexpedient to prescribe rules of practice by statute .....	51
By express written <i>Rules</i> of Court .....	52
Introduction of general rules for regulating the practice of all the Courts ..	53
Distinction between a statutory regulation and a rule of Court .....	54
By <i>Decisions</i> and effect thereof .....	55
How regulated by <i>Usage</i> , and effect thereof .....	<i>id.</i>
Objections to any <i>conventional practice</i> .....	56
Inconveniences resulting from the great variety of process and rules before the recent acts of 1 W. 4, c. 70, and 2 W. 4, c. 39 .....	<i>id.</i>
2. Alterations introduced by 1 W. 4, c. 70 .....	57
3. Alterations by the rules Trinity Term, 1831 .....	58
Hilary Term, 1832 .....	<i>id.</i>
Easter Term, 1832 .....	59
4. Alterations by <i>subsequent statutes</i> , and in particular by 2 W. 4, c. 39 .....	<i>id.</i>
The uniformity of process act in particular, and amended by 3 & 4 W. 4, c. 67	60
5. Rules founded on the uniformity of process act, 2 W. 4, c. 39, viz. of Mich. Term, 3 W. 4, and the subsequent rules .....	61
General rules of Hilary Term, 1833 .....	62
Trinity Term, 1833 .....	<i>id.</i>
Hilary Term, 1834 .....	<i>id.</i>
The 3 & 4 W. 4, c. 42, s. 1, and rules thereon relative to pleading .....	<i>id.</i>
General rules of Hilary Term, 1834, as to <i>pleadings</i> and <i>entries</i> on record, founded on 3 & 4 W. 4, c. 42, s. 1 .....	63
6. General advantages resulting from the recent statutes and rules and all the judges conferring thereon .....	64
In what respects the present practice objectionable .....	<i>id.</i>
Instances in which the practice of the three Courts differs .....	67
Suggestions to rectify dissimilarity .....	<i>id.</i>
Consequences of all the judges conferring together .....	<i>id.</i>

	Page.
CHAP. II. <i>By what authority the practice of the Courts, &amp;c.—continued.</i>	
7. Why exact observance should be required, and inquiry into the distinction between the force of statutes and rules .....	68
8. Inconveniences from distinction between <i>peremptory</i> and <i>directory</i> .....	72
9. Recent rule, Michaelmas Term, 3 W. 4, r. 10, that certain <i>omissions</i> shall be deemed <i>irregularities</i> .....	73
Distinctions between acts void or merely irregular .....	75
Proceeding when void and consequence .....	<i>id.</i>
Proceeding when irregular and consequence .....	<i>id.</i>
10. Distinctions between acts void and voidable and those contrary to good faith ..	<i>id.</i>
11. Whether imperative or discretionary in Court or judge to give effect to an alleged irregularity .....	<i>id.</i>
12. Why advisable not to take trifling objections .....	76
But knowledge of technicalities why essential .....	<i>id.</i>
Suggested notice of objecting to process, &c. before summons or motion be allowed .....	80
13. Discretion of Court and judge over interlocutory costs .....	<i>id.</i>
14. Practice of a Court, how proved .....	82
15. Simplicity in practice of superior Courts of Law .....	83
16. Summary of the ordinary proceedings in an action .....	<i>id.</i>
17. But by irregularities proceedings may become complicated .....	85
18. Proceedings of less frequent occurrence .....	86
19. Practical proceedings peculiar to one Court .....	<i>id.</i>
20. Practice at law, in what respects dissimilar to that in Courts of Equity, &c. ..	87

## CHAPTER III.

OF THE TERMS AND VACATIONS, SITTINGS AT NISI PRIUS, IMPARLANCES, DIES NON, HOLIDAYS, YEAR, HALF YEAR, MONTH, AND WEEK, AND TIME IN GENERAL AS IT AFFECTS PROCEEDINGS IN ACTIONS AT LAW.

Limitations of actions referred to .....	89
1. Of the terms and vacation, esoin and return days, and how altered and consequences .....	<i>id.</i>
Formerly few proceedings in vacation .....	<i>id.</i>
Alterations by 11 G. 4, and 1 W. 4, c. 70, and 1 W. 4, c. 3 .....	90
Prescribed commencement of each term, and the four esoin or general return days in each .....	91
Prescribed number of days of sitting at Nisi Prius between the terms .....	<i>id.</i>
Proviso for trials at bar .....	<i>id.</i>
Proviso for trials at Nisi Prius on any day with consent of parties .....	92
Immediate judgments on indictments in vacation .....	<i>id.</i>
Justifying bail in vacation .....	<i>id.</i>
Expediting proceedings in actions of ejectment and immediate execution ....	<i>id.</i>
Enactments in 1 W. 4, c. 3, again altering return days and duration of terms ..	<i>id.</i>
Alterations by 1 W. 4, c. 7, writs of inquiry returnable in vacation, and immediate execution thereon, and also after verdict in vacation .....	93
Alterations by the uniformity of process act, 2 W. 4, c. 39 .....	95
Enactment of 2 W. 4, c. 39, s. 11, enabling a plaintiff to issue his writ and proceed to judgment and execution, even in the same vacation ..	<i>id.</i>
Requires appearance or bail above to process, even in vacation .....	96
The <i>exceptions</i> as to certain proceedings, especially between 10th August and 24th October .....	<i>id.</i>
Provides that bail and appearance must be perfected during that time ..	<i>id.</i>
But no declaration or pleading to take place between those days .....	<i>id.</i>

	Page.
<b>CHAPTER III. <i>Of the Terms and Vacations, &amp;c.—continued.</i></b>	
Rule M. T. 3 W. 4, r. 12, respecting pleadings .....	97
Principal result of the modern alterations, and what exceptions .....	98
Sittings in Middlesex and London after term .....	<i>id.</i>
Time for transacting business during the circuit .....	<i>id.</i>
Enactment of 3 & 4 W. 4, c. 67, s. 2, that all jury process and writs of execution may be tested in vacation, and returnable immediately after the same have been executed .....	99
A judge's order may be for return of all process in vacation .....	99
Of the necessity for enlarging or reviving rules of one term until or in the next .....	<i>id.</i>
Terms and vacations, how altered or affected by modern rules .....	100
Rule 2 of H. T. 4 W. 4, A. D. 1834 .....	101
The general result .....	<i>id.</i>
What acts must still be transacted in term .....	102
2. Imparances in certain actions abolished .....	103
3. Of dies non and holidays and hours of attendance .....	104
Of other dies non and holidays, and what abolished .....	105
Hours of attendance at Seal Office and other offices .....	105
4. Year or half year, how calculated .....	107
5. Months, how calculated .....	108
6. Day, when or not excluded .....	109
General rule of Hilary term, 2 W. 4, excluding first day and including the last .....	110
7. Hour of the day, when or not material in practice .....	<i>id.</i>
Fraction of a day .....	111
8. Meaning of terms <i>Instantan</i> , <i>Forthwith</i> , <i>Peremptory</i> , &c. ....	112
9. Time of declaring, pleading, &c. when to be stated in title .....	113

## CHAPTER IV.

**PRELIMINARY STEPS BEFORE COMMENCEMENT OF ACTION; AND PRINCIPALLY OF THE RETAINER OF AN ATTORNEY—INSTRUCTIONS TO SUE—WHO TO BE PLAINTIFF OR DEFENDANT, AND TENDER OF INDEMNITY TO A RELUCTANT PLAINTIFF—FORM OF ACTION—OPINION OF COUNSEL—LETTER TO DEFENDANT—CONSIDERATION WHETHER OR NOT TO ARREST THE DEFENDANT—AND SUBJECTS TO BE CONSIDERED BY AN ATTORNEY FOR A DEFENDANT.**

<i>First</i> , Of the retainer of an attorney .....	114
Form of general retainer .....	116
<i>Secondly</i> , Instructions to sue or defend .....	117
Instructions to sue .....	118
Form of instructions to sue .....	120
Instructions to defend .....	121
Form of instructions to sue in an action of trespass for injury to land .....	123
Suggested questions in order to obtain proper instructions for a defence .....	124
<i>Thirdly</i> , Circumstances for attorney's consideration thereupon .....	125
<i>Fourthly</i> , Who to be plaintiff or defendant .....	<i>id.</i>
<i>Fifthly</i> , Of obtaining a person's authority to use his name as plaintiff or lessor of plaintiff .....	127
Tendering indemnity against costs .....	<i>id.</i>
Suggested form of indemnity bond .....	128
Form of letter to accompany same .....	<i>id.</i>
<i>Sixthly</i> , Form of action to be observed .....	130

	Page.
CHAP. IV. <i>Preliminary Steps before commencement of Action—continued.</i>	
<i>Seventhly</i> , Of taking counsel's opinion .....	131
Suggested form of case for counsel's or pleader's opinion .....	132
<i>Eighthly</i> , Of retaining counsel .....	id.
Form of retainer of counsel .....	134
<i>Ninthly</i> , Of the plaintiff's attorney's letter before action .....	id.
Suggested form of letter .....	135
<i>Tenthly</i> , Whether or not to arrest the intended defendant.....	137
Reasons for not arresting .....	137, 323, 327
Reasons for arresting .....	id.
<i>Eleventhly</i> , Subjects to be considered by an attorney for a defendant .....	139

## CHAPTER V.

## OF MESNE PROCESS, AND PROCEEDINGS THEREON IN GENERAL.

## SECT. I.

*Of Mesne Process and Proceedings thereon in general.*

1. Subject of this chapter .....	140
2. Necessity for some process, and why.....	141
On what principles to be framed, served and executed .....	142
Time of service .....	143
Mode of service .....	144
3. Of the ancient process, and objections to the same .....	145
4. The five several processes substituted by 2 W. 4, c. 39, and observations on the same .....	147
Statement of the outline of the regulations in that act .....	148
Object of the legislature to afford information to defendant .....	149
Objections suggested to 2 W. 4, c. 39, and rules thereon.....	id.
The act printed in a note.....	150
The practical operation of 2 W. 4, c. 39.....	156
Enumeration and consideration of the five forms of writ .....	158
Process must be in English .....	id.
General operation of the act .....	id.
The writ now considered the commencement of the action .....	159
5. Statement of the Rules of Court for enforcing the same .....	id.
N. B. The rules printed in a note .....	160
6. Examination of the several parts of each of the five writs, and memoranda, warnings and indorsements thereby required .....	162
See analytical table of subdivisions.....	163

## SECT. II.

*Of the several Parts and Requisites of Process in general, 162.*

<i>First</i> , Name of the king .....	164
<i>Secondly</i> , Direction to the defendant .....	id.
<i>Thirdly</i> , Statement of Christian and Surname of defendant .....	165
Consequences of mistake .....	165, 170, 353
Form of affidavit to account for plaintiff's suing defendant by initial or wrong name.....	166
Name of a corporation .....	169
Names of hundredors .....	id.
Consequences of omission and mistakes in name of a defendant .....	170, 353

	Page.
SECT. II. <i>Of the several Parts and Requisites of Process in general—continued.</i>	
Cases of idem sonans .....	171, 232
Amendments as regards names, when refused .....	173, 235, 236
Statement of names in continued process .....	174
Fourthly, Statement of defendant's residence .....	<i>id.</i>
Consequences of mistakes .....	178
Description of defendant's residence in continued process .....	179
Fifthly, Defendant's addition of degree .....	180
Sixthly, Character in which the defendant is sued or plaintiff sues .....	181
Seventhly, Names of all the defendants to be inserted and no more .....	183
Eighthly, Direction to sheriff or other officer, by whom distringas, capias or detainer to be executed .....	185
Forms of directions to sheriffs .....	187
Ninthly, Non omittas clause .....	190
Tenthly, Statement of what defendant or sheriff is required to do .....	191
Eleventhly, Time in which defendant to appear, &c. and of return days .....	192
Twelfthly, Returnable in what Court .....	193
Thirteenthly, Statement of form of action .....	194
Proper descriptions of forms of action .....	197
Fourteenthly, Name of the plaintiff, or at whose suit .....	199
Subsequent repetition of his Christian and Surname .....	200
Character in which plaintiff sues .....	<i>id.</i>
Fifteenthly, Notice to the defendant of the consequences of his nonappearance, or not putting in bail above, and other warnings in body of writ .....	<i>id.</i>
Sixteenthly, Teste in name of chief justice or chief baron .....	202
Seventeenthly, Teste or date of day of issuing the writ .....	<i>id.</i>
Teste of proceedings to outlawry by writ of exigent and proclamation .....	204
Day of issuing process is the commencement of action .....	<i>id.</i>
Eighteenthly, Memoranda, notices and warnings at bottom of writ .....	205
Nineteenthly, Indorsements on writs .....	206
1. Sum sworn to on bailable process .....	207
Forms of indorsements .....	<i>id.</i>
Indorsed direction not to arrest a particular defendant .....	208
2. Name and place of abode of plaintiff's attorney or agent, &c. ....	<i>id.</i>
Forms of indorsements .....	209
3. Indorsements upon writs issued by a plaintiff suing in person .....	211
Form of such indorsement .....	<i>id.</i>
4. Indorsement of amount of debt and costs .....	212
Form of such indorsement .....	<i>id.</i>
5. Of defendant's abode, addition or description on bailable process unnecessary .....	215
6. Of day of serving writ or arresting defendant .....	243
Twentieth, Of concurrent writs into different counties .....	216
Forms of concurrent writs .....	217
Twenty-first, Of alias and pluries writs of summons and capias .....	<i>id.</i>
Form of alias or pluries summons .....	218
The like of alias or pluries capias .....	<i>id.</i>
Twenty-second, Of supposed necessity for second affidavit of debt, &c. ....	219, 349
Twenty-third, Of the præcipe for every writ .....	220
Form of præcipe for a writ of summons .....	221
for a capias .....	<i>id.</i>
for a concurrent capias into another county .....	<i>id.</i>
Twenty-fourth, By what officer writ to be signed .....	222
Twenty-fifth, By what officer writ is to be sealed .....	224
Twenty-sixth, Practical proceedings on issuing any writ .....	225

	Page.
<b>SECT. II. Of the several Parts and Requisites of Process in general—continued.</b>	
<i>Twenty-seventh</i> , Consequences of nonobservance of requisites in meane process and copies thereof.....	226
Omissions declared <i>irregularities</i> , but not to render writ <i>void</i> .....	227
Application to amend must be made in due time .....	<i>id.</i>
What deviations fatal .....	229
When not.....	231
<i>Twenty-eighth</i> , Of amending and resealing before execution.....	233
Notice to defendant not to appear, when prudent .....	234
Form of notice .....	<i>id.</i>
<i>Twenty-ninth</i> , Of amendments of writs and copies, when refused .....	235
No distinction between writ and copy.....	236
<i>Thirtieth</i> , Of motions and summons for irregularity .....	<i>id.</i>
Time for application .....	237
<i>Thirty-first</i> , Of preparing to serve or execute writ.....	238
<i>Thirty-second</i> , Of the execution of writs in general .....	239
1. Delivery to attorney, or sheriff or officer .....	<i>id.</i>
2. Attorney's undertaking to appear .....	240
Form of .....	<i>id.</i>
3. Duration of writs .....	241
Time of execution .....	<i>id.</i>
4. Place where to be executed .....	<i>id.</i>
5. Preparing to serve or execute.....	238
6. Mode of service or execution, and delivery of copy of writ .....	242
<i>Thirty-third</i> , Indorsements on writs of time when executed .....	243
Forms of indorsement .....	244
Consequences of sheriff's noncompliance .....	<i>id.</i>
<i>Thirty-fourth</i> , Affidavit of execution of process .....	245
<i>Thirty-fifth</i> , Return to writ, by whom to be made.....	<i>id.</i>
Who to return same.....	<i>id.</i>
How to enforce returns.....	246
Forms of returns .....	248
<i>Thirty-sixth</i> , Summary of circumstances to be attended to by a defendant after execution of process in general .....	249
<i>Thirty-seventh</i> , His ascertaining the attorney's authority to sue, and plaintiff's residence, &c.....	251

## CHAPTER VI.

## OF THE WRIT OF SUMMONS, PROCEEDINGS THEREON, AND APPEARANCE.

Consideration, what process to issue .....	253
Plaintiff's right to abandon serviceable process and issue a <i>capias</i> .....	254

## SECT. I.

*Form and Requisites of Writ of Summons, and Indorsements and Service thereof, 255*

<i>First</i> , The enactments and rules relating to .....	255
1. The 2 W. 4, c. 39, s. 1, and 3 & 4 W. 4, c. 67, s. 1.....	<i>id.</i>
Schedule and prescribed form of writ of summons.....	256
2. The rules Mich. T. 3 W. 4.....	<i>id.</i>
Duration of a writ of summons .....	<i>id.</i>
<i>Second</i> , Form of writ with indorsements.....	<i>id.</i>
Forms of indorsements.....	257, 258, in notes.

	Page
<i>SECT. I. Form and requisites of Writs of Summons, &amp;c.—continued.</i>	
<i>Third, When this writ preferable</i> .....	258
<i>Fourth, Of several concurrent writs of summons</i> .....	259
<i>Fifth, Practical proceedings on issuing same</i> .....	id.
Form of precept for a writ of summons .....	260
<i>Sixth, Service of, how to be made</i> .....	id.
1. Of what copy .....	id.
2. By whom to be served .....	262
3. On whom .....	263
Consequences of service on a wrong person .....	264
4. Time of service .....	id.
5. Place of service .....	265
6. Mode of service by delivering a copy .....	266
<i>Seventh, Indorsements of day of service</i> .....	271
Form of indorsement of service of process .....	id.
<i>Eighth, Return of summons non est inventus</i> .....	id.
Form of return of non est inventus .....	272
<i>Ninth, Proceedings in case of defendant's default of appearance</i> .....	id.
<i>Tenth, Of disputed service</i> .....	id.
<i>Eleventh, Of attorney's undertaking to appear and enforcing same</i> .....	273
Forms of undertakings .....	id.

## SECT. II.

*Proceedings after service of Summons, 274.*

1. Demanding inspection of the principal writ, and taking copy thereof .....	274
2. Demanding of plaintiff's attorney whether he had authority to issue writ, &c. .	275
3. Of obtaining particulars of plaintiff's demand .....	id.
4. Tender of the debt without costs .....	id.
5. Discovery of irregularities; and time and mode of objecting to same .....	id.
Reason for not objecting to irregularities .....	276
How to be taken advantage of .....	id.
Affidavits in support of motion to set aside proceedings, &c .....	278
Forms of .....	279
Hearing; making absolute; or discharging rule .....	id.
6. Payment of the indorsed debt and costs .....	280
7. Consequences of an offer to pay a sufficient sum and costs to the time of offer if not accepted .....	281
8. Time within which the defendant to appear after service .....	282
9. Mode and form of appearance by defendant or by plaintiff for him .....	id.
Forms of entering an appearance .....	283
1. By defendant in person .....	id.
2. By attorney of defendant .....	id.
3. By plaintiff's attorney for defendant .....	id.
What plea or act of defendant before his appearance is a nullity or otherwise .....	285
Proposed new forms of appearance .....	285, in note.
Practical proceedings on entering appearance by defendant himself ....	286
Former proceedings as to filing warrant to defendant .....	id.
Fees on appearance .....	287
Consequences of non-appearance .....	id.
The appearance must correspond with the process .....	id.
Appearance by an infant .....	288

Proceedings to enable plaintiff to enter appearance for defendant sec. stat. 289



# TABLE OF CONTENTS.

IV

	Page
<b>SECT. II. Proceedings after service of Summons—continued.</b>	
Necessary affidavit of service of process .....	289
Forms of affidavit .....	289, 290, in notes.
Before whom affidavit of service may or may not be sworn, and of enforcing the swearing to such affidavit .....	292
How to enter appearance for the defendant by the plaintiff .....	id.
Consequences of mistake in entry of appearance sec. stat .....	293
Time within which such appearance according to statute may be made ..	id.
Course of practice upon entering an appearance by the plaintiff for the defendant, according to 12 G. 1, c. 29 .....	294
Appearance must correspond with process .....	295
10. Of declaring on a writ of summons .....	296

## CHAPTER VII.

### OF THE WRIT OF DISTINGAS, AND PROCEEDINGS THEREON.

1. How regulated by 2 W. 4, c. 39, s. 3, and schedule No. 3 .....	298
2. When proper to be adopted .....	300
1. When to enable a plaintiff to enter an appearance for the defendant ....	301
2. When issued to proceed to outlawry .....	id.
3. The practice in the first case .....	id.
1. Requisite diligence in endeavouring to serve summons .....	302
2. Search for defendant's appearance to summons, and requisite affidavit on which to move for distingas .....	305
The requisite affidavit .....	id.
Suggested form of affidavit .....	306, 307
Supplementary affidavit admissible .....	308
3. Proceeding thereon .....	309
1. Motion for writ .....	id.
2. Rule for writ .....	id.
Form of rule for a distingas .....	309
Judge's order for rule in vacation .....	310
4. Principle for writ .....	id.
5. Form and requisites of distingas and indorsements thereon .....	id.
Writs of distingas into counties palatine .....	312
6. Proceedings thereon and how to be executed .....	id.
Sheriff's warrant to officer .....	id.
7. Defendant's own appearance to distingas .....	314
8. Sheriff's return of levy, or of personal service, or nulla bona and non est inventus .....	id.
9. When plaintiff may enter appearance <i>without leave</i> .....	315
Form of return that writ of distingas has been executed, and goods seized .....	id.
Forms of affidavit that goods have been taken .....	316
Form of affidavit where service of writ but no goods taken .....	317
10. Motion <i>for leave</i> to enter appearance for defendant .....	id.
Plaintiff's entering appearance thereupon .....	319
1. Proceedings where a defendant resided in furnished lodgings ..	id.
2. Where a defendant has a known residence in England, and goods, but is out of the kingdom .....	320
3. Where defendant has no known residence, but supposed to be in England .....	id.
Declaring upon a distingas .....	321
4. The practice in nonbailable cases in proceeding to outlawry, <i>post</i> , Chap. X <i>id.</i> , 400	

## CHAPTER VIII.

OF THE WRIT OF CAPIAS—CONSIDERATION OF ARRESTS—PRIVILEGES THEREFROM—RESTRAINTS UPON THE SAME—AFFIDAVITS TO HOLD TO BAIL, AND JUDGE'S ORDERS PERMITTING AN ARREST—PRÆCIPE FOR WRIT OF CAPIAS—WRIT OF CAPIAS ITSELF—SHERIFF'S WARRANT—ARREST, AND PROCEEDINGS THEREON TO PERFECTING BAIL ABOVE, AND CONSEQUENCES OF NEGLECT, AS REGARDS ACTIONS ON BAIL—BONDS AND PROCEEDINGS AGAINST SHERIFF.

	Page.
1. Introductory observations on law of arrests .....	323
Reason for arresting .....	<i>id.</i>
Reasons against arresting .....	327
2. Imprudent to arrest if evidence of debt doubtful .....	328
3. The privileges from arrest .....	329
1. Absolute and general .....	<i>id.</i>
2. Temporary or qualified .....	330
4. Requisite affidavit of cause of action .....	331
Enactments and rules .....	<i>id.</i>
Affidavit not considered commencement of action .....	332
Form and requisites of affidavit .....	<i>id.</i>
Title of Court but not in any cause .....	<i>id.</i>
Deponent's abode, addition, degree, &c. ....	333
Statement of the names of the parties .....	334
Cause of action, how to be stated .....	<i>id.</i>
The principle upon which great certainty and precision required in an affidavit .....	<i>id.</i>
Of affidavits defective in stating cause of action .....	337
Practical proceedings with respect to the affidavit of debt .....	<i>id.</i>
Before whom to be sworn .....	338
The jurat .....	339
The usual form of affidavit on a bill of exchange and other debts ....	<i>id.</i>
Defects in affidavit, when to be objected to .....	340
Of filing the affidavit .....	341
5. The writ of capias, form, and requisites .....	<i>id.</i>
A full form of writ, with notes .....	342
Practice in filling up blanks .....	343
Indorsements on writ .....	344
1. Of sum sworn to .....	<i>id.</i>
2. By plaintiff's attorney &c., of name, abode, &c. ....	345
3. In actions for a debt, of the debt and costs claimed .....	<i>id.</i>
Indorsements of day of issuing capias no longer requisite .....	346
The præcipe for a capias .....	<i>id.</i>
Form of præcipe for a capias .....	<i>id.</i>
6. Practice in issuing a capias, and signing thereof .....	347
7. Of sealing the capias .....	<i>id.</i>
8. Directions not to arrest one of several defendants .....	348
Forms of directions .....	<i>id.</i>
9. Of concurrent and continued writs of capias, and of alias and pluries writs ..	<i>id.</i>
10. When more than one affidavit of debt or copy to be filed .....	349
11. Of obtaining warrant to arrest .....	350
12. Form and requisites of warrant .....	351
Form of a sheriff's warrant on a capias .....	<i>id.</i>

	Page
CHAP. VIII. <i>Of the Writ of Capias, &amp;c.—continued.</i>	
13. Delivery of warrant and copies of writ to officer.....	352
14. Of arrests, analytical table of points relating to, and subsequent proceedings	353
1. Consequences of arrest by a wrong name .....	363
2. Place of arrest.....	354
3. Time of arrest.....	355
4. Of second arrest .....	id.
5. Of arrests and detainers when the defendant is already in custody of the sheriff .....	id.
6. Mode of arrest.....	356
No right to handcuff a party .....	357
7. Duty of officer thereupon .....	id.
To deliver to defendant a copy of the writ .....	id.
To inform defendant of his right to be taken to the house of a friend for twenty-four hours .....	358
Conduct of officer if defendant be ill .....	id.
Production to defendant of writ and warrant .....	id.
Duty to indorse on writ time of arrest.....	359
15. Extortion on arrests .....	id.
16. Duty of officer to search for other writs before discharging the defendant....	360
17. The proper conduct of a defendant on his arrest.....	361
18. The several legal modes of defendant's obtaining his release from process ..	362
1. By deposit of sum sworn to and 10 <i>l.</i> for costs .....	id.
2. By executing a bail-bond .....	id.
3. By defendant's attorney undertaking to appear and perfect bail ....	id.
Consequences of discharging a defendant without requiring one of these.....	363
19. Of executing a bail-bond.....	id.
Form of a bail-bond .....	364
Consequences of indulgence to principal discharges sureties.....	365
20. Deposit of sum sworn to and 10 <i>l.</i> for costs .....	366
Proceedings after same.....	367
21. Payment into Court of a further sum of 10 <i>l.</i> in lieu of bail above .....	id.
22. Undertaking by defendant's attorney to put in bail in lieu of bail-bond ....	id.
Form of undertaking .....	368
23. Change of officer .....	id.
24. Proceedings by defendant on account of irregularities.....	id.
25. Of motions to set aside or reduce the necessity for putting in full bail above on contradictory affidavits of the non-existence of the debt .....	369
26. Putting in bail above or deposit in Court of sum sworn to, and 20 <i>l.</i> for costs in lieu of bail .....	370
Time of putting in bail above .....	id.
Of obtaining further time to put in bail .....	372
Of putting in bail at any time pending action and before defendant is charged in execution.....	id.
Import of term " <i>putting in bail</i> " .....	373
Proceedings antecedent to putting in bail, competency of bail, and to what facts they must be prepared to swear .....	id.
The requisites to which bail must swear.....	374
Summary of who can or cannot be bail .....	375
Moral character of bail .....	376
Not more than two bail to be put in without leave of a judge .....	377
Form of bail-piece .....	id.
Modes of putting in bail.....	378

	Page
CHAP. VIII. <i>Of the Writ of Capias, &amp;c.—continued.</i>	
Notice of bail and requisites .....	379
Forms of notices .....	379, 380, 381
Forms of affidavits .....	382, 383
Other practical proceedings relating to bail.....	383
Time and mode of putting in bail .....	<i>id.</i>
Entry of exception to bail .....	384
Written notice of exception .....	<i>id.</i>
Of adding bail .....	<i>id.</i>
Written notice of justification.....	385
Of obtaining further time to justify .....	<i>id.</i>
Affidavit of service of such notice .....	<i>id.</i>
Brief and motion to justify bail in Court in term time .....	<i>id.</i>
Calling and appearance of bail to justify .....	<i>id.</i>
The usual hour of bail justifying .....	<i>id.</i>
Opposition to bail.....	<i>id.</i>
Allowance of bail, rule for, and service thereof.....	386
The declaration, how affected by the process of <i>capias</i> .....	<i>id.</i>
Proceedings on the bail bond .....	387
Proceedings against the sheriff.....	389
The course of proceeding to fix the sheriff with liability .....	390

## CHAPTER IX.

## OF THE WRIT OF DETAINER AND PROCEEDINGS THEREON, 392.

Declaration on a writ of detainer .....	393
---	-----

## CHAPTER X.

PROCEEDINGS AGAINST A MEMBER OF PARLIAMENT, A TRADER, UNDER  
6 GEO. 4, c. 16, s. 10..... 395.

Writ of summons against a member of parliament to enforce provisions of 6 Geo. 4, c. 16, s. 10 .....	395
---	-----

## CHAPTER XI.

## PROCEEDINGS TO OUTLAWRY ON MESNE PROCESS.

Proceedings to outlawry in general.....	396
The improved and more expeditious proceedings to outlawry.....	397
The necessity for proceedings to outlawry when one of several defendants abroad, removed by 3 & 4 W. 4, c. 42, s. 7 .....	398
Substance of modern practice in proceedings to outlawry under 2 W. 4, c. 39, s. 5. 399	399
First, On serviceable process .....	400
Form of affidavit to obtain <i>distringas</i> .....	401
Writs of exigent and proclamation.....	402
Secondly, On bailable process .....	403
Thirdly, In joint action where one defendant a prisoner .....	404

## CHAPTER XII.

OF PROCESS AND PROCEEDINGS TO SAVE THE STATUTE OF  
LIMITATIONS, 406.

# THE PRACTICE OF THE LAW,

*&c. &c.*

## PART FIVE.

### CHAPTER I.

#### IN WHAT BRANCH OF EACH COURT TO PROCEED.

<p>Recapitulation of previous subjects . . . 1</p> <p>Subjects remaining to be considered . . . 2</p> <p>Subjects of this chapter . . . . . <i>id.</i></p> <p>Enumeration of the six branches of jurisdiction of each Court . . . . . <i>id.</i></p> <p><i>First, The jurisdiction and practice of the Court in banc . . . . . 4</i></p> <p style="padding-left: 20px;">1. In general . . . . . <i>id.</i></p> <p style="padding-left: 20px;">2. What acts must be in banc, and course of proceeding . . . 5</p> <p style="padding-left: 20px;">3. What relationship or interest precludes a judge from acting . . . . . 9</p> <p style="padding-left: 20px;">4. Necessity for concurrence of a majority of the judges . . . 10</p> <p style="padding-left: 20px;">5. Limits of jurisdiction of judges . . . . . 11</p> <p><i>Second, The Jurisdiction of a judge in Practice Court . . . . . id.</i></p> <p style="padding-left: 20px;">1. Jurisdiction of in general . . . <i>id.</i></p> <p style="padding-left: 20px;">2. Where holden . . . . . 15</p> <p style="padding-left: 20px;">3. Operation of 1 W. 4, c. 70 . . . <i>id.</i></p> <p style="padding-left: 20px;">4. The extent of jurisdiction of Practice Court of K. B. . . . <i>id.</i></p> <p style="padding-left: 20px;">5. Common paper and peremptory paper of this Court . . . 17</p> <p style="padding-left: 20px;">6. Limited expediency of this Court . . . . . <i>id.</i></p> <p><i>Third, The jurisdiction of a single judge at chambers either in vacation or term . . . . . 19</i></p> <p style="padding-left: 20px;">1. In general . . . . . <i>id.</i></p> <p style="padding-left: 20px;">2. His jurisdiction at Common Law . . . . . <i>id.</i></p> <p style="padding-left: 20px;">3. By different statutes . . . . . 20</p> <p style="padding-left: 20px;">4. By any judge of another Court . . . . . 22</p> <p style="padding-left: 20px;">5. When a judge at chambers cannot act in term or vacation . . . . . 24</p> <p style="padding-left: 20px;">6. Jurisdiction of a single judge during term . . . . . <i>id.</i></p>	<p style="padding-left: 20px;">7. Hours of attendance at chambers . . . . . 27</p> <p style="padding-left: 20px;">8. Business of term transferred to a judge after term . . . . <i>id.</i></p> <p style="padding-left: 20px;">9. Judge's power at chambers to allow costs . . . . . 29</p> <p style="padding-left: 20px;">10. When a judge's order is beyond his jurisdiction or objectionable, how to proceed . . . . . 32</p> <p style="padding-left: 20px;">11. Judge's order, how enforced . . . 33</p> <p style="padding-left: 20px;">12. Motions to Court to set aside the order . . . . . <i>id.</i></p> <p style="padding-left: 20px;">13. When a judge's order is final . . . . . 35</p> <p><i>Fourth, Jurisdiction or authority of the Master of King's Bench on the civil side, and of the Master on crown side, and of Prothonotary of Common Pleas, and Master of Exchequer . . . . . 36</i></p> <p style="padding-left: 20px;">1. Master on civil or plea side . . . <i>id.</i></p> <p style="padding-left: 20px;">2. Master on crown side . . . . . 38</p> <p style="padding-left: 20px;">3. Prothonotaries in Common Pleas . . . . . <i>id.</i></p> <p style="padding-left: 20px;">4. Master in Exchequer . . . . . 39</p> <p><i>Fifth, Of the jurisdiction and practice of a judge at nisi prius in term or vacation in London or Middlesex, and on the circuit . . . 39</i></p> <p style="padding-left: 20px;">1. In London and Middlesex in and after term . . . . . <i>id.</i></p> <p style="padding-left: 20px;">2. No power of the Court or a judge at chambers to interfere with cause list of another judge, or the finding of jury . . . . . <i>id.</i></p> <p style="padding-left: 20px;">3. On the circuit, his different powers . . . . . 41</p> <p><i>Sixth, Jurisdiction and practice of the Sheriff and his deputies . . . 46</i></p>
--	--

IN the preceding parts we have not only examined the *remedies* without the aid of any Court, but also the principal preliminary considerations antecedent to an action, as the *retainer*

CHAP. I.  
INTRODUCTION.

of an attorney, solicitor or proctor; (a) the *proper parties* to sue or be sued; (b) the differences in *causes of action*; (c) the *evidence* for or against the claim; (d) how such evidence is to be elicited, as by *bill of discovery*, &c.; (e) the propriety of an attorney's *letter* preceding the writ; (f) and of *apologies or compromises*; (g) the expediency of *offers of security* to induce a creditor to give time; (h) the necessity for and utility of *notices, tenders and demands*; (i) *demands* of inspection and copy of warrants; (k) *notices of action*; (l) *notices* of an attorney's *lien*, and prohibition to pay his client; (m) with an enumeration of the various *preferable remedies*; (n) the expediency of *retaining counsel*; (o) the remedy by *arbitration*, (p) or by *summary proceedings* before a justice of the peace by information, conviction, &c. (q) We have also in the *fourth part* examined much of the *jurisdiction* and *general practice* of the *fourteen principal Courts* of Law, Equity, Ecclesiastical, Admiralty, Bankruptcy, and in Error.

Subjects remaining to be considered.

We are now in this concluding part more particularly to examine the detail of the practice of all those Courts. We shall give *full* consideration only to those parts which at present appear to require most particular attention.

Subjects of this Chapter.

*First, we are to inquire to what Court of Law, and to what department, branch or subdivision in particular of each, the application for redress should be sought by a plaintiff or a defendant.*

Enumeration of the six branches of jurisdiction of each Court,

The different *branches of jurisdiction* of the three superior Courts of Law are, 1. That of the full Court in *Banc*; 2. Of the Practice Court (at present holden only for the Court of K. B.); 3. Of a single Judge at Chambers; 4. Of the Master or Prothonotaries; 5. Of the Judge at Nisi Prius and on the Circuit; and 6. Of the Sheriff on Trials and Inquiry, &c.

Each Court of Law is *divided* into several distinct departments or branches of jurisdiction, in aid or relief of that which is *superior*, sometimes termed the *full Court*, (or rather the Court in *banc*, for it is not essential that *all* the *four* judges should be present,) and each other branch has distinct jurisdiction in aid of the highest. The departments of each Court are principally *six, viz.* 1. The Court properly consisting of four

- (a) *Ante*, vol. ii. 18.
- (b) *Id.* 47, 48.
- (c) *Id.* 52.
- (d) *Id.* 53.
- (e) *Id.* 54.
- (f) *Id.* 56.
- (g) *Id.* 57.
- (h) *Id.* 59.

- (i) *Id.* 60.
- (k) *Id.* 61.
- (l) *Id.* 63.
- (m) *Id.* 69.
- (n) *Id.* 70.
- (o) *Id.* 71 and 322.
- (p) *Id.* 73 to 125.
- (q) *Id.* 127 to 257.

judges or four barons sitting in *banc*, and only in term time, except on trials at bar under the authority of 1 W. 4, c. 70, s. 7, and before whom most proceedings in a cause are *supposed* to take place; and before whom, *in fact*, all the *most important* parts of business are transacted; such as all *formal arguments* and *judgments* upon *demurrer*, or in *arrest of judgment*, or *after verdict*, or on special cases or special verdicts, &c.; and to whom *appeals* may sometimes be made from the proceeding of either of the inferior branch jurisdictions of the same Court, or from inferior Courts, and in King's Bench, still on writs of error *in fact* even from the judgment of the Court of Common Pleas; 2. The *Practice Court*, recently created by the 1 W. 4, c. 70, s. 1, and held before a *single judge* sitting apart from the other four *only during term*, and now holden only as a branch of the Court of *King's Bench*,) and who in an *open Court*, and upon motion and rule in the same *forms* as those theretofore used in the principal Court in *banc*, disposes of certain *less important* branches of business, and grants rules *nisi* even in some difficult cases, to be afterwards discussed before the four judges in *banc*; 3. *A judge* of each Court attending singly at his *chambers* in rotation, as well during the terms in the afternoon, as in the vacations, and who disposes of *still less important* matters connected with a suit, not by formal motion and rule, but upon *summons*, and by his *order*; or sometimes on *petition*, and sometimes (though not so frequently so as before the Practice Court was instituted) *after term*, by hearing rules *delegated* to him by the Court in consequence of the Court in *banc* not having been able to dispose of them during the term; or as being more fit for *private examination*; and sometimes even at the judge's house in the evening, so as not to interrupt or delay the judge's decision on the press of smaller matters at his chambers; 4. The *master* or prothonotary, to whom *many matters* are referred by the Court to decide upon, as in references as to the amount due on a bill of exchange, &c., or in order that, after he has examined the affidavits, and perhaps made an extended inquiry upon *further affidavits*, he may *report* the result of his investigation to the Court; as frequently occurs in the King's Bench, where the propriety of the conduct of an attorney has been questioned; 5. The jurisdiction of a judge on the circuit, who, besides the ancient jurisdiction of presiding as a judge on the trial, has several new or enlarged powers connected with the cause to be tried, and essential to remove difficulties that might otherwise then occur, such as the powers of *amendment* under

CHAP. I.  
INTRODUCTION.

3 & 4 W. 4, c. 42, s. 23; and *lastly*, the jurisdiction of the *sheriff* of each county or his deputy, as an officer of and in aid of the Court either on *trials of issues* under the same statute, when the claim for a debt or demand does not exceed *twenty pounds*, or on an inquiry of damages after a judgment by default, or in executing the process of the Court. But each of these several branch jurisdictions require further consideration than this mere summary or outline. Therefore to proceed.

*First, The Jurisdiction and Practice of the Court in Banc.*

I. IN BANC.  
*First, The jurisdiction and practice of the Court in banc, and what business must be there transacted, or may be transacted, before one of its inferior branch jurisdictions.*

1. In general.

In general, and in the ordinary course of litigation, the attorney for the complainant whose *legal* right has been injured, issues, according to his own discretion, one of the several prescribed forms of *writs* against the wrong-doer out of an *appointed office*, and which writ is *signed* by an officer of the particular Court, and afterwards *impressed* with the *seal* of the Court by another appointed officer, and thereby finally receives its authenticity; and to forge or imitate the signature or seal is a high crime; and these steps are taken without the Court, or even one of its judges having any actual knowledge of the proceeding; and the Court *in banc* hears nothing of the suit until, in consequence of a demurrer or a verdict, or some irregularity, a contest between the parties has arisen which is of sufficient importance to require the *actual interference* and decision of such *Court in banc*.<sup>(s)</sup> But in the course of the numerous actions and defences successively depending in the three Courts, there are almost innumerable intermediate *smaller practical differences* between the parties, which, although of less importance than a formal judgment or decision to be pronounced by the four judges, are nevertheless fit to be discussed and determined on motion and rule nisi, afterwards made absolute or discharged by a single judge sitting in the Practice Court; whilst other differences of *still less importance* are disposed of before a single judge at his *chambers*, in a still more summary manner upon summons and by order. The *regular* proceedings in a suit are comparatively few and simple, but by collateral circumstances of innumerable variety, and by blunders and irregularities, the proceedings not unfrequently become complex; and the whole of these are important to be known by all practi-

(s) It seems, therefore, that, as observed by Mr. Justice Taunton, there is no sufficient ground for any distinction in permitting an amendment of a writ, and not of a copy, for each is in fact the act of the plaintiff's attorney, and not of the Court; and it is not the duty even of the

officer who signs and seals the writ to see that it is formally correct, but that duty entirely falls on such attorney. Per Taunton, J., in *Hodgkinson v. Hodgkinson*, 3 Nev. & Man. 565; but see *Byfield v. Street*, 10 Bing. 28.



ioners, since it is impossible to anticipate that they may not have to encounter some such difficulty. In the present chapter we will concisely consider what description of business must be transacted in *full Court* or rather in *banc*; what in the *Practice Court*; what before a *single judge at chambers* in term or vacation; what before the *master* or prothonotary; and what at *nisi prius* before a single judge; and what by or before the *sheriff*. This inquiry will clear the ground, and enable us in the next chapter to consider *upon what authority*, grounds or rules, the *practice* of the Courts proceeds or depends. We will then in the third chapter consider the differences between the *terms and vacations*, and some general rules respecting *time*; and in the fourth chapter we will examine some important *preliminaries* before the first step in the cause by issuing the *process*; and the rest of the practice will follow in natural order as it arises in the usual course of a cause.

The *number* of the *judges* and *barons*(u) of each of the superior Courts of Law at Westminster, viz. King's Bench, Common Pleas and Exchequer, constituting the *full Court* sitting in *banc*, has varied at different times, according as it has been considered essential to exercise the prerogative unquestionably vested in the *king*,(x) though according to modern practice, the legislature, as in the late instance, sometimes give him express power.(y) Before the 23d July, 1830, each Court had attached to it for a very considerable time only *four* judges; and although the 1 W. 4, c. 70, s. 1, authorized the king to appoint a *fifth* judge in each Court, yet it is expressly provided that only *three puisne judges* shall sit in *banc* with the chief justice or chief baron, so that the *five* judges cannot sit together, or *professedly* concur in any proceeding in either of these Courts; and the number of the judges constituting the *full Court* sitting in *banc* is limited to *four*, consisting of the chief and three of the *puisne judges* or barons sitting in rotation, whilst the other *puisne judge* (*usually* for an *entire term*) sits apart in the *Practice Court* in the early part of the morning, and to hear and decide upon matters of less

2. What acts must be transacted before the whole Court or in *banc*.(t)

(t) And see *post* as to what a single judge cannot decide upon.

(u) The 1 W. 4, c. 70, s. 1, treats the terms of judge and baron as synonymous, and throughout this work the term *judge* alone will be used as including each.

(x) *Emerton v. Emerton*, Sir T. Raym. 475; *Dug. Orig. Jur.* c. 19; 3 Bla. Com. 41.

(y) 1 W. 4, c. 70, s. 1. The student will observe as a general rule, that in mo-

dern times it has been customary for the king very rarely to exercise his prerogative, but to delegate the expediency of every measure in the least affecting the public to the consideration of parliament, so that most changes have been made by statute, though the king might of his own authority have effected the object; as by his warrant alone opening the Court of Common Pleas to all barristers, *ante*, vol. ii. 385.

CHAP. I.  
I. IN BANC.

importance, under the provisions in the 1 W. 4, c. 70, s. 1 and 4, and in the afternoon he attends at chambers; and in the ensuing term another puisne judge relieves him in this subordinate though exceedingly important duty, and he then takes his seat in banc, and so on in rotation. By these means the same four judges are enabled to sit continuously from ten in the morning until four or five o'clock in the afternoon, and having during that term no chamber duty to perform, are enabled in the evenings to examine and consider the numerous demurrers, books, special cases, and special verdicts, and proceedings standing for argument (in the King's Bench as well on the civil as the criminal side of that Court,) so as to be better able to understand the arguments to be heard on the succeeding day, and are thereby enabled to devote the whole of the morning to the superior class of business.

It is not, however, essential to the validity of the proceedings in full Court that the full number of four judges or barons shall be assembled, and the 3 & 4 W. 4, c. 41, s. 6 and 25 and 26, expressly provides for the absence of the Chief Justice, or Chief Baron, or of the Chief Judge of the Court of Review, whilst attending the Judicial Committee of the Privy Council, (x) and it is expressly provided that *two* judges of the Court of Review may proceed in the absence of the chief; (z) and before the recent addition of a fifth judge in the three superior Courts of Law, it frequently happened that in the absence of the chief, as when trying causes at Nisi Prius, especially after three o'clock in the afternoon, when one of the judges had left the Court, and proceeded to chambers, many cases of importance were heard and determined by only two judges in the Court of King's Bench. In general, however, it has been considered by the judges important, not only that there should be a *full* Court during the entire *hearing* as well as in deciding upon all formal arguments on *demurrer*, rules absolute in *arrest of judgment*, rules absolute for *new trials* (when on the *merits* and not on a mere practical point), and in the King's Bench rules absolute for a *criminal information* and the *Crown paper*, including questions on *parochial settlement* and *rates*; but it is also a principle that each judge should, on all points of the least novelty or difficulty, state his opinion *seriatim*, on the ground that the suitors have a right, not only to know the determination of each judge, but also the precise reasons which have led him after due investigation and consideration to arrive at his

---

(x) *Ante*, vol. ii. 575.

conclusion, so as to evince that he has *really* and *energetically* applied his attention and mind to the question, and not like a mere cipher, or merely to save the labour of research, tacitly assented to what the other judges may have decided. (a) Another advantage also has *not unfrequently* arisen from this faithful discharge of a judge's duty, viz., that *not unfrequently* it has occurred that the respectful firmness and pertinacity of counsel has fixed the attention and influenced the opinion of one of the several judges, and who, after one or more of the judges has delivered an unfavourable opinion upon first impressions, has so earnestly advocated the cause of truth, as to induce such other judges to pause and delay giving their judgment conclusively, and in consequence, ultimately all the other judges have concurred in that opinion, at first entertained only by one of the judges, (b) and thus the decisions in banc of the *full Court*, faithfully reported by experienced barristers, (c)

(a) Per Bayley, B. in *Young v. Timmins*, 1 Tyr. Rep. 238. The most enlightened and experienced judge, when deciding apart from others, from want of that useful comparison of views prevailing in *banc*, will sometimes err; see an instance in *Young v. Beck*, 2 Dowl. 462, and 1 Crom. M. & R. 460. There is a ludicrous statement in verse in Burrow's Settlement Cases, 122, of the supposed then practice of the puisne judges stating their opinion in chorus, as assenting to the Chief Justice's opinion and not stating their own *seriatim*. Sir James Burrows there states that he had heard a report of a decision on a settlement case in the form of a catch, and which will be found there given.<sup>1</sup> And see Burn's Justice, 26 edit. tit. Poor, 313, note (a).

(b) This occurred in *Luntley v. Bat-time*, 2 Bar. & Ald. 234, where one of the defendant's counsel gave up the point, but the junior so pressed the argument, that he almost incurred the displeasure of the then Lord Chief Justice Ellenborough, for jejune and injudicious pertinacity; but at length Mr. Justice Bayley induced the Chief Justice to pause and hear the argument; after which, the distinguished Chief Justice, with that candour which always influences a great mind, and is indispensable in the due administration of justice, publicly avowed that he had changed his opinion, and with the other judges decided in favour of the defendant; upon which the bar, with a warmth and sincerity, negating all supposition of unworthy jealousy, congratulated the junior; and he has attributed much of his subsequent success in his profession to the result of that particular discharge of his duty.

(c) As regards *legal reports*, it has been the misfortune of the profession in some

instances to have them undertaken by inexperienced personages, who can scarcely understand the question before the Court, and still less appreciate the import of the arguments or judgment, and whose haste and misapprehension too often occasions the mistatement even of facts. It will be remembered that the late Lord Kenyon observed that the report of a case might in some respects be correct, but that in the statement of his judgment, it had been by the omission of one little word "*not*" supposed to have been in the affirmative, when in fact it was in the negative. A person should be a good lawyer to be a reporter. It is scarcely fair to a judge, and is likely to mislead the profession, to report *Nisi Prius* cases, or even the decisions of a single judge in the Practice Court, excepting on the laudible ground that one side or the other usually wants to have *some materials*, however questionable, to support a bad case, and so far *Nisi Prius* decisions and those of the Practice Court may be useful in a *desperate* case; but really three or even five reports of the same case as at present to be found are too severe a tax on the time and pocket of the profession, more especially when they as usual reiterate the similar decisions upon the same point instead of confining reports to new and important points decided in *banc*, and not unfrequently copy from a prior report. I remember the late Lord Ellenborough's declaration, "although I cannot refuse to hear such decisions and hasty dicta, when quoted by counsel, yet I wish that in every town and village in the kingdom there were an officer of justice to perform on such books the same office as was so ably executed by the curate and the barber upon Don Quixote's library."

CHAP. I.  
I. IN BANC.

become landmarks, by which *each single judge afterwards considers himself bound*, (d) and the profession and suitors may afterwards steer their course. These, and a few other such essential advantages result from an investigation, whether of fact or law, before a *full Court*, that nothing but extreme necessity for delegating even a mere question of costs to a single judge, should, in the administration of justice, be admitted. But at the same time, when it is recollected that at *Nisi Prius*, except on trials at bar, only one judge presides, and that in Courts of Equity and Ecclesiastical, Admiralty, and Prize Courts, only one person presides as judge, even upon the most intricate and important questions, therefore suitors have not any positive right to complain when they find that for the purposes of despatch, cases of less importance are referred to a single judge. It should be constantly kept in view that it is scarcely consistent with the due and perfect administration of justice, that the judges who have to sit in banc or full Court should be frequently kept in Court to a late hour in the afternoon of each day, for it is essential that, not only in the evenings before civil and crown paper days, the judges should have full time to examine the paper books left at their chambers for perusal, but even to consult authorities, so that they may be better prepared to hear and appreciate the arguments of counsel, and it would be advantageous to the suitors of the Court, even if more time than at present were afforded to the judges for this important purpose. (e)

Before the Court of King's Bench was relieved from a part of its burthensome jurisdiction by the appointment of a fifth judge with power to sit apart and decide upon the more simple matters during the term in order to despatch business, a practice was adopted by the judges of that Court to sit in Serjeants' Inn Hall, some days previous to the commencement of Hilary, Easter, and Michaelmas Terms, there to hear special arguments on demurrers, writs of error, special verdicts, special cases, and new trials, upon which they then delivered their opinions *seriatim*, (except in cases reserved for further consideration,) and judgment was afterwards formally pronounced as was con-

(d) It seems that a single judge, even in the Practice Court, does not consider himself at liberty to decide against a decision in *banc*, on a similar point in any other of the Superior Courts, and this, although another single judge of his own Court had, on another occasion deviated from that rule, and decided differently. Per Littledale, J. in *Hilleur v. Hengale*, 3

Dowl. 61. As to the *last* decision being to be preferred, see *post*, Chapter II., and *Duncan v. Grant*, 4 Tyr. 819.

(e) The public know only of the labour of the judges in Court, and are ignorant of the arduous professional duties they have to perform, as it were in their library, not only during the terms as pending the sittings and circuits.

sidered essential in the following term in open Court, thereby evincing the understanding that all decisions of the Court must at least be formally pronounced in term. (f) And the statute 1 & 2 G. 4, c. 16, repealed and altered by 3 G. 4, c. 102, contained enactments expressly authorising decisions as well in criminal as civil cases at certain times in vacation. (g) But as the appointment of a fifth judge for each Court to sit apart and decide upon the less difficult descriptions of business, (h) and the enactment requiring judgment in most criminal cases to be given at the assizes instead of occupying the time of the full Court above in term time, (i) and the enactment enabling the judges, when attending the Court of Exchequer Chamber in error, to hear arguments and decide thereupon *in vacation*, (k) have greatly relieved the Courts of considerable parts of pressing jurisdiction, it became no longer necessary for the Court of King's Bench, or any other of the Superior Courts of Law, to sit in vacation for the purpose of disposing of business that by the common law ought to be disposed of in term time, and therefore the above act 3 G. 4, c. 102, was repealed by 1 W. 4, c. 70, s. 5. It is fit also that the suitors should know that in the vacation, the judges are almost incessantly occupied, either in the Exchequer Chamber, or in attending the Privy Council, or the House of Lords, or in assisting the Chancellor, or at the Old Bailey, or otherwise, so that they have scarcely time for adequate exercise or repose.

In so extensive a community as England or the United Kingdom it can rarely occur that *relationship* or other objection, usually constituting a ground of challenge to a jurymen, can exist so as to render it improper for a *judge* to act. The greatest delicacy however is constantly observed on the part of the judges, so that they never act when there could be the *possibility* of doubt whether they would be free from bias. Anciently a judge could not try a civil or criminal case in the county in which he was born or inhabited; but that impediment and exclusion being found exceedingly inconvenient and an indulgence of unnecessary jealousy, was expressly altered

3. What relationship or interest precludes a judge from acting as such.

(f) *Rosse v. Roach*, 1 Maule & Sel. 304; *Evans v. Soule*, 2 Id. 1; *Thomas v. Courtney*, 1 Bar & Ald. 1; *M'Neillage v. Holloway*, Id. 218; *Wilson v. Dickson*, 2 Id. 2; *Cartwright v. Keely*, 7 Taunt. 192, Tidd, 39, 40, 9 edit.

(g) See the enactments concisely stated, Tidd, 39, 40.

(h) 1 W. 4, c. 70, s. 1.

(i) *Id.* sect. 9. See observations on the altered practice of giving judgment in criminal cases on the circuit immediately after trial, Chitty's Summary Practice, 185 to 188, and *post*.

(k) *Id.* sect. 8.

CHAP. I.  
I. IN BANC.

by statutes. (l) A recent decision in the Privy Council, that a judge could not sit in that character in a cause wherein his deceased wife's nephew was interested, because the feelings of such collateral relationship are not to be considered as determining with the death of the wife, evinces that the slightest degree of relationship would induce a judge to decline interfering. (m) And the common law establishes that the *slightest degree* of pecuniary interest would be considered an insuperable objection. (n)

Consequences  
of the judges  
differing in  
opinion.

When the judges differ in opinion the judgment or decision depends on the majority in number, without regard to any distinction between the Chief Justice or the Chief Baron; (o) though in making general rules or orders under the 1 W. 4, c. 70, s. 11, or the 3 & 4 W. 4, c. 42, s. 1, the three chiefs must concur with the majority or the rules cannot be made. If the Court should be equally divided, as two for and two against a rule or demurrer or motion in arrest of judgment or for a new trial, or judgment on verdict or other proceeding, then there can be no rule, order, or judgment; but in such a case, where considerable property is at stake, or it is otherwise important to have a decision in a Court of Error, and it is desired to take the cause into the Exchequer Chamber or House of Lords, it is usual for one of the judges to withdraw his opinion, so as to prevent an

(l) 3 Bla. Com. 271; 4 Bla. Com. 59, 60; 12 G. 2, c. 27; 49 G. 3, c. 91. But still it is exceedingly important that a judge, (when acting in such county, or indeed in any other, where he may have relations or intimate acquaintance,) should during his circuit, or whenever he is exercising his judicial functions, separate himself from their society; for although it is well known amongst honourable men that the only danger from relationship with a judge or arbitrator is that he may be inclined to decide against his relation for fear of regard warping his judgment, yet the vulgar will think otherwise. I know professionally that the late Mr. Justice Taunton, one of the most highly honourable and best of men, was subjected to a libel in a cause of *Blake v. Pilford*, tried on the western circuit, A.D. 1832, merely because some persons supposed to be his relations and to be also related to the defendant attended the Court during the trial and sat near the judge and, as was supposed, partook of refreshment in his ante-room.

(m) *Becquet v. Lempriere*, 1 Knapp's Rep. 376.

(n) *Matthew v. Olleston*, 4 Mod. 226; Comb. 218; Hard. 44; Hob. 87; and see

3 Bla. Com. 299, *ante*, 3d part, p. 83, as to who may be an arbitrator. On a motion for a new trial in *Dauncey v. Berkley*, T.T. 1827, Lord Tenterden and the rest of the judges granted a new trial principally on the ground that one of the special jurors who had given the plaintiff a verdict for 1000*l.* damages was also one of his assignees, although he could have no beneficial interest in the verdict, which was given in an action for criminal conversation with the plaintiff's wife, commenced after he had obtained his certificate, the Court observing that the circumstance of the juror being an assignee might constitute a bias or inclination in the plaintiff's favour, and that it was important for the administration of justice that in every department it should be free even from the breath of suspicion.

(o) See *Selby v. Bardons*, 3 Bar. & Adolp. 2, where the two puisne judges but recently appointed on correct ground differed from and consequently overruled the decision of that distinguished lawyer the deceased Lord Tenterden; a memorable instance of the uncertainty which must ever accompany legal opinions, and admirably calculated to moderate conceit in any extent of legal knowledge.

equal division and enable the two judges then constituting a majority to declare their formal judgments, by which means there may be an appeal to the highest tribunal.

CHAP. I.  
I. IN BANC.

The jurisdiction of the judges is limited by statutes or express rules, or by the practice or usage of the Courts, from which they cannot deviate unless by consent of the parties or as a condition of granting some favour or permitting some act which it is discretionary in the Court to refuse; as if a defendant apply for a new trial the Court may refuse it unless he bring the sum recovered, or a part, into Court as a certain security for the result; but they could not *ex mero motu* impose such terms during an action. And the full Court in Banc could not any more than a judge give *more time* to a defendant for the payment of a debt recovered than the ordinary practice at law allows; (q) although, under the recent acts 1 W. 4, c. 7, s. 2, and 3 & 4 W. 4, c. 42, s. 18, 19, a judge, and even a sheriff, has a discretionary power to *expedite* execution immediately or soon after verdict in an action; and although under most of the Court of Request Acts the commissioners for carrying the same into execution have power to direct by what, if any instalments, a debt shall be paid, and it might perhaps be well to vest similar powers in the *superior* judges. (r)

5. Limits of the jurisdiction of the judges. (p)

### Second.—The Practice Court.

II. Those who have been accustomed to attend the superior Courts of Law at Westminster, where four judges constantly preside, and who have witnessed the great advantages resulting from those four *communicating* with each other pending an argument, and comparing the *inclination* of their opinions before they are openly declared, thereby preventing the hasty statement of an opinion to which in the ordinary attachment to consistency there might be a natural but injurious inclination to adhere, will undoubtedly prefer such tribunal to that where *only one judge* presides, as in the Courts of Equity and Spiritual

### II. PRACTICE COURT.

The jurisdiction of one judge in the Practice Court during the terms.

Creation and jurisdiction of the Practice Court in general.

(p) And as regards jurisdiction each Court is so strictly confined to its proper limits that it has been said that if the Court of King's Bench should issue a *grand cape* in a real action, and cause it to be put in force, that Court having no jurisdiction over real actions, an action of

trespass would lie; 10 Coke, 76 a; 2 Bulst. 64.

(q) Kirby v. Ellier, 2 Crompt. & M. 315.

(r) See an instance in 39 & 40 G. 3, c. 194, s. 5, in the Court of Requests for London, Chitty's Col. Stat. 325.

CHAP. I.  
II. PRACTICE  
COURT.

Courts, where the most important matters are decided by such single judge. It will however be admitted that at law as well as in equity many matters very frequently arise which are not of sufficient difficulty or importance to require the united wisdom of four judges, but may be safely determined by one. (s) Nevertheless, before the recent act, 11 G. 4 and 1 W. 4, c. 70, s. 1, it was essential that almost every matter should be determined in full Court, and the jurisdiction of one of them during the terms to sit apart was confined to the Court of King's Bench under the then existing act, (t) and even there was very limited and depended entirely on particular enactment; for as the Courts of Law were constituted and designed to be holden before the *four judges* of each, it was considered the *absolute right* of the suitors in *all cases* to have the decision of the four judges, unless prevented by illness from attending; and even bail could not legally have justified in chambers in term time unless by consent. (u) And it was even enjoined by express rule of the Court of King's Bench and Common Pleas that no business should be transacted before a judge at chambers *during the sitting* of the Courts at Westminster; (x) and the consequence was that in term time the judges could only transact business at chambers in term time in the *evening*, or at least during hours when the Court was not sitting. The 57 G. 3, c. 11, confined to the Court of King's Bench, was the first act for altering the practice in this respect, and after reciting "that the Court of King's Bench, by reason of the great increase of business therein, had of late been much occupied during term in the adding and justifying of special bail, *whereby other business of great public concern* had been much obstructed and delayed, and that it would tend materially to remedy that inconvenience if one of the judges of the same Court should be enabled to sit and proceed, when occasion should so require, upon the said business of *adding and justifying bail* in some place in or near to Westminster-hall,

(s) Before the 11 G. 4 and 1 W. 4, c. 70, it frequently bordered on the ridiculous to witness two if not four learned serjeants supporting or opposing *bail*, and the four judges almost vying with each other in acuteness and skill in endeavouring to elicit truth from such bail with respect to their property or other matter, and when it frequently occurred that in such Court the cunning of the bail succeeded against all the learning and experience of the judges and serjeants and the bail there justified; but perhaps within a quarter of an

hour afterwards the same bail were rejected either by a different course of proceeding in the King's Bench or the more active inquiries of the plaintiff's attorney and his better affidavits.

(t) 57 G. 3, c. 11; 1 G. 4, c. 55, s. 3.  
(u) *Hawkins v. Plomer*, 2 Bla. Rep. 1064; Tidd, 263.

(x) Rule M. 11 G. 1, K. B.; R. T. 14 Car. 2, Reg. 2, K. B., Tidd, 509; and R. H. 17 G. 2, C. P. Rescinded in K. B. by Rule Mich. T. 2 G. 4; see 5 Bar. & Ald. 217, and Tidd, 509.



other than the usual place of sitting for the whole Court, whilst others of the judges of the same Court should proceed in the despatch of the other business of the same Court in their ordinary place of sitting in Westminster-hall," then enacted accordingly, and that the proceedings so had should be as valid and effectual as if transacted by or before the full Court. (y) But still the ancient practice of bail justifying in full Court in the Common Pleas and Exchequer continued, and in the King's Bench the single judge sat in what was called the Bail Court at half-past nine o'clock in the morning to hear the oppositions to and justification of bail, and to discharge imprisoned debtors under the Lords' Act, and which business frequently detained him in that Court until twelve o'clock, and on the ninth day of the term, when the number of bail was the greatest, he was frequently detained till near two or even three o'clock, whilst the other three judges met in banc at ten o'clock to hear sometimes motions and rules quite of course, and by which the more important business was delayed; and constantly at about three o'clock one of the puisne judges was obliged to leave the Court to despatch the usual chamber business, so that the time when the *four* judges actually heard the most important business was too limited, and in consequence much of the business accumulated towards the end of the term and on the last day of each was either pressed to a reference before the master of the Court or his deputies, or was enlarged until the next term, occasioning a great increase of expense as well as serious delay. (z) In order therefore, as appears by the recital in the act 1 W. 4, c. 70, s. 1, intituled "An Act for the more effectual Administration of Justice in England and Wales," that the appointment of an additional puisne judge to each of the superior Courts of Common Law might cause much *greater facility and despatch of business therein*, enabled his Majesty to appoint an additional puisne judge to either of the Courts of King's Bench, Common Pleas, or Exchequer, and that after such appointments the puisne judges of each Court should sit by rotation in each term or otherwise, as they should agree amongst themselves, *so that no greater number than three of*

(y) It will be observed that this act was confined to the Court of King's Bench and did not extend to the Common Pleas or Exchequer; and hence, after this enactment and until the 1 W. 4, c. 70, s. 1, the proceeding in opposing and justifying bail continued to be transacted in those Courts before all the four judges or barons of each, and sometimes they were beneath

the dignity of those Courts, see *ante*, 12, note (s).

(z) Also since that enactment the necessity for an additional judge has been increased by the act 3 & 4 W. 4, c. 41, requiring the frequent attendance of some of the judges at the judicial committee of the Privy Council; *ante*, vol. ii. 573 to 585.

CHAP. I.  
II. PRACTICE  
COURT.

*them should sit at the same time in banc for the transaction of business in term, unless in the absence of the Lord Chief Justice or Lord Chief Baron, and that it should be lawful for any one of the judges of either of the said Courts, when occasion should so require, while the other judges of the same Court are sitting in banc, "to sit apart from them for the business of "adding and justifying special bail, discharging insolvent debtors, (a) administering oaths, receiving declarations required by statute, hearing and deciding upon matters on motion, and making rules and orders in causes and business depending in the Court to which such judge shall belong, (b) in the same manner and with the same force and validity as may be done by the Court sitting in banc," And the 4th section authorizes "every judge of the said Court, to whatever Court he may belong, to sit in London and Middlesex for the trial of issues arising in any of the said Courts, and to transact such business at chambers or elsewhere, (c) depending in any of the said Courts, as relates to matters over which the said Courts have a common jurisdiction (d) and as may according to the course and practice of the Court be transacted by a single judge."*

Since this act a puisne judge of each of the Courts, during the terms, *may* set apart in a separate Court when the press of business requires; and in the King's Bench one of the puisne judges in rotation, and usually for a term continuously, sits at half-past nine o'clock in the morning every day, until the business brought before him has been disposed of, or until the afternoon, excepting on those appointed days when, during the term, he may have to try common jury causes.

(a) The first enactment of this nature was 57 G. 3, c. 11, followed by 1 G. 4, c. 55, s. 3, and 3 G. 4, c. 199, but virtually repealed by this act, 1 W. 4, c. 70. The Insolvent Act, 1 W. 4, c. 38, s. 10, transferred the discharge of imprisoned debtors under the Lords' Act, 32 G. 2, c. 28, s. 15 to 16, on their own petition, to the Insolvent Court. So that no longer is any judge of either of the superior Courts burthened with that disagreeable branch of business. But the *compulsive* clauses, on the application of a creditor, viz. 32 G. 2, c. 28, s. 16, are still in force, and are to be made to a single judge in the Practice Court as

heretofore.\* And an application by an imprisoned debtor for his discharge after a year's imprisonment for a debt or damages, under 48 G. 3, c. 123, is still to be made to a single judge in that Court.†

(b) This only gives power to pronounce a rule or order in a particular cause, and not an authority to make rules or orders affecting the *general practice* of the Court.

(c) Consequently any judge on the circuit, to whatever Court he may belong, may amend; and see 1 G. 4, c. 55, s. 5, 9 G. 4, c. 15, 3 & 4 W. 4, c. 42, s. 23.

(d) See construction, *post*, 23.

\* See cases Chitty's Col. Stat. 581 to 586.

† See Chitty's Col. Stat. 589, 590, 10 Bar. & Cres. 481. That act extends to

damages, *Winter v. Elliot*, 1 Adolp. & Ellis, 24; but not to imprisonment for a contempt of an Ecclesiastical Court, *Ex parte Kaye*, 1 Bar. & Adolp. 652.

A puisne judge of the Court of King's Bench in rotation, for a term, sits in a small Court on the left-hand side of the passage leading from Westminster Hall into the principal Court of King's Bench, and having also a direct entrance from Westminster Hall, and is now usually called the *Practice Court*, though sometimes called the *Bail Court*. (d)

CHAP. I.  
II. PRACTICE  
COURT.

Where holden.

The puisne judge of the Court of Common Pleas, before the destruction of the Houses of Lords and Commons, in October, 1834, also in rotation usually sat for the purposes mentioned in the act at ten o'clock in the morning on each day of term, in a small Court in Westminster Hall, situate immediately up steps on the left of the entrance into the Hall, and called the Court Palatine of Lancaster, and he afterwards at the usual hour attended at chambers. (e) But on the 4th of November, 1834, Mr. Justice Gaselee came upon the bench of the principal Court of Common Pleas, before the other learned judges entered the Court, and stated to the bar that for the remainder of that term one of the judges would sit in the ordinary Court in which the full Court was held, at a quarter before ten o'clock, to hear motions on justification of bail, as from the then state of the Hall there was no other place to sit in for that purpose.

Common Pleas.

A puisne judge, or Baron of the Court of Exchequer, also in rotation, sits in the same place as the Court in Banc, to hear justifications and oppositions of bail, though at an earlier hour. But in practice even the most ordinary motions relating to practice are heard and determined in full Court, and consequently the authority of the decisions in the Court of Exchequer on matters of practice, under the Uniformity of Process Act, 2 W. 4, c. 39, may be considered of more weight than those of the Practice Court attached to the Court of King's Bench.

Exchequer.

The enactments in 11 G. 4, and 1 W. 4, c. 70, as far as respected the justification of bail, was a repetition of the jurisdiction given to a *single judge* by 57 G. 3, c. 11, and 3 G. 4, c. 48, with the additional power of *hearing and deciding upon matters on motion, and making rules and orders in causes and business depending in the Court*, (i.e. in each particular action or proceeding depending there). After the king had exercised this power by appointing an additional judge to each of the superior Courts in Michaelmas term, 1830, Lord Ten-

3. The operation of the 11 G. 4 and 1 W. 4, c. 70, as to the Practice Court.

4. The extent of jurisdiction and course of proceeding in Practice Court of King's Bench.

(d) See Mr. Dowling's Reports of the decisions in this Court.

(e) Archbold, Pr. C. P. [2].

CHAP. I.  
II. PRACTICE  
COURT.

terden informed the bar, " that in *addition* to the powers then already exercised by *one judge sitting apart* from the others in the Bail Court, *all matters of practice* would for the future be determined by *him*. (f) And since this enactment it has become usual, at least as respects the Practice Court of the King's Bench, held before one judge in rotation, not only to hear and determine *common matters of practice*, but also in ordinary cases even motions for writs of mandamus and of prohibition, certiorari, &c. (g) But if any doubt should arise in the mind of the presiding judge as to the propriety of granting any such rule, he usually refers the party applying, to the full Court, or himself consults the judges thereof; and should rules *nisi* be granted in any of the above instances, viz. of mandamus or prohibition, *cause* against the same is generally shewn in full Court. So cases of difficulty are, at the instance of the judge himself, *ex meromotu*, sometimes *re-argued* before the full Court; that, however, is only in the judge's discretion, *for the decision of the single judge is conclusive in all matters brought before him*, unless he think fit to open the case for a rehearing; (g) in which respect the decision of a single judge in the *practice Court* differs very materially from the decision of a judge at chambers, which does not preclude an appeal to the full Court on the merits, except in those few cases where the legislature has, by the terms of an enactment, expressly directed that the judge's decision shall be final.

The Interpleader Act, 1 & 2 W. 4, c. 58, s. 5, we have seen, expressly provides, that if upon application to a judge in the first instance, or in any later stage of the proceeding, he *shall think the matter more fit for the decision of the Court*, he is authorized to refer the matter to the Court, and thereupon the Court shall and may hear and dispose of the same in the same manner as if the proceeding had originally commenced by rule of Court instead of the order of a judge. (h)

It should seem that when *summary* jurisdiction has by the terms of an enactment been given to the *Court*, and not merely to a single judge, the Court *in Banc* ought to decide in a case of that nature, and not a single judge, (i) as it can scarcely be

(f) 1 Dowl. Prac. Rep. Preface iv.

(g) *Ibid.*

(h) *Ante*, vol. ii. 345, note (s). It will be observed, that the desire of the suitor to appeal to the full Court is not allowed to have any effect, but it rests entirely upon the discretion of the judge.

(i) For instance, cases of awards, annuities, and mortgage deeds, *ante*, vol. ii. 328 to 333; appeals by tenants against justices' decision, *id.* 361, where it is manifest the legislature intended that the matter should be determined upon in the Court in Banc.

supposed that the 11 G. 4, and 1 W. 4. c. 70, s. 1, without *expressly* referring to the particular statutes, giving summary jurisdiction to the whole Court, intended to deprive suitors of the benefit and security in the decision of several judges in lieu of one.

CHAP. I.  
II. PRACTICE  
COURT.

The *common paper*, as it is technically termed, and including demurrer books, writs of false judgment, and writs of error, (now only from inferior Courts,) when not set down for argument in full Court, or when so set down, if counsel cannot, in answer to an application for immediate judgment, suggest to the satisfaction of the judge some arguable point, are also disposed of in *this* Court; but special cases, and really arguable demurrers, must be decided in banc. A *separate peremptory paper*, containing all matters of practice, as principally rules for judgment as in case of a nonsuit and other short practical rules, is made out and cleared in this Court, in the same manner as in the Court in Banc.

Common paper and peremptory paper of this Court.

As regards the *despatch* of business, unquestionably this Court, holden before a single judge, is useful; but unless very cautiously exercised, it might become a most objectionable tribunal. It is true that there are some of the most experienced officers of the principal Court usually attending to inform the judge of what they consider to be the *established practice* of the Court in case he should think fit to consult them, yet if hereafter it should be possible that a single judge should be too confident in his own opinion to think it expedient to consult such officers, serious inconveniences might result. It has not unfrequently occurred, that the rights of suitors have, in one term, been decided upon by a single judge in one way, when another judge, who has presided the term before, decided differently, which could scarcely occur in the full Court, where we have seen it is a maxim that the parties to each cause are entitled to be satisfied by knowing the opinion of each judge, and the grounds on which it is founded, and that therefore each judge should deliver his opinion seriatim, so as not only to evince his concurrence, but also the principle upon which his decision proceeds; and the full examination of the subject in Banc leads to a better decision. (k) And certainly there are many cases of practice involving very intricate

6. Limited expediency of this Court.

(k) *Ante*, 7, n. (a), Per Bayley, B., in *Young v. Timmings*, 1 Tyr. Rep. 238, where he said, "Although Lord Lyndhurst has in a great degree anticipated the judgment which I intended to deliver, the

parties to the cause are entitled to be satisfied by knowing the opinion of *each* judge, and the grounds on which it is founded."

CHAP. I.  
II. PRACTICE  
COURT.

---

questions of law or fact, and either directly or collaterally, or in respect of the amount of *costs*, of great importance, and require the opinions of several judges, and are unfit to be decided by one. (*l*) This, therefore, is a jurisdiction not in practice to be extended, more especially as it would be objectionable, and contrary to the intention of the statutes, which have delegated a summary jurisdiction to the *superior Courts* of law, as the Habeas Corpus Act, the Arbitration Act, the Annuity Act, the Landlord and Tenant Act, and some others presently noticed, for a single judge to decide in such cases; but yet we find recent decisions where a single judge has decided even upon the jurisdiction of the Ecclesiastical Courts. (*m*) It will be observed, upon examination of the reports in the Court of C. P., that points of practice are there discussed in *banc*; and from Mr. Tyrwhitt's reports, and those of Messrs. Crompton, Meeson and Roscoe, in the Exchequer, that Court also in general continues *in banc* to decide upon all questions, even of practice, of the least doubt, difficulty, or novelty, and consequently it may be presumed that the decisions of the Courts of Common Pleas and Exchequer are more to be depended upon than those in the Practice Court of K. B.

Certainly it would be objectionable and unconstitutional for a *single judge* to assume to decide upon a point manifestly intended by the legislature to be determined by the *full Court*. (*n*) But at the same time, when it is recollected that at Nisi Prius, (excepting on trials at bar), only one judge presides and determines upon law and fact, and that in Equity and Ecclesiastical Courts only a single judge presides, and frequently decides upon most important and difficult questions, perhaps no serious objection could be made, if the *legislature* should vest even extended powers in a single judge sitting in a Practice Court, provided the matters should be *formally* and *deliberately investigated* upon affidavits, motion, rule nisi, and rule absolute, and openly discussed and decided upon before the public and intelligent officers, a jurisdiction standing certainly on very superior and preferable grounds to any proceeding before a *single judge at chambers*.

---

(*l*) See ante, 7, note (*b*).

(*m*) *Birch v. Brown*, 1 Dowl. Pr. R. 395; but that was a case of *habeas corpus*, in which, by statute 56 Geo. 3, c. 100,

in vacation a single judge is bound to decide; ante, vol. i. 686.

(*n*) See instances, *post*, 24.

*Third. The Jurisdiction of a Single Judge at Chambers.*

*Thirdly.* By long established usage, each of the judges of the Courts of King's Bench, Common Pleas and Exchequer, has, at *common law*, and independently of any legislative authority, at his *chambers* exercised a very extensive jurisdiction over certain minor and practical proceedings, *especially irregularities* that arise in conducting an action or defence, and this as well in the vacations as during the four terms. It would be difficult if not impracticable to trace the *inception* of this practice. It has been observed, that probably it originated either in the overflow of the business of the full Court in term, or the expediency of certain matters, probably much of course, though sometimes obstinately disputed by the parties, being decided upon or transacted before a single judge, as well to avoid the expense of formal rules, as to prevent the important time of the Court in Banc being consumed in disposing of trifling matters; and in the vacation, from the absolute necessity for some tribunal having power to interfere and relieve from the consequences of the abuse of the process of the Court, or of irregularities, as by illegal arrest, or execution under irregular or insufficient proceedings, under which otherwise a party might continue in imprisonment, or his goods be irretrievably sold under an execution, sometimes without any redress, and at least not otherwise redeemable until the next term.<sup>(n)</sup> The authority of a judge at chambers to make orders in the various cases which are brought before him is, when considered upon principle, the authority of the Court itself; his order may be considered as an *inceptive* act of the Court; he ought never to make such order, unless from his experience in the practice of the Courts he knows that it is most probable that the majority of the Court would afterwards, if appealed to, ratify such order. And although the order is usually obeyed from respect, or fear of its being afterwards enforced and disobedience punished, yet no order which is made can be enforced by attachment until it has been first made a rule of the Court, and the party who disputes the propriety of the order has an opportunity to question its validity by application to the Court.<sup>(o)</sup> And although an order has been acquiesced in

The jurisdiction of a single judge at chambers, either in vacation or term. (n)

1. In general.

2. This jurisdiction at common law.

(n) See in general Tidd, 9 ed. 509 to 511, 469, 470; and see *post*, summons and order; Mr. Bagley's Pr. Chambers, *per tot.* a distinct work upon the subject, very ably composed; and see the juris-

diction of a single judge at chambers examined and illustrated by Tindal, C. J. in *Doe d. Prescott*, 9 Bing. 104.

(o) Per Tindal, C. J. in *Doe d. Prescott*, 9 Bing. 104.

CHAP. I.  
III. BEFORE  
SINGLE JUDGE.

and acted upon, still it must be made a rule of Court before an attachment can be obtained for disobeying its directions. (q) With respect to *attornies*, when an action is depending, but not otherwise, a judge at chambers may, on summons, order an attorney to pay over monies received by him for the use of his client; (r) and there are numerous other instances of judge's orders against attornies. (s)

3. A single  
judge's jurisdic-  
tion when to be  
resorted to.

Where by the usage of the Courts a judge at chambers has jurisdiction, and it has been the constant course for matters of a particular description to be disposed of only there, the judges would censure the making an application to the Court, as calculated to increase the costs; as in the instance of a motion and rule to compel a party to deliver a copy of an agreement to the applicant and produce the original at the stamp office to be stamped, which is an application usually made with success at chambers. (t)

In many cases authority has been given by *statute in express terms* to a single judge to perform *certain acts at chambers*, and we have seen that whenever a statute gives a summary jurisdiction, the terms of the enactment must be strictly pursued. (u) Thus the annuity act 53 Geo. 3, c. 141, s. 5, expressly authorizes a judge of the K. B. or C. P. (singularly omitting the Exchequer) *on summons* to make an order for the production of the instrument, by which an annuity or rent charge required to be enrolled under that act shall be secured; and for suffering the complainant to take copies and examine the same with such copies, and otherwise in the premises as to the judge shall seem meet. So the 1 Will. 4, c. 7, s. 1, enables a judge *to stay judgment* on a writ of inquiry in vacation. So the uniformity of process act, 2 Will. 4, c. 39, s. 15, and Rule M.T. 3 W. 4, 1832, enable a single judge *in vacation* to make an order on a sheriff to compel the immediate return of mesne or final process, in order to expedite the suit; though it would seem to follow, that during term the Court, and not a single judge, must pronounce the rule or order for returning a writ. And the same act, section 14, having required the judges to make rules for the effectual execution of that act as to the prescribed forms of process and indorsements thereon, all the judges in

(q) *Baker v. Rye*, 1 Dowl. Pr. C. 689. But as regards a judge's order upon a bailable writ, made in vacation, if it be disobeyed, *subsequent* compliance, before the next term, will not prevent an attachment from issuing *nunc pro tunc*, see Rule Mich. T. 3 W. 4, 1833.

(r) Price N. P. 306; *Ex parte Higgs*, 1 Dowl. Pr. C. 495.

(s) Bagley Cham. Pr. 47 to 55, a very useful work.

(t) *Reid v. Colman*, 2 Cr. & M. 456.

(u) *Ante*, vol. ii. 327, note (i).



M. T. 3 W. 4, 1832, promulgated amongst others a rule that any *omissions* in any writ or copy or indorsement should be deemed an irregularity, and might be set aside as irregular upon application to the Court *or to any judge*. And therefore, as regards all *omissions* in process, or copy or indorsements, a single judge at chambers, as well in term as vacation, has jurisdiction to set the same aside for such irregularity. So the 3 & 4 Will. 4, c. 42, s. 17, gives a single judge, as well as the Court in banc, jurisdiction to *order* that the issue or issues joined in an action for any *debt* or demand not exceeding twenty pounds, shall be tried before the sheriff of the county where the action is brought, (i. e. venue laid,) or the judge of any Court of Record for the recovery of the debt in that county; and in case it should be necessary to postpone the trial, a single judge impliedly has power to give effect to an application for that purpose. (x) So although an application for relief, when made by a *sheriff* under the sixth section of the interpleader act, 1 & 2 Will. 4, c. 58, must be to the Court in banc, and not to a judge at chambers, who has no jurisdiction; (y) it is otherwise under the first section in other cases when the application may be to the Court or a judge; though in the latter case with an appeal to the Court. (z) In short, there are so many modern enactments giving a single judge jurisdiction, that with the exception of a few provisions of a general nature, it becomes necessary in most cases to examine the particular powers of each act.

It was observed by Mr. Baron Bayley, "that since the uniformity of process act, a judge at chambers is in a very different situation to what he was in before that act. A great deal of new business is now thrown upon him in vacation by the 2 Will. 4, c. 39, s. 11; and although the act certainly does not give power to a single judge in express terms, yet it seems to be *impliedly given him in some cases*; as where a declaration is delivered in vacation, and is irregular, cannot an application be made to a judge to set aside the declaration with costs?" (a) In other words, as the new statutes and rules founded upon them now enable the parties to commence an action and proceed even to execution in the same vacation when the Court is not sitting, those regulations impliedly give a single judge jurisdiction to interfere in all cases of irregularity, and all other necessary powers essential for the justly taking such proceedings in a cause; for otherwise, from want of the full Court being sitting, there would be a failure of justice. It must also be observed, that

(x) *Packham v. Newman*, 3 Dowl. 163, 166.

(z) 1 & 2 W. 4, c. 58, s. 4.

(y) Per Alderson, B., in *Brackenbury v. Laurie*, 3 Dowl. 180.

(a) Per Bayley, B., in *Hughes v. Brand*, 2 Dowl. 132.

CHAP. I.  
III. BEFORE  
SINGLE JUDGE.

the uniformity of process act, 2 Will. 4, c. 39, s. 14, as well as the 11 Geo. 4 and 1 Will. 4, c. 70, s. 11, authorized, and indeed *required* the judges to make rules for regulating the practice; and the rule thereon of Mich. T. 3 Will. 4., A. D. 1832, expressly orders, "that if the process or indorsements do not conform to the forms prescribed by the statute and rules, the same may be set aside as *irregular* upon application to the Court out of which the process issued, or to *any judge*." It has also been decided, that applications for irregularities must be made soon after they have arisen and *in vacaton*; and that if the party wait until the next term he may be too late. (α) Of necessity, therefore, it is clear that the jurisdiction of a single judge in vacation, has impliedly been much extended by the new enactments and rules.

4. In what cases a single judge or baron of either of the three superior Courts may act in matters not depending in his own Court.

As it frequently occurred in the vacation, and especially during the circuit, that although a judge of one of the Courts was in or near London, yet no judge of the *particular* Court in relation to which the requisite business was to be transacted was at hand, the 11 Geo. 4 and 1 Will. 4, c. 70, (which in section 1 gave the power of appointing an additional judge in each Court) by section 4 authorized "a judge of either of the three Courts, to *whatever Court he may belong*, to transact such business *at chambers or elsewhere*, depending in *any of the said Courts*, as relates to matters over which the said Courts have a *common jurisdiction*, and as may *according to the course and practice of the Court* be transacted by a single judge." Since which enactment, by arrangement, one of the fifteen judges during the circuit remains in town, and transacts the greater portion of the chamber business for several successive weeks, but is occasionally (but in practice scarcely for more than one day) assisted by the two judges who travel the home circuit, and who avail themselves of such short intervals as may occur between the termination of the assizes at one county town, and the day appointed for opening the commission at the next, to return to London for that purpose. (b) But this rarely occurs excepting on the return of the judges from Chelmsford in Essex, for usually in Kent, Sussex, and Surrey, the press of business will not allow them time to come to, or at least remain in London, for any time sufficient to assist the single judge who continues in town. It will be observed, that the terms of the act limit the jurisdiction of the single judge

(α) *Cox v. Tullock*, 3 Tyrw. Rep. 578, M. 345.  
591; *Elliston v. Robinson*, 2 Crompt. & (b) *Bagley's Chamber Practice*, 16.

not merely to such matters over which the judges of the three Courts have a *common jurisdiction*, but also to matters that may "*according to the course and practice of the Court be transacted by a single judge*;" thus leaving it in each particular case to be ascertained whether the *established course and practice* of the Court will justify the single judge to interfere. Under 11 Geo. 4 and 1 Will. 4, c. 70, s. 4, an *affidavit* may be made before a judge of one Court, though the cause to which it relates, and in which it is to be used, is depending in another Court; and this even in cases of contempt of a Court to which such judge does not belong; (c) and the Court observed, that the "*common jurisdiction*" mentioned in the act, was to be understood with reference to the subject matter of the application, and not to the Court itself. (c) However, the usual practice at chambers excepting during the circuits, or when only one judge is in town, is to obtain a summons returnable before a judge of the Court in or relating to which the business is to be transacted, and also to obtain an order of a judge of that Court, and not without absolute necessity to apply to a judge of any other Court. (d)

The 56 Geo. 3, c. 100, expressly authorizes, and indeed in certain cases imperatively *requires*, any judge or baron to issue a writ of *habeas corpus in vacation*, returnable before him or any other judge immediately; or if the writ be issued late in the *vacation*, it may be returnable in the next term, and in the former case, the single judge is in vacation to examine into and decide upon the matter, and discharge, remand, or bail the party; and the 43 Geo. 3, c. 46, s. 6, enables a single judge *in vacation* to *bail* a party in *actual custody* on civil mesne process, but expressly prohibited *his* bailing in term time. The 11 Geo. 4 and 1 Will. 4, c. 70, s. 12, however, now expressly enables a judge *at chambers*, or elsewhere as he may appoint, either in term time or in vacation, to hear the justification of bail, whether the defendant be or not in custody. But it seems that a single judge sitting at chambers has not, at least *in vacation*, and it should seem not in term, unless on motion to him in the *Practice Court*, power or jurisdiction to make an order to quash a *defendant's demurrer* on the ground that it appeared to him to be sham for the purposes of delay, and

(c) *Phillip v. Drake*, 2 Dowl. Pr. C. 45. But an affidavit and other proceedings in support of a criminal information cannot properly be sworn or take place before a judge of C. P. or Exchequer, because the judges of those Courts have

no *common jurisdiction* with K.B. over criminal proceedings; *Res v. Bryant and others*, K: B. January 31, 1835.

(d) And see Price's New Pr. 316; Bagley's Ch. Pr. 9.

CHAP. I.  
III. BEFORE  
SINGLE JUDGE.

giving leave to the plaintiff to sign final judgment in ten days; and the Court of Exchequer on motion set aside such order, and Bayley B. said a single judge has no such power, and the 11 Geo. 4 and 1 Will. 4, c. 70, s. 1, only applies to a single judge sitting in term while the other judges are sitting in banc, i. e. a judge sitting apart, and proceeding as directed by that section, i. e. *in the Practice Court* and not at chambers. (e).

5. When a single judge cannot act either in term or vacation.

But when a statute in express terms *limits* the jurisdiction to the "*Court*" or "*during the term*," then even the Court itself cannot direct that cause shall be shewn against its own rule either in vacation or term at chambers. (f) Thus as the act 48 G. 3, c. 123, declares that a debtor who has been in custody for twelve months for a debt or damage under £20, may have relief "by rule or order of Court, upon application *in term time*;" it was decided that even the Court has no power to order cause to be shewn *at chambers*, which necessarily would not be a compliance with the direction of the statute requiring the interference of the Court sitting in banc. (f) So as the 18 Eliz. c. 5, s. 3, only authorizes the compounding of a penal action by leave of the *Court*, a single judge has not, either in vacation or term, any jurisdiction to grant leave to compound a penal action, and there must also be the consent of counsel; (g) and when a statute still in force distinctly enacts, that in *term time* the *Court* shall decide upon a matter, and gives power to a single judge to decide upon the same *only in vacation*, an order cannot be made by a single judge *in term*, even upon a summons taken out in vacation, and although the order was only delayed until the beginning of the term by an irregularity in the affidavits. (h) And all matters relating to the re-admission of attorneys must be settled in term time in Court, and not at chambers. (i) And where money has been paid into Court pursuant to the 43 G. 3, c. 46, s. 2, the defendant cannot obtain the same out of Court by application to a judge, but must apply to the Court in banc. (k)

6. Jurisdiction of a single judge at chambers during the terms.

Formerly, in order to prevent the inconvenience arising from the Court and a judge at chambers sitting at the same time, though at different places, and the impracticability of an attorney attending in person to his duties in both, there were

(e) *Foster v. Burton*, 3 Tyrw. 380.

(f) *Jones v. Fitzaddams*, 3 Tyr. 904; 1 Crump. & Mee. 855; 2 Dowl. 111, S. C.

(g) *Morgan v. Lute*, 1 Chit. Rep. 381.

(h) *Huskins v. Morris*, 1 Bos. & Pul. 92, on Lords' Act, 32 G. 2, c. 28, s. 13.

(i) *Ex parte Owen*, 1 Dowl. 511.

(k) *Geach v. Coppin*, 5 Dowl. 75.

express rules that no attorney or other person should be *summoned* to attend any justice of the King's Bench, nor any matters be transacted before such justice at his *chambers* or elsewhere out of Court during the *sitting* of the Court at Westminster, <sup>(l)</sup> and there was a similar rule in the Common Pleas. <sup>(m)</sup> But those rules merely prohibited chamber practice during *those hours* when the Court in banc was *actually sitting*, and did not prevent the practice at *chambers in the evening*; and the above rule for the King's Bench was expressly discharged by a subsequent rule of that Court. <sup>(n)</sup> And it is now, in order to avoid inconveniences resulting from late attendance at chambers in the evening, the established practice of *all the three Courts* for one of the judges to attend daily at chambers, during term, *from three, or half-past three o'clock, until five o'clock*, <sup>(o)</sup> or even later, until the business to be then transacted has been disposed of; and now the evening attendance of the judges at chambers in term time is discontinued. <sup>(p)</sup>

This practice of one judge for each Court attending as well in the Practice Court *during term time* in the morning, and in the afternoon at chambers, where he is detained frequently until a late hour in the evening, although extremely burthensome to the judges, is exceedingly advantageous to the suitors, so long as the single judge abstains from assuming to decide upon matters of the least difficulty, which ought constitutionally to be determined by the Court *in Banc*; because, if such ordinary matters, almost of course, were required to be transacted in Court upon affidavits, motion, rule nisi, and rule absolute, instead of at most two summonses and the order of a single judge at chambers, there would not only be the useless retainer of counsel, and other considerable expense for Court fees and the delay of four or six day rules, but also a great waste of the time of the four judges, who have scarcely sufficient opportunity fully and maturely to consider the really difficult and important matters pressing for their decision. <sup>(q)</sup> But on the other hand, it would be a dangerous and injudicious assumption of jurisdiction for a judge at chambers to decide

<sup>(l)</sup> R. M. 11 G. 1, K. B.; see R. T. 14 Car. 2, reg. 2, K. B. Tidd, 509.

<sup>(m)</sup> R. H. 17 G. 2, C. P.

<sup>(n)</sup> R. M. 2 G. 4, K. B. 5 Barn. & Ald. 217.

<sup>(o)</sup> In the note to 5 Barn. & Ald. 217 the hours are from half-past two until half-past four, but they vary.

<sup>(p)</sup> Tidd, 509, 510.

<sup>(q)</sup> It must be observed that the

judges are not only detained in Court during the term till four or five o'clock in the afternoon, but in the evening they have to read and consider demurrer-books, special cases, and cases in the crown paper and other proceedings, preparatory to discussion on the next day, and they have scarcely time to get through their burthensome duties.

CHAP. I.  
III. BEFORE  
SINGLE JUDGE.

upon difficult questions of law or fact, or lengthy contradictory conflicting affidavits, properly requiring much nice and scrupulous examination, comparison, and deliberation to decide upon, and which, if duly investigated *before him*, would occupy that time which more judiciously should be devoted to the despatch of the pressing business of *numerous* parties waiting to have their more concise matters quickly disposed of. It will be observed; that even as regards mere matters of practice, the judge here presides alone unassisted by any experienced officer as in the Practice Court, and that he is in general hurried by the press of a great concourse of applicants, all anxious to be dismissed in a short time; the judge, therefore, has a jurisdiction to be exercised with great caution, and not, at least in term time, in cases of the least doubt. If the application appear to the judge novel or doubtful on principle, or even on the facts, then he should decline to interfere, or at most stay the proceedings quousque, so as to afford the applicant an opportunity of bringing the matter upon full affidavits before the Court in the ensuing term. (r)

A judge at chambers cannot make an absolute indefinite and continuing order, either to set aside or to stay proceedings; at most he has only power to stay the proceedings for a *time*, as until the next term, or until a rule nisi has been applied for,

(r) When it is considered that in Courts of Equity and Ecclesiastical Courts a *single judge* in all cases presides, the objection to chamber practice is not to the *judge*, but to the *place*. The practice at chambers was originally designed only for disposing of small matters *quite of course*, so as to relieve the time of the Court in matters not requiring four judges to determine upon. But in cases in the least out of the ordinary course, or where there are long or conflicting affidavits requiring comparison and strict examination, it is improper to occupy the time of the judge at chambers which ought to be distributed amongst numerous suitors anxious to be dismissed. If suitors should absurdly press a judge at chambers either in term or vacation to decide upon difficult or lengthy matters, they ought not afterwards to complain of what they might term a hasty decision; and although they might be at liberty to re-investigate the matter by motion to the Court, it must be remembered that the prior unfavourable decision of an experienced judge will naturally and properly excite a prejudice in favour of his decision, which, even if erroneous, it might be difficult, if not impracticable, to remove. Since the appointment of the *Practice Court*, holden before one of the puisne

judges in rotation during the terms, there is still more objection to the bringing difficult or lengthy matters before a judge at chambers, which might be disposed of in such Practice Court by the intervention of counsel there attending, without requiring their hurried and inconvenient attendance at chambers, and it might be well if the practice were not to hear counsel at chambers. When it is remembered that even the judges frequently differ in opinion after hearing full discussions before them, and sometimes err, it is to be regretted that great discredit has been brought upon chamber practice by the very frequent exercise of jurisdiction in cases by no means clear upon new enactments and rules, and the consequent unfortunate discordance and contradiction in the decisions of different judges, rendering the practice so uncertain and unsettled, that scarcely any practitioner can proceed with confidence in any step he may take. Cases of delinquency, as disputes between relatives or impeaching character, or otherwise requiring *private* discussion, and where the judge will obligingly adjourn the first meeting, and take the trouble of deliberately examining the affidavits before the hearing, may justly constitute exceptions.

so as to afford a party an opportunity of applying to the Court to set them aside or stay them generally. (s)

CHAP. I.  
III. BEFORE  
SINCE JUDGE

The regular hours of attendance at chambers *in vacation*, are from eleven or half-past eleven in the forenoon, to one o'clock in the afternoon, or usually until the business of all the persons in attendance has been disposed of. The hours of attendance at chambers *in term time* are from three o'clock until five; after which hour the judge may, if he thinks fit, decline sitting until the same hours the next day; in practice, however, the anxiety of the judge to despatch all the business before him frequently induces him for that purpose to continue at chambers much later.

7. Hours of attendance at chambers in vacation and during the terms.

Before the Uniformity of Process Act, 2 W. 4, c. 39, s. 11; as well as since, (though not so frequently as before, because there is now more time in the term for the full Court to determine the matters before them,) when motions have been made late in the term, or been enlarged until towards the end of it, or have otherwise stood over from various causes, if it be essential for the purposes of justice not then to decide upon the same, nor on the other hand to enlarge the hearing until the next term, the Court will *sometimes permit a hearing at chambers* in vacation, as in a week or ten days after the term, so as not to interfere with the circuit. (t) And where the coroner has returned *cepi corpus* to a writ of attachment against the sheriff of Middlesex on the last day of term, it is of course to move on that day for writs of *habeas corpus* to bring up the bodies of the sheriffs before one of the judges at chambers, and which motion being of course requires no affidavit. (u) And cause may be shewn at chambers in vacation against a rule for paying money out of Court to a defendant, on the ground that he has put in and perfected bail under 7 & 8 G. 4, c. 71. (v) But in general the hearing at chambers of a rule *nisi* is to be considered *matter of indulgence*, and is granted by the Court only when the justice of the case requires a speedier decision than could be obtained by waiting until the next term; for otherwise, and especially when the rule *nisi* was obtained late in the term, the Court will enlarge the rule until the next term, especially in the case of a motion for judgment as in case of a nonsuit, which in general, and always so in a

8. Business of the term transferred to a judge after term.

(s) *Spliter v. Todd*, 2 Tyr. 172; *Tidd*, 511.

(t) 1 Chit. Rep. 232, n. (a).

(u) *Res v. The Sheriff of Middlesex*, in

the cause of *Walker v. Whaley*, 1 Chit. Rep. 249.

(v) *Hanwell v. Mure*, 2 Dowl. P. C. 155.

CHAP. I.  
III. BEFORE  
SINGLE JUDGE.

country cause, might have been made within the first four days of the term; (x) and there can be no reason to indulge a party who complains of the laches of his opponent, when he himself has been unnecessarily dilatory in his proceedings. And the Court have refused to direct cause to be shewn at chambers on a motion for judgment against the casual ejector, (y) or against a rule for an attachment for nonpayment of costs. (z) But it has been permitted to shew cause at chambers against a rule nisi for setting aside an attachment for nonpayment of costs according to the master's allocatur. (a) But although the first and second section of the Interpleader Act, 1 & 2 W. 4, c. 58, gives a *single* judge, as well as the Court, jurisdiction *in general* to interfere, yet the 6th section relative to *sheriffs* only authorizes the *Court* to interfere; and, therefore, when an application is made under that act on behalf of the *sheriff* late in the term, the Court will not direct cause to be shewn at chambers after the term. (b) And we have seen that where a statute requires *the Court* to decide, the decision cannot be delegated to a single judge. (c) And the powers of a single judge at chambers are limited by general principles and practice, and therefore a judge at chambers has no power *directly* to allow a defendant more time to pay a debt than the law allows, and consequently cannot, without the consent of the plaintiff, order that the debt shall be paid by named instalments. (d)

In general when the Court expressly transfer the decision to one of its own judges, such judge impliedly has all the same powers as the Court in banc, and as a consequence may award *costs*, or declare that no costs shall be paid, or forbear to say any thing upon the subject of costs; and in the latter case, if the judge should set aside a proceeding for irregularity, the party may in his subsequent action of trespass, when sustainable, recover the costs of setting the proceeding aside as special damage; though if the Court or a judge has expressly adjudicated upon costs, and declared that they shall not be allowed, they cannot be recovered. (e)

(z) *Picker v. Webster*, 1 Chit. Rep. 237.

(y) *Doe v. Roe*, 2 Dowl. P. C. 88.

(x) *Fall v. Fall*, 2 Dowl. P. C. 88.

(a) *Rex v. C. D.*, 1 Chit. Rep. 724.

(b) And see *Shaw v. Roberts*, 2 Dowl. P. C. 25; *Jones v. Fitzdams*, 1 Crompt. & Mee. 85; 2 Dowl. P. C. 111.

(c) *Ante*, 24; *Jones v. Fitzdams*, 1 Crompt. & Mee. 855; *Morgan v. Lister*,

1 Chit. Rep. 381; *Huskins v. Morris*, 1 Bos. & Pul. 92.

(d) *Kirby v. Ellison*, 2 Dowl. P. C. 219. Perhaps it might be desirable to vest in the superior Courts a discretionary jurisdiction in this respect on such terms as they might think fit to impose, the same as in Courts of Request.

(e) *Pritchett v. Bovey*, 3 Tyr. 949.



CHAP. I.  
III BEFORE  
SINGLE JUDGES.

9. Judge's power  
at chambers to  
allow costs.

The chamber practice of the judges has of late been greatly increased, in consequence of the express decisions in the Courts of Common Pleas and Exchequer, that a judge at chambers has at common law, and independently of any express enactment, a *general jurisdiction to give or refuse costs when he makes or refuses an order in favour of an application*; (f) and although the Court of King's Bench formerly considered the practice to be otherwise, (g) Lord Tenterden at the same time said, "If the subject were investigated very closely, it might be found that such a power existed;" (h) and the decision in the Common Pleas was subsequent to that in the King's Bench, and therefore probably, on formal discussion in K. B., the decisions of the Courts of C. P. and Exchequer would be adopted; (i) and of late the judges of the Court of King's Bench frequently make the payment of costs part of their orders at chambers. And, as observed by Bayley, Baron, "Since the Uniformity of Process Act, and other recent statutes, have so much increased the practice at chambers, and authorized so many proceedings in an action to take place during the vacations, and transferred to a single judge so many acts that heretofore could only be transacted in full Court, a jurisdiction to award costs seems *impliedly to be given*; (k) and, indeed, there seems no reason why, if a single judge be authorized to decide upon the *principal matter*, he should not also have, as an incident, the same power as the Court to award costs in all those cases where the Court would have awarded them, as is so general upon motions and rules." In *Doe d. Prescott v. Roe*, (l) Tindal, C. J. observes, "The authority of a judge at chambers to make orders in the various cases which are brought before him, is, when considered upon principle, the authority of the Court itself; (m) for no order which is made can be enforced by attachment until it has been first made a rule of the Court; and the party who disputes the propriety of the order, has the opportunity to question its validity by application to the Court. (m) On any other prin-

(f) See *post*, as to costs of irregularities, 8 Legal Observer, and 9 Legal Observer, 9. See in C. P. *Doe d. Prescott v. Roe*, 9 Bing. 104; 2 Moore & Scott, 119; 1 Dowl. Pr. C. 274, S. C. In Exchequer, *Hughes v. Brand*, 2 Dowl. Pr. C. 131. But see *Spicer v. Todd*, 2 Tyr. R. 173.

(g) *Read v. Lee*, 2 Bar. & Adol. 415; 2 Crompt. & J. 165; Dowl. Pr. C. 307, S. C.; 9 East, 471; 2 Tyr. R. 173, note (b).

(h) Per Lord Tenterden, in *Read v. Lee*, 2 B. & Adol. 415. But see *Anonymous*, 1 Dowl. Pr. C. 52.

(i) See Bagley's Prac. 33.

(k) *Hughes v. Brand*, 2 Dowl. Pr. C. 131, 132.

(l) 9 Bing. 104.

(m) This reasoning, as expressed by the reporter, is not strictly logical; for it does not prove that a judge has power to award costs, because his order cannot be enforced without first making it a rule of Court. It

CHAP. I.  
 III. BEFORE  
 SINGLE JUDGES.

It is difficult to account for the validity of many acts done by a single judge at chambers; such as setting aside irregular judgments signed in vacation, which judgments are to be considered on principle the acts of the whole Court; and discharging persons under writs of execution improperly taken out, and the like. And considered as resting on this principle, we see no reason why a single judge should not make the payment of costs part of his order; (n) because until such order is made a rule of the Court, where the party called upon has the opportunity to contest it, it is altogether inoperative. It would certainly impose a great hardship in many cases upon suitors, if no such power existed. Costs are, in many cases, so important a consideration with the poorer suitor, that if he could not obtain them at chambers, he would make his application to the Court, and to the Court alone, at a much greater expense." His lordship (after reiterating and enlarging upon the same course of reasoning) concluded, "We think, therefore, the judge at chambers has the power to direct payment of costs on the same principle that he has to exercise any other authority in the progress of the cause; but at the same time it is obviously one which ought to be exercised with care and discretion." In *Hughes v. Brand*, (o) Bayley, B. put the authority of a judge to award costs at chambers as *implied* from the Uniformity of Process Act and other recent enactments, transferring so much business to chambers that would otherwise be decided by the Court. It is singular that in *Read v. Les*, (p) Lord Tenterden, as a reason against allowing costs at chambers, inferred that the fear of having to pay costs, in case the application should be unsuccessful, would diminish the frequency of applications to a judge at chambers.

There is not, however, any *general* statute or rule as might be desirable on this subject; although, in some particular cases, the statute 1 W. 4, c. 22, s. 9, as to examining witnesses on interrogatories, the 3 & 4 W. 4, c. 42, s. 11, 15, and 21, and the general rules of Hil. T. 1834, No. 6 and 20, *expressly* give a judge at chambers jurisdiction over costs in those particular

---

is however a reason why, on principle, a judge ought to be allowed power to give costs, that no prejudice can arise, because if that part of his adjudication were unreasonable, the Court might refuse to make that part of the order relating to costs a rule of Court, or on motion discharge it. But the true question as to costs is, whether as no costs were recoverable at com-

mon law, there is any statute that expressly or impliedly gives authority to award costs upon these summary proceedings. See post, *Costs*, Tidd, 509 to 511.

(n) As the Court always may do in cases of irregularity; Tidd, 9th ed. 509 to 511, and post.

(o) 2 Dowl. P. C. 131.

(p) 2 Bar. & Adol. 415.

cases. (g) In a recent case, where the indorsement on a *capias* was considered irregular, it is reported that Lord Denman considered it *imperative* on a single judge at chambers, in setting aside the proceedings, to award costs, and that he had no alternative in cases of irregularity. (r) But in another case it is reported that another distinguished judge refused costs, saying, had you applied to the Court, costs might have been ordered, but if you choose to come to this cheap and summary tribunal you cannot have them. (s)

In the exercise of the jurisdiction over costs, an enlightened judge observed, that whenever a party captiously takes an objection to a proceeding wide of the merits, and fails in establishing such objection, it is proper to make him pay costs to the opponent who has to resist his trifling attempt; and that when the objection succeeds, yet if it were illiberally taken, and was not necessary as regards the merits, no costs should be awarded to be paid by the party in error, excepting the fees to the judge's clerk for the summons and order, and any expense occasioned by rectifying the proceeding. It is fit that the statutory regulations should be compulsory, and their observance enforced; but, at the same time, frivolous objections should not be encouraged by a captious party deriving any pecuniary advantage in recovering costs. (t) That doctrine accords with the decision upon demurrer to a declaration for an *untechnical* commencement, where, although the Court held the objection not to be a ground of demurrer, yet, as the statement objected to was untechnical, they compelled the plaintiff to amend and to pay his own costs, on the ground that infinite mischief has been produced by the facility of the Courts in overlooking errors in form, which encourages carelessness, and places ignorance too much upon a footing with knowledge. (u)

In cases where the Court *in banc* must or would award costs in respect of *irregularity* in a proceeding, it should seem that *a fortiori* a single judge ought also to award such costs upon deciding on a similar objection on summons; *first*, because the decision of the full Court in such a case, as regards costs, establishes on principle what is the best practice as regards the allowance of costs; *secondly*, because if a single judge should refuse costs, an attorney taking the objection will, when he has

Reasons for a single judge allowing costs in certain cases.

(g) But it should be observed that these particular powers, in enumerated cases, impliedly negative the supposition of any general power, or at least a doubt whether any general power exists.

(r) *Shirley v. Jacobs*, Legal Observer,

vol. viii. 487, 488.

(s) Legal Observer, vol. ix. 9.

(t) Per Lord Ellenborough, MS. Mich. T. 1816.

(u) Per Eyre, C. J. in *Morgan v. Sargent*, 1 Bos. & Pul. 59.

CHAP. I.  
III. BEFORE  
SINGLE JUDGE.

the option of moving the Court, be induced to do so instead of applying by summons, and incurring trouble and loss of time without remuneration, and thereby greatly increase the expenses as well to the party guilty of the irregularity, as occupying the more valuable time of the judges or barons in banc; and *thirdly*, because the probability of his having to pay costs in case his motion should not succeed, is not a reason of itself sufficient to repress the adoption of the more expensive proceeding, when he could get no costs upon a summons.

10. When a judge's order is beyond his jurisdiction, or improper, how to proceed.

The jurisdiction of a single judge at chambers is impliedly, at least, as limited as that of the full Court, and indeed should in general, in term time, or even vacation, accord with established precedents or positive enactments, unless clearly a case new only in instance, but sanctioned by admitted principles. A judge at chambers, therefore, cannot make an order against the plaintiff's consent to stay proceedings on payment of debt and costs *by monthly instalments*; and it was considered that the plaintiff might treat such order as a nullity, and proceed in the action by delivering a declaration; for, *per curiam*, "a judge at chambers can at most only give to a defendant in such cases the time *he would have had by law*, and here the payment was postponed for *many months*;"(x) and yet in some instances a judge's discretion is limited only by what he may consider reasonable, as in giving time to plead. It will, however, rarely occur that a judge's order will be so absolutely void as even *in law* (and independently of that deference and respect which ought always to be paid to the decision of a judge) to justify any practitioner in treating it as a nullity; and certainly, in due respect and prudence, it will be preferable to apply to the Court to *discharge* the order,(y) unless perhaps in cases where a trial, or other important advantage, might be lost if the delay incident to an application to the Court to set aside the order were incurred, in which case, after a respectful protest against the order, and intimation to the defendant's attorney of the necessity and ground for immediately proceeding in the action, the plaintiff might so proceed.(z)

(x) *Kirby v. Ellier*, 2 Crompt. & M. 315. In that case the defendant obtained another order for setting aside the declaration with costs, and then the plaintiff obtained a rule for setting aside both the orders, and the defendant, on the recommendation of the Court, gave up the costs under the second order, and the action was compromised.

(y) See the result of the last case in note (z), *supra*.

(z) In a case where a rule nisi had in K. B. been drawn up by the defendant's counsel without the *express* authority of the Court, concluding "In the meantime all proceedings to be stayed," and the plaintiff nevertheless proceeded in the action, the Court afterwards, on *discharging* the rule said, that the plaintiff had a right so to proceed, although at his peril and expense, in case the rule had been made absolute. MS.

So if an order has been obtained by misrepresentation, as by falsely stating to a judge's clerk that the judge directed certain terms, which he did not, and thereupon the clerk drew up and delivered out such order, the same may be treated as a nullity without moving the Court to set it aside. (a) It seems also that a single judge at chambers has no power to interfere with the *Nisi Prius* cause list to be tried before another judge in directing the order of trial, but the proper judge on the circuit, or the Chief Justice at his chambers, on application, directs the time of trial. (b) Supposing that inadvertently an order of the Court or a judge should be obtained by surprise, it would seem that the cause might nevertheless be tried without regarding such order.

An attachment will not lie for disobedience to a judge's order until it has been made a rule of Court, although the order has been acquiesced in and acted upon. (c) And a judge's order made in vacation cannot be made a rule of Court before the following term. (d) But by rule, Mich. T. 3 W. 4, A. D. 1832, and Hil. T. 3 W. 4, A. D. 1833, if a judge's order to return mesne or final process be made and served in vacation, and not promptly or duly obeyed, it may afterwards be made a rule of Court in next term, and an attachment shall go, although in the mean time there may have been an attempt to purge the contempt by subsequent performance.

11. Judge's order, how enforced.

Unless a judge's order has been made under the authority of a statute and thereby declared to be final, or it be previously agreed by the parties that it shall be final, either party dissatisfied with his decision may, it has been supposed, as *of right*, within a reasonable time, move the full Court "to set aside" or "rescind such order," (e) either entirely or partially, as to costs, or to set aside the same, and proceedings taken in pursuance. But in a recent case the Court of King's Bench intimated that where a *discretionary* jurisdiction has been delegated to a judge (as in the instance of allowing an amendment of a declaration by the introduction of new counts in an action of *quare impedit* at the suit of the king) and he has decided, it by no means follows that a party can move the Court to set aside his order. (f)

12. Motions to Court to set aside a judge's order.

(a) *Woodsam v. Price*, 1 Crompt. & Mee. Rep. 352.

(b) *Johnson v. The Coks and Gas Light Company*, 7 Taunt. 390; *Maltby v. Moses*, 1 Chitty, R. 489, post, 41.

(c) *Baker v. Rye*, 1 Dowl. Pr. C. 689; *Ex parte Lawrence*, 2 id. 231.

(d) *The King v. Price*, 2 Crompt. & M. 212; 2 Dowl. Pr. C. 233.

(e) Per Tindal, C. J. in *Doe dem. Prescott v. Roe*, 9 Bing. 105, 6; 1 Dowl. Pr. C. 274; and see 4 Burr, 2569; *James v.*

*Kirk*, 1 Chit. Rep. 246; 9 Bing. 104; *Foster v. Burton*, 3 Tyrw. 380. And it will be observed that the concluding part of sect. 4 of the Interpleader Act, 1 & 2 W. 4, c. 58, appears to suppose that, in general, "all orders of a judge may be rescinded or altered by the Court."

(f) Per Denman, C. J. and Patteson, J. in *Rex v. Archbishop of York and others*, 1 Adol. & El. 397; 3 Nev. & Man. 453; S. C. post, 35.

CHAP. I.  
III. BEFORE  
SINGLE JUDGE.

And when a judge's order is set aside, as the matter objected to was the decision or act of a judge, it is not the practice to award any costs of the motion in favour of the party who succeeds in the reversal. (g) The recent interpleader act, 1 & 2 W. 4, c. 58, s. 4, in *express* terms, subjects an order under the authority of that act of a *single judge not sitting in open Court* to be rescinded or altered by this Court. (h) In general such application should be made as early as practicable in the next term, and before the opponent has taken any proceedings in that term upon such order. (i) And when a judge's order has been acquiesced in, it is as valid as any act of the Court. (k) But even a delay of an intervening term on the part of a plaintiff, complaining of an order, who has not since taken proceedings in the cause, nor has the defendant taken any proceedings upon the order, might possibly be excused, as by the continuing illness of the plaintiff's attorney; (l) of course in support of a motion of that description the applicant must shew some sufficient objection, (m) such as that the order was to set aside a sham demurrer, which a judge at chambers cannot make; (n) and if the ground of the application be not apparent on the face of the order itself, there should be an *affidavit* fully stating what occurred before the judge and all extrinsic facts. In practice, it is most respectful to make the motion, if time will allow, when the judge is present, and he does not interfere unless called upon to explain, and the rest of the judges hear and give effect to the motion by granting or refusing a rule nisi with anxious impartiality, as if the order had not been made by a judge.

If the judge's order has been made without jurisdiction, or he has come to a conclusion against the propriety of which the party thinks fit to complain, he may move the Court in banc to set it aside without first making the same a rule of Court, (o) as is requisite in the case of motions to set aside an award made under a submission and judge's order, (o) and as is also necessary before a motion to the Court to discharge an order for suing in

(g) *Hargrave v. Holden*, 3 Dowl. 176.

(h) See the act, *ante*, vol. II. 345, note (i). From the expression, "not sitting in open Court," it should seem that when an order under this act has been made in the Practice Court it could not be rescinded.

(i) Per Tindal, C. J. in *D. D. Prescott v. Roe*, 9 Bing. 105, 6; 1 Dowl. Pr. C. 274, and see 4 Burr. 2569; *James v. Kirk*, 1 Chit. Rep. 246; *Foster v. Burton*, 3 Tyrw. 380.

(k) *Wood v. Plant*, 1 Taunt. 47.

(l) *Huges v. Brand*, 2 Dowl. Pr. C.

131, *sed quere*, for although illness was sworn to, Bayley, J. said, "the Court is not satisfied about the excuse for the delay."

(m) Per Abbott, C. J. *James v. Kirk*, 1 Chitty, R. 248.

(n) *Foster v. Burton*, 3 Tyr. Rep. 380.

(o) *Spicer v. Todd*, 2 Tyr. R. 172; but see contra *Haves v. Johnson*, 1 Young & J. 10, where the Court inclined to think that a judge's order allowing a plaintiff to sue in forma pauperis must be made a rule of Court before the Court will entertain a motion to discharge it.

*forma pauperis.* (p) And it seems that the propriety of a judge's order will not be suffered to be impeached *collaterally* upon another motion or proceeding, but there must be a direct and distinct motion to the Court for a rule to shew cause why such order should not be set aside, for otherwise the Court will not attend to any objection; (q) and it seems to be a rule not only not to allow costs when a judge's order has upon a direct application been set aside, but it is also usual when a practitioner has acted upon the supposed sufficiency of a judge's decision in another case, but which the Court think incorrect in point of law, to set aside the proceeding expressly without costs, thus testifying the respect due to any judge's decision. (r)

CHAP. I.  
III. BEFORE  
SINGLE JUDGE

When an order has been made under an express power given by statute it is sometimes conclusive and is not subject to review unless an appeal to the Court be expressly or impliedly given. Thus a judge's order made in vacation under the Lords' Act is final and not subject to the review of the Court, because that intention of the legislature is apparent on the face of the act, (s) and the decision of a judge of assize on remanding a prisoner under the same statute is final up to the time of remanding. (t) But the decision of a single judge under the interpleader act, 1 & 2 W. 4, c. 58, although in s. 2 declared to be final, may by sect 4, if made by a judge not sitting *in open Court*, (*i. e.* not sitting in banc or in the Practice Court,) be rescinded or altered by the Court in like manner "as other orders made by a single judge." It seems questionable, however, whether the decision of a judge at chambers as to *amendments* of pleadings within the limits of his *discretionary power* over such amendments can be interfered with by the Court, (u) or his order for striking out a second or subsequent count under the Pleading Rules of Hil. T. 1834; and as 3 & 4 W. 4, c. 42, s. 23, gives a judge at *nisi prius* an unqualified discretion in *refusing* an amendment, though there is an appeal to the Court, when he has *allowed* an amendment, yet the Court cannot in the former case interfere to examine the propriety of such *refusal*. (x)

13. What orders of a judge are conclusive and cannot be set aside.

(p) *Hawes v. Johnson*, 1 Young & J. 10; and see *Hargrave v. Holden*, 3 Dowl. 176; rule 34, n. (g).

(q) *Urquhart v. Deck*, 3 Dowl. 19.

(r) *Wigley v. Tomlins*, 3 Dowl. 9; *Narve v. Geeling*, *id.* 158.

(s) 32 G. 2, c. 28, s. 15; *Lench v. Pargiter*, Doug. 68; 3 J. B. Moore, 64,

65.

(t) *Briggs v. Sharp*, 6 Bing. 517.

(u) Per Denman, C. J. and Patteson, J. in *Rex v. Archbishop of York and others*, 3 Nev. & Man. 453, and 1 Adol. & El. 397, S. C.

(x) *Doe v. Errington*, 3 Nev. & Man. 646.

CHAP. I.  
IV. OF THE  
MASTER, &c.

IV. Authority of the MASTER of King's Bench on the civil side, and of the Master on the crown side ; and of Prothonotaries of C. P. and of Master of Exchequer.

1. Master on civil side of K. B.

*Fourth, The Offices of the Masters and Prothonotaries.*

In relief of each of the three Courts of a part of the burthen of business, some branches thereof are delegated to an officer or officers of each Court, called the Master or Prothonotary, and whose functions are somewhat analogous to those of a Master in Chancery who acts in aid of the Court of Chancery.

On the plea or civil side of the King's Bench, the Master, now Mr. Le Blanc, is a most important officer, transacting much of certain parts of the business of the Court, and who is the secondary or deputy to the chief clerk, and has able assistants under him.(y.) In consequence of the great experience of this important officer, and his ability to state, not only the course of practice, but also instances when or not a similar rule or proceeding has been permitted or refused, *the judges frequently make inquiries of him* upon such subjects when connected with the *practice* on the civil side of the Court.(z) Though it should seem that where the construction of a statute or an express written rule of the Court is involved, no weight should be attached to the report of any officer of the Court.(a) In general, especially towards the end of a term, when there are disputed rules upon matters of account or practice, or relating to the conduct of an attorney, and founded upon or opposed by long or conflicting affidavits, and when the Court perceive that it is probable that further affidavits and perhaps personal examination of the parties may elucidate the facts, it is very usual to refer the matter to the master, either generally or with a direction to him to report the result and his opinion thereon to the Court. As it is an established rule in Court practice not to receive supplementary affidavits on shewing cause against a *rulenisi*, at least without leave of the Court, and which is rarely given, (b) it is frequently advantageous to one, if not both the parties, that the matter in dispute should be thus referred, because the master will in general receive further affidavits on each side and examine the parties *viva voce*, until every source of information has been exhausted. On these occasions the master or prothonotary is frequently attended by counsel on behalf of one or of both the parties, and considerable

(y) Tidd, 43.

(z) See a late instance on application of *Pitt v. —*, 3 Nev. & Mann. 566, and see *Bugden v. Burr*, 10 Bar. & Cres. 457 ; and *Cook v. Allen*, 3 Tyrw. 380 ; But see the objections of Hullock, B. to the Court taking the statements of their officers as the evidence of the practice of the particular Court, *Anonymous Case*, Price Gen. Prac. 84, 85, and see the case,

*post*, chap. 2 ; and also see *id.* note \*. \* and *Bulkely v. Smith*, 1 Price's Exch. Cas. of the Court of Exchequer having strongly reprov'd any conventional course of practice amongst the officers of a Court.

(a) *Semhle*, see observations of Hullock, B. referred to in the last note, and *post*, second chapter.

(b) Tidd, 493, 496, 501 ; *Salloway v. Whorewood*, 2 Salk, 461.



experience has satisfied me that whilst this office is filled by so able, so sensible, and so honorable a personage as at present, justice is as efficiently administered by him as it would be by the judges.

Either of the parties may by his counsel move the Court for the master's or prothonotary's report, and may after it has been read object and argue upon any part thereof. (c) The master or prothonotary usually, as matter of courtesy, allows the counsel to see his report or a copy, before it is publicly read, so as thereby the better to enable them to observe thereon to the Court.

As regards *matters of account*, and especially the ascertaining what is due for principal and interest on bills of exchange, promissory notes, or in actions of covenant for rent, or arrears of annuity, &c. after judgment by default, *references to the master* of King's Bench, or Exchequer, or to a prothonotary in the Common Pleas, constitute a very extensive description of business, decided upon by those officers without the intervention of a jury or the Court, and which will hereafter be fully considered. The master also exercises by himself and deputies the very extensive and important ministerial office of *taxing and allowing the costs*, as well in original actions as on motions, and depending sometimes on the difficult construction of various acts of parliament allowing costs; and as well before as since the 1 W. 4, c. 22, even the expense of bringing over witnesses from abroad, and of subsisting them here, (though not for their loss of time,) may be allowed at the discretion of the master or prothonotary of King's Bench, Common Pleas, or Exchequer, subject to the review of the Court; (d) and with respect to the allowance of the expenses of numerous witnesses, much is in the discretion of the master, and the Court will not interfere with his decision unless *mala fides* be shewn in the successful party, as an intention unnecessarily to increase the costs, when the Court will, on affidavit and motion, sometimes interfere. (e)

The Court frequently, especially towards the end of the terms, and on the last day of each, when all the matters before the Court cannot otherwise be disposed of, and especially when the facts are contradicted and require further affidavits and inquiry, suggest to the parties the expediency of a reference of the matter to the master of the Court, or sometimes to a barrister; and the former suggestion is usually acceded to, or the motion will be enlarged and not disposed of until the next term. But this jurisdiction is *entirely voluntary*, and either

(c) Tidd, 486.

(d) *Macalpines v. Poules*, 3 Tyrw. 871.(e) *Thomas v. Saunders and another*, 3

Nev. &amp; Man. 572.

CHAP. I.  
IV. OF THE  
MASTER, &c.

party may refuse his assent. In questions of mere practice such a reference is proper; but in matters of law connected with facts, it may be otherwise; and when the parties wish to have the full consideration and judgment of the four judges upon the matter, it may be the duty of their counsel not to consent to a reference to the master, although the consequence may be that the Court, attributable to the press of business on the last day of the term, and the impracticability of their deciding upon all the unheard motions, will enlarge the rule, in which case it will stand in the list of peremptories to be heard in the early part of the next term. It is an important point in the practice of a skilful counsel to bring on all contested motions, especially when it is probable they will, when deliberately heard and considered, be determined in his favour, and thus expedite the proceedings of his client, on an *early day* in the term; but it frequently occurs that the opposing party will effectually counteract that endeavour, a part of practice which will be more particularly condemned in the chapter on motions.

2. Master of  
Crown Office.

The *Master* of the Crown Office transacts a considerable portion of business on the crown or criminal side of the Court, and where a party has been taken upon an attachment, such officer examines him on interrogatories, and reports thereon to the Court. (f) So it is not unfrequent, after conviction upon an indictment or information, for the Court to direct the defendant to go before the *master*; which imports an authority to the master to ascertain the prosecutor's costs, and direct the defendant to pay the same.

3. Prothono-  
taries in C. P.

In the Common Pleas a great variety of matters arising out of causes are referred to the Prothonotaries, who in that respect resemble the Master on the plea side of the King's Bench, and they make reports thereon to the Court; and also on the examination of persons in contempt on interrogatories, and report thereupon to the Court. (g) But in the Common Pleas, where a complaint had been made against an officer of the Court, the judges have declared that they will not refer it to the prothonotaries for examination, but will examine it themselves. (h) In the King's Bench, however, it is very frequent to refer motions imputing misconduct to an attorney to the master,

(f) Tidd, 481, 2.

(g) Tidd, 47, 481, 482; where see the difference in the practice of K. B. and C. P. And see the strong observations of Hullock, B., against referring a question of practice, or delegating the jurisdiction

of the judges to the decision of their officers, *Anonymous case*, Price Gen. Pr. 84, 85, and stated *post*, 2d chap.

(h) *Johnson v. Smith*, 1 Hen. Bl. 105; Tidd, 58.

but with a reservation that he shall report to the Court, who thereupon pronounce a rule absolute that may affect the character or future practice of such attorney.

CHAP. I.  
IV. OF THE  
MASTER, &c.

In the Exchequer, the Deputy of the Clerk of the Pleas (now Thomas Dax, Esq.) is called *the Master*, and his business is to take minutes of what is done in Court, draw up rules, *make reports on matters referred to him*, and to tax bills of costs, draw up rules for the allowance of bail, and he *signs process and judgments*. (i) The 2 & 3 W. 4, c. 110, s. 1, enacts, "that the said Thomas Dax, and Kenrick Collett, and Edmund Walker, shall perform the duties of master and prothonotary;" and the chief baron and other barons are by section 5 authorized from time to time to order and direct the hours and manner in which the several officers of the Court shall give their attendance and conduct the business in their several departments.

4. Master in  
the Exchequer.

#### *Fifthly. Jurisdiction of a Judge at Nisi Prius and on the Circuit.*

On the trial of issues in fact, very frequently difficult questions upon the admissibility of *evidence*, and in general upon other matters of *law*, as well as upon the application of law to complicated facts arise, and therefore, in certain very difficult cases, a trial at bar before four of the judges of the Court in which the issue has been joined may be had; yet, *in general*, trials at nisi prius can only be had before a *single judge*, although it is obvious that the assistance of other judges is then frequently even more requisite than upon the argument of a mere question of law in full Court. This defect in the administration of justice is attributable to the necessity for the fifteen judges separating to try civil causes and criminal prosecutions in different counties and circuits at the same time.

V. Of the  
jurisdiction of a  
Judge at Nisi  
Prius in term  
or vacation in  
London or Mid-  
dlesex, and on  
the circuits.

Trials of *issues in fact* by a *jury* take place before a single judge in *London and Middlesex*, as well in and during the terms, as in the four vacations after term; and also on the *circuits* throughout England and Wales after Hilary and Trinity terms, technically called *the issuable terms*. In order to expedite actions against actual prisoners, and in other suits, principally for debts, it was deemed essential that trials of issues should take place in and during each of the four terms on certain parts of days, and the consequence was, that usually the chief justice of each Court (although a puisne judge might

1. In Middle-  
sex and London  
in and after  
term.

(i) Tidd, 54 to 58, Supplement, 1833; and see Dax's Exch. 2d ed. 4 and 10.

CHAP. I.  
V. JUDGE AT  
NISI PRIUS,  
&c.

at the request of the chief justice try causes for him (*k*)) was at those times obliged to leave the full Court to attend at nisi prius, and either break up the Court sitting at Westminster, or proceed elsewhere; thereby, in either case, greatly impeding the proper business to be transacted in banc during the terms. This injurious practice has been in some measure improved by the appointment of a fifth judge; (*l*) and by section 4 of the same act, which enables a judge or baron of *either Court* to try causes at nisi prius issuing out of either Court; so that in no case is it essential that either of the chief justices or the chief baron should sit at nisi prius in the terms, unless the state of the business in banc will permit him to do so without injury to the suitors. But still great inconvenience to *counsel* and *attornies* is occasioned in consequence of the impracticability of their being present at the same time in two different and sometimes distant places, and it is very desirable that *there should be no sittings in the terms*, but that the causes that might otherwise be then disposed of, should be tried on the first or second entire days immediately after the term, and have judgment of the term if proper, and be declared as effectual against prisoners as if tried during the terms.

The 11 Geo. 4 and 1 Will. 4, c. 70, s. 7, enacts, that when the alteration of the terms under section 6 of the act shall have taken effect, not more than twenty four days, exclusive of Sundays, after any Hilary, Trinity, and Michaelmas term, nor more than six days, exclusive of Sundays, after any Easter term, to be reckoned consecutively immediately after such terms, shall be appropriated to sittings in London and Middlesex for the trial of issues on fact arising in any of the said Courts: provided, that if any trial *at bar* shall be directed by any of the said Courts, it shall be competent to the judges of such Court to appoint such day or days for the trial thereof as they shall think fit, and the time so appointed, if in vacation, shall, for the purpose of such trial, be deemed and taken to be a part of the preceding term: provided also, that a day or days may be specially appointed at any time, not being within such twenty four days, for the trial of any cause at nisi prius, with the consent of the parties thereto, their counsel or attornies. (*m*)

(*k*) 1 Geo. 4, c. 55, s. 2.

(*l*) 11 Geo. 4 and 1 Will. 4, c. 70, s. 1 and 4.

(*m*) It will be observed, that in consequence of this latter enactment Lord

Lyndhurst appointed the cause of *De Beauvoir v. Rhodes* to be tried, and the same was tried on 31st October and 1st November, 1834.

Although the *Court* in banc has jurisdiction not only to grant but to discharge rules for the trial of a cause by special jury, and upon affidavits they will hear and decide upon a rule nisi for discharging a rule obtained by a defendant for a special jury even on the very morning of the day, when, if such rule should be discharged, the plaintiff might try the cause by a common jury, yet the Court, and still less a single judge, has no jurisdiction to interfere, or at least will not interfere, with the cause list at nisi prius by forwarding or postponing a particular cause or otherwise, but the controul over the same is exclusively vested in the judge who is to try the causes; (n) and therefore the Courts refuse to give directions as to the order in which a special jury cause shall be tried, although the rule for a special jury had been obtained for delay, (n) and the judges at chambers refuse applications for restoring causes struck out of the list, (o) for the application should be made to the chief justice at his chambers. And it is erroneous to apply to the Court in banc to rectify or alter the terms of a postea or the entry of the verdict or finding of the jury, but the application must be made to the judge who tried the cause to correct the verdict according to his notes. (p)

We have just seen the exclusive power and controul of the judges of nisi prius over the nisi prius list of causes and the records sent from the Courts to be tried before him. (q) The judges upon their circuits act by virtue of five several authorities; first, the commission of the peace; second, a commission of oyer and terminer; third, a commission of general gaol delivery; fourth, a commission of assize, for the trial of landed disputes; and fifth, their authority at *nisi prius*; the commission of assize being annexed to the office of justice of assize by the statute of Westminster 2, (13 Edw. 1, c. 30,) which empowers the judges to try all questions of fact issuing out of the Courts at Westminster; (r) and the 3 Geo. 4, c. 10, authorizes them to open the commission on the day after the appointed day, or if that should be a Sunday, even on the succeeding day. The powers of the judges on the circuits have been considerably extended by several modern enactments.

CHAP. I.  
V. JUDGES AT  
NISI PRIUS,  
&c.

2. The Court or a single judge at chambers will not interfere with the nisi prius cause list.

3. On the circuit, the different powers of a judge.

(n) *Johnson v. The Coke and Gas Light Company*, 7 Taunt. 390; *Maltby v. Moses*, 1 Chit. R. 489, ante, 33.

(o) *Jacob v. Rule*, 1 Dowl. Pr. C. 349.

(p) *Iles v. Turner*, Exch. Mich. T. 1834; 9 Leg. Ob. 237.

(q) *Supra*, this page.

(r) *Bullock v. Parsons*, 2 Salk. 454; 3 Bla. Com. 59; Tidd, 41. See the forms of the criminal commission in 4 Chitty's Crim. Law, and of all the commissions at the Rolls in Rolls Yard, Chancery Lane.

CHAP. I.  
V. JUDGES AT  
NISI PRIUS,  
&c.

Before the 9 G. 4, c. 55, s. 5, the powers of a judge at Nisi Prius, or on the circuit, were limited, and it was decided that even in an undefended cause, and before the trial, a judge could not on the circuit amend any mistake, or make any order in a cause, unless he was a judge of the Court out of which the Nisi Prius record had issued. (r) But the above act enacts, (s) that it shall be lawful for the judges of each of the superior Courts at Westminster, and each and every or any one of them, during their respective circuits for taking the assizes, *to grant such and the like summonses, and make such and the like orders in all actions and prosecutions* which are or shall be depending in any of his Majesty's Courts of Record at Westminster in which the issue, if brought to trial, would be *to be tried* upon such their respective circuits, as if such justices were respectively judges of the Court in which such actions or prosecutions are or shall be depending, although such respective justices of the Court of King's Bench and Common Pleas, and Barons of the Exchequer, and justices of Chester, or any of them, may not be judges of the Court in which such actions or prosecutions are or shall be depending, and such summonses and orders shall be of the same force and effect as if such justices were respectively judges of the Court in which such actions or prosecutions are or shall be depending. But the powers given by this act were considered to be strictly confined to those cases in which the issue, if *tried*, could have been *tried* before a judge on the circuit, and therefore where a cause about to be tried on the circuit had been referred to arbitration by an order of nisi prius, and the judge *afterwards* and during the assizes made a second order, to *enable the defendant to give a notice of set-off*, it was holden, that after such order of reference, the judge was *functus officio*, and the jurisdiction entirely delegated to the arbitrator, and that the statute did not authorize the second order. (t)

Amendments on  
the circuit.

As respects amendments immediately *before* a trial on the circuit, it was formerly supposed that a judge at Nisi Prius ought not to permit an amendment of a material allegation; thus, in an action on a bond, (u) where counsel moved at Nisi Prius to put off the trial in order to amend the declaration by omitting a profert of the bond, and alleging that the bond was in the possession of the defendant, Lord Ellenborough refused the ap-

(r) *Halhead v. Abrahams*, 3 Taunt. 80; Bagley Ch. Pr. 6.

(t) See Chitty's Col. Stat. 734, 735.

(u) *Ashworth v. Heathcock*, 6 Bing. 596; 4 Moore & P. 396, S. C.

(u) *Pain v. Buskin*, 1 Stark. Rep. 174.

plication, observing that it should have been made earlier and at chambers, and that if a party wil allege possession of that which he has not, he must take the consequences; and that the alteration proposed was matter of material allegation, and not the subject of amendment at Nisi Prius. (x) But the practice is now otherwise, and the judge may, independently of the 9 G. 4, c. 15, permit an amendment in the pleadings at any instant *before* the jury has been sworn to try the cause, unless it be manifest that the defence on the *merits* would be thereby prejudiced. (y) In a recent case, (x) in an action of assumpsit on the money counts, upon a summons attended by counsel immediately before the trial, in the judge's room, Lord Tenterden allowed several special counts on foreign bills of exchange, alleged to have been paid *supra protest*, to be *considered as added to the record*, and made an order that if the Court should thereafter be of opinion that the plaintiff could not have recovered upon the common counts, the defendant should have the costs up to the time of trial, and that the plaintiff should take the verdict on the special counts; and the cause was immediately afterwards tried.

The 9 G. 4, c. 15, gives *any* judge of *any* Court power *during* the trial to amend any variance between any *written* document and the record; and the 3 & 4 W. 4, c. 42, s. 22, extends such power to *all* variances from the record, "as well *in verbal* as written evidence, in any particular, *in the judgment of the Court or judge not material to the merits of the case, and by which the opposite party cannot have been prejudiced in the conduct of his action, prosecution, or defence*; (a) but it is *discretionary* to permit an amendment, and if *refused*, there is no appeal; though when *permitted*, express power to appeal to the Court in banc is reserved to the party who alleges he has been prejudiced by the amendment.

(x) *Pain v. Buskin*, 1 Stark. 174; and see also Tidd, 8th ed. 53.

(y) *Murphy v. Marlow*, 1 Camp. 57.

(z) *Reid v. Smart*, K. B. Sittings at Guildhall after Hil. T. 1828, Chitty for plaintiff and Pollock for defendant; see Chitty's Col. Stat. 735, note (b); but see *Pain v. Buskin*, 1 Starkie's R. 74. With respect to the exercise of the powers of amendment under the 9 G. 4, c. 42, see *post*, the Chapter on Trials.

(a) These terms must have been intended only to preclude an amendment which would deprive the opponent from availing himself of a just defence or answer

on the *merits*; because of course every amendment of what would otherwise be a *fatal variance*, deprives a defendant of his *formal* and *technical* defence on that point. *Quere*, therefore, whether the refusal in *Doe d. Errington*, 3 Nev. & Man. 646, to permit an amendment by introducing a separate demise in the declaration in ejectment, in lieu of a *joint* demise, and which refusal gave effect to a mere *formal* and *technical* defence, accorded with the spirit of this enactment; and see observations of Parke, J., in *Hanbury v. Ella*, 1 Adol. & El. 64, 65, and see *post* more fully.

CHAP. I.  
V. JUDGE AT  
NISI PRIUS,  
&c.

---

The decision of a judge at Nisi Prius, either refusing or permitting an amendment *during* the trial, in case of a variance between the record and any *written* document, under the 9 G. 4, c. 15, was decided to be conclusive, and that the Court above could not review the propriety of his decision. (b) And although the subsequent statute, 3 & 4 W. 4, c. 42, s. 23, (which gives extended powers of amendment pending a trial,) expressly gives power to a party dissatisfied with the judge's *allowance* of an amendment, to apply to the Court above for a new trial upon that ground; and in case the Court should think such amendment improper, then a new trial is to be granted accordingly, on such terms as the Court shall think fit, or the Court shall make such other order as to them may seem meet; yet as the statute gives no appeal against a judge's *refusal to allow an amendment* at Nisi Prius, he has an *uncontrolled discretion*, with which the Court in banc will not interfere. (c) It is obvious, therefore, that a judge should in general permit an amendment, unless it be manifest that the defendant or the plaintiff would be prejudiced in the conduct of his *just* and *meritorious* right or defence, and not refuse an amendment merely because it would defeat an *unjust* or mere formal objection; (d) the more especially because the right of a plaintiff to vary the statement of his cause of action in *several counts*, was taken away expressly on the ground that the judges on trials *would liberally exercise the power to permit amendments*, and the new rules of pleading would operate most unjustly unless amendments be *uniformly permitted when justice requires*.

A judge at Nisi Prius, however, has no jurisdiction to set aside or otherwise avoid the effect of a release pleaded puis darrien continuance, or produced at the trial, either on the ground of fraud or otherwise; (e) and indeed no proceedings at Nisi Prius can ever take place upon a plea puis darrien con-

---

(b) *Parks v Edge*, 1 Crompt. & M. 429.

(c) *Doe v. Errington*, 3 Nev. & Man. 646. This is a great defect in the act, because, if in the hurry of Nisi Prius the judge should misapprehend the nature or effect of the proposed amendment and refuse it, he would perhaps be the first person to regret his decision, and that he has not power to concur with the Court above in permitting an amendment. In a cause tried before Lord Tenterden at Guildhall, and in which his lordship refused an amendment in a very unimportant variance, merely because he considered it proper that the attorney should be punished for his blunder, it turned out that in consequence of such refusal to

amend, and of the delay before a second action could be tried, the defendant, who before would have paid, became insolvent, and the attorney, on being sued for his negligence, also became insolvent, and the *unfortunate plaintiff* only was the sufferer, and his bankruptcy ensued. Besides, it may happen, in course of time, that there may be a judge who might, in actions for political libels, or other cases which he would not be disposed to favour, refuse to exercise such discretionary power, though perhaps justice required he should do so.

(d) See observations of Parke, J., in *Hambury v. Ella*, 1 Adol. & El. 645.

(e) *Almer v. George*, 1 Campb. 392.



tinuance, if regularly supported by affidavit; but the trial is instanter suspended, and the future proceedings take place in bank. (f)

CHAP. I.  
V: JUDOR AT  
NISI PRIUS,  
&c.

Practice of  
summons and  
order on the  
circuit.

The practice by *summons* and order, when that mode of procedure is adopted on the circuits, varies in no substantial respect from the practice at a judge's chambers in town. (g) Thus an affidavit, if the nature of the case require, is made on the part of the applicant, and a summons obtained from the judge, as to show cause at the judge's lodging the next morning at eight o'clock, or some other hour, before the judge goes into Court, why an amendment should not take place in the record; copies of the affidavit and of the summons are then immediately, on the same evening, served on the opponent, who, if considered expedient, makes a short affidavit in answer, and then, at the appointed hour, the two attornies attend by their attornies, and by counsel, if any difficulty occur, or it be deemed essential to quote authorities; and the judge makes or refuses his summons. If the amendment be considerable, so as to render it impracticable to alter the record before the cause in ordinary course comes on for trial, the judge may, perhaps, at least by consent, order that the amendment shall be *considered* as if it had been already made and added to the record, and the cause may be tried in the previous state of the record. (h)

The 1 W. 4, c. 70, s. 38, (enacted 23d July, 1830,) authorizes a judge immediately after a trial of an action of *ejectment* before him, to certify that an *execution may issue immediately* and before the next term; (i) and the subsequent act, 1 W. 4, c. 7, s. 12, (enacted 11th March, 1831,) extended such power of certifying to *all* actions. (i)

The 11 G. 2, c. 19, s. 17, where justices of the peace have ordered possession to be given to a landlord of premises deserted by a tenant, enacts, "that such proceedings of the said justices shall be examinable in a summary way by the next justice or justices of assize of the respective counties in which such lands or premises are situate, and who are thereby respectively empowered to order restitution to be made to such tenant, together with his expenses and costs, to be paid by the lessor or landlord, if they shall see cause for the same; and in case they shall affirm the act of the said justices, to award costs not exceeding £5 for the frivolous appeal."

(f) 1 Chitty on Pleading, 699, 700.

(g) Bagley's Prac. Cham. 5, 6.

(h) *Reid v. Smart*, see n. (x), ante, 43.

(i) See the cases as to the exercise of this power, *post*, and Chitty's Summary Prac. 187, 188.

CHAP. I.  
IV. SHERIFFS  
AND DEPUTIES.

VI. SHERIFFS  
and their DEPU-  
TIES, and of  
their judicial as  
well as ministe-  
rial functions as  
officers of the  
Court.

*Sixthly, Jurisdiction and Practice of each Sheriff and his Deputy.*

*Sixthly, The Sheriff in each county of England has immemorially been considered a ministerial officer of the superior Courts in executing process and obeying its rules, and is at common law subject to its jurisdiction in all matters touching his office; and by statute he is liable for his own or his officers' extortion or other misconduct under colour of his office, (k) and there are rules of Court prescribing some of the duties of the sheriff; (l) and the 11 G. 4 and 1 W. 4, c. 70, impliedly extends these liabilities to the sheriffs of the Welsh counties, now bound to execute the direct process of the Courts at Westminster. And the Uniformity of Process Act, 2 W. 4, c. 80, s. 15, authorizes the Court in term time, and a single judge in vacation, to make a rule or order for the immediate return in vacation of any process mesne or final, and which enactment is further enforced by rule of M. T. 1832; and R. H. 2 W. 4, rule 11 & 12, direct, that when a rule to return a writ expires in vacation, the sheriff shall file the writ at the expiration of the rule, or as soon after as the office shall open, and the officer with whom it is filed shall indorse the day and hour when it was filed. A rule also was made in the same term requiring the sheriff or other officer or person within six days after executing a writ of *capias* to indorse the true day of executing the same.*

Sheriff's power  
as a judicial  
officer.

But until recently, although a sheriff *might* preside as judge in his County Court in actions therein for debts under 40s., or by justices to any amount, and also might in person, and actually *did* by his under-sheriff preside and direct a jury in executing all writs of *inquiry of damages*, and in executing writs of *elegit* before a jury; yet the 8 & 9 W. 3, c. 11, s. 1, gave him no authority to preside before a jury in executing an inquiry suggesting breaches under that statute; nor in any case had he or his under-sheriff jurisdiction to preside on the *trial of an issue or issues of facts*, until the 3 & 4 W. 4, c. 42, materially extended his powers in those respects. The 16th

(k) On *mesne* process, 23 Hen. 5. c. 9; on *final* process, 29 Eliz. c. 4; 3 G. 1, c. 15; *generally*, 32 G. 2, c. 28, s. 11, 12; 7 G. 3, c. 29; 43 G. 3, c. 46, s. 5; Chit. Col. Stat. tit. Extortion.

(l) Thus R. E. 15 Car. 2, required every sheriff to appoint a sufficient deputy, and required every sheriff or his deputy to give *personal attendance* in Westminster Hall every day during term, and the same rule prohibited the issuing blank warrants upon pain of severe punishment. R. M. 1654, s. 2, prohibited the issuing of a warrant to arrest before

he has received the writ. R. M. 1654, s. 7, required the sheriff to make his returns. R. M. 1654, for prohibiting delay in executing or returning any process or execution. R. M. 1654, s. 2, punished sheriffs guilty of extortion on writs of possession. R. E. 15 Car. 2, punished bailiffs or sheriffs' officers for taking a warrant of attorney from a person in custody without the presence of an attorney on his behalf; and there are several other rules shewing the exercise of a power at common law to make general rules affecting sheriffs and their officers.

section of that act directs, that the truth of breaches suggested under the 8 & 9 W. 3, c. 11, and the assessment of damages thereby sustained, shall be inquired of before *the sheriff*, unless the Court or a judge shall otherwise direct; and the 17th section enacts, that in any action depending in any of the superior Courts for any *debt* or *demand*(*m*) in which the sum sought to be recovered and indorsed on the summons shall not exceed £20, the Court or a judge, if satisfied that the trial will not involve any *difficult* question of *fact* or *law*, may direct that the issues shall be tried before the sheriff of the county where the venue is laid, or any judge of any Court of Record for the recovery of debts in such county. And the 18th section gives the sheriff or his deputy, or the judge of record, power to certify that the defendant ought to have an opportunity of applying to the Court for a new inquiry or trial, (*n*) and also to prevent judgment and execution immediately after the inquiry or trial; and the sheriff, &c. is to have the same *power of amendment* as a judge has upon a trial under the 28d section of the same act. (*o*) But he has no power to certify that the debt is under 40s. so as to deprive the plaintiff of costs under the 43 Eliz. c. 6, s. 2. (*p*)

The 20th section also directs all sheriffs of England or Wales to *appoint a sufficient deputy*, having an office within a mile of the Inner Temple Hall, for the receipt of writs, granting warrants thereon, making returns thereto, and accepting of all rules and orders to be made on or touching the execution of *any process or writ to be directed* to such sheriff. This regulation, concentrating, as it were, the offices of all the sheriffs throughout England and Wales within one mile of the centre of the metropolis, and in the vicinity of all the public law offices, must be attended with great advantages.

It is the imperative duty of every sheriff to appoint such London deputy, and if he should neglect, the duty may be enforced by mandamus; (*q*) and if any delay or prejudice should arise, the sheriff will be responsible for the loss. (*r*) But it has not been decided whether the delivery of a writ of fieri facias to a sheriff's deputy in London, under 3 & 4 W. 4, c. 42, would bind the goods, in case between the time

Sheriff to appoint a deputy with an office in London.

(*m*) *Quære*, does this extend to unliquidated damages? See 1 Adol. & Ellis, 24. *Samble*, it does not, 2 Crom. & Mee. 150.

(*n*) See *post* as to trials before the sheriff and under-sheriff, motion for new trial. The sheriff or under-sheriff may nonsuit a plaintiff, 2 Cromp. & Mee. 153. As to the course of proceeding, if under-sheriff withhold his notes of trial, *Metcalf v. Perry*, 3 Dowl. 93; *Thomas v. Edwards*,

1 Cromp. M. & R. 382; *Mansfield v. Breaury*, 1 Adol. & Ell. 346; *Johnson v. Willis*, 2 Cromp. & Mee. 428.

(*o*) See *Hill v. Salt*, 2 Cromp. & Mee. 420.

(*p*) *Wardroper v. Richardson*, 1 Adol. & Ellis, 75.

(*q*) *The King v. Sheriff of Lincolnshire*, K. B. 31 Jan. 1835.

(*r*) *Brackenbury v. Laurie*, 3 Dowl. 180.

CHAP. I.  
VI. SHERIFFS  
AND DEPUTIES.

of such delivery in London, and the actual receipt of the writ or information of it by the sheriff or his deputy in the country, there should be a *bonâ fide* transfer of the goods; and, therefore, the prudent course will be in all cases, not only to lodge the execution at the deputy's office in London, but also to forward a copy and notice immediately to the under-sheriff in the country, or cause the deputy in London to do so instantly. (s)

Notification of  
appointment of  
sheriff.

Transfer of  
process and  
prisoners.

The 3 & 4 W. 4, c. 99, s. 3, regulates the notification in the London Gazette of a person having been duly pricked or nominated a sheriff, and the form of his warrant of appointment, and enables him to act as sheriff upon taking a certain oath, without any patent as theretofore. Section 15 requires such sheriff, by writing signed by him, to nominate and appoint some fit and proper person to be his *under-sheriff*, and prisoners, writs and processes are to be transferred to the new sheriff by the out-going sheriff's delivering to him a true and correct list and account thereof under his hand, with all such particulars as shall be necessary to explain to the in-coming sheriff the several matters intended to be transferred to him; and the in-coming sheriff is thereupon to sign and give a duplicate of such list and account to the out-going sheriff, and to whom the same is to be a good and sufficient discharge of and from all prisoners therein mentioned and transferred to such in-coming sheriff; and in future no indenture is requisite for turning over or transferring prisoners or process to the new sheriff, nor is any writ of discharge now to be issued. The act also contains regulations for auditing the accounts of sheriffs.

Functions of  
sheriffs in fact  
executed by  
deputy.

But sheriffs, being rarely practically acquainted with the law, and still less with the rules of evidence, do not in person preside on the execution of writs of inquiry, or the trial of issues for debts or demands not exceeding £20; nor do they interfere with any of the mere practical duties of their office, but leave the same to be conducted by their *under-sheriff or deputy*, who is expressly authorized to preside in executing the inquiry or writ of trial, by 3 & 4 W. 4, c. 42, and who in general is or has been an attorney of experience. As the duties of such deputies, in the character of judges, have been thus of late considerably increased, it behoves them to be better informed generally of the law than perhaps heretofore, and especially so of the existing rules of evidence, and one chapter in this work will be devoted to their assistance.

## CHAPTER II.

BY WHAT AUTHORITY THE PRACTICE OF THE COURTS IS REGULATED AND WHY THE REGULATIONS OUGHT TO BE STRICTLY OBSERVED, AND CONSEQUENCES OF DEVIATIONS, &c.

1. Introductory observations on the SEVERAL AUTHORITIES upon which the practice and pleadings of each Court stand .....	49	sions shall be deemed <i>irregularities</i> .....	73
2. Alterations introduced by 1 W. 4, c. 70.....	57	10. Distinctions between acts void and voidable and those contrary to good faith .....	75.
3. Alterations by the rules		11. Whether imperative or discretionary in Court or judge to give effect to an alleged irregularity ..	76
Trinity Term, 1831. ....	58	12. Why advisable not to take trifling objections .....	77
Hilary Term, 1832. ....	<i>id.</i>	But knowledge of technicalities why essential .....	<i>id.</i>
Easter Term, 1832.....	59	15. Discretionary in Court or judge to allow <i>costs</i> for irregularities....	80
4. Alterations by subsequent statutes, and in particular by 2 W. 4, c. 39	<i>id.</i>	14. Practice of a Court, how proved .....	82
5. Rules founded on the Uniformity of Process Act, 2 W. 4, c. 39, viz. of Mich. T. 3 W. 4, and the subsequent rules .....	61	15. Simplicity in practice of superior Courts of Law .....	83
6. General advantages resulting from the recent statutes and rules and all the judges conferring thereon .	65	16. Summary of the ordinary proceedings in an action .....	<i>id.</i>
7. Why exact observance should be required, and inquiry into the distinction between the force of statutes and rules.....	68	17. But by irregularities proceedings may become complicated .....	85
8. Inconveniences from distinction between <i>peremptory</i> and <i>directory</i> .	72	18. Proceedings of less frequent occurrence .....	86
9. Recent rule, Michaelmas Term, 3 W. 4, r. 10, that certain omissions shall be deemed <i>irregularities</i> .....		19. Practical proceedings peculiar to one Court.....	<i>id.</i>
		20. Practices at <i>law</i> , in what respects dissimilar to that in Courts of Equity, &c. ....	87

It will be obvious that however varying the facts of each case, and consequently the *pleadings* in different actions describing them, yet the *practical mode of conducting* the proceedings in a suit from the commencement to its determination may or ought in general, for the sake of certainty, to be the same; nor ought the practical mode of conducting a suit to be so intricate or difficult as to delay or prejudice the *trial of the substantial question on the merits*; and yet it has been objected that such desirable *simplicity* as regards some of the modern enactments, especially in the 2 W. 4, c. 39, appears to have been forgotten. (a)

CHAP. II.  
1st, INTRODUCTORY OBSERVATIONS AS TO PRACTICE IN GENERAL, AND AUTHORITIES ON WHICH SAME IS FOUNDED.

(a) It is to be feared that the Uniformity of Process Act, 2 W. 4, c. 39, has introduced more *technical* trifling objec-

tions and rules in respect of irregularities, than were previously known. It is really distressing and prejudicial to the admi-

CHAP. II.  
INTRODUCTORY  
OBSERVATIONS,  
&c.

---

Another essential matter to be regarded respecting practice is, that having once been settled it is better to be adhered to than altered on account of any *small* objection, perhaps only occasionally felt, nor found to be very pressingly inconvenient; and, indeed, it will be found that *any* alteration in the law or its practice should be most deliberate and cautious, and not adopted until all its bearings and consequences shall have been fully ascertained and duly appreciated.

Upon what authority the practice stood before the statute 1 W. 4, c. 70.

Before the 1 W. 4, c. 70, the course of proceedings in the superior Courts of law, as well respecting practice as pleading, was regulated by one of four authorities, viz. first, by general statutes; secondly, by express written rules; thirdly, by prior decisions; and fourthly, by usage. The statutes in general equally applied to all those Courts, but the express rules were made by the judges of each Court from time to time, and only applied to the proceedings in that particular Court; and the decisions and usages were principally confined to a particular Court, although sometimes all the Courts promulgated or adopted similar rules. Such usages constitute what might be termed the common law of the Court, as distinguished from the statutes and written particular rules.

Practice, how regulated by Statutes.

With respect to statutes, when they have been intended by the legislature equally to affect the practice in all the Courts, it would seem to follow that if the intention of the legislature be clear and unambiguous, all the judges of every Court must necessarily adopt a similar construction; (b) but if the language of an act (as in the 14 G. 2, c. 17, s. 1, respecting judgments as in case of a nonsuit,) be capable of different constructions, then it may occur that each judge, or the majority of each Court, conscientiously deciding according to his oath and deliberate opinion, will come to different conclusions; and hence, even where uniformity of practice has been enjoined by the legislature, yet it will sometimes materially differ in the three Courts, and which accounts for the contrariety in some decisions upon

---

nistration of justice to observe, that upon a writ of *capias*, mere process to bring a party into Court, four of the most able judges should be equally divided in opinion whether in the printed blank for the residence or description of the defendant in a *capias* it is necessary to name the county as well as town or parish of residence: *Bosler v. Levy*, 1 Bing. New Cas.

362; and see other embarrassing technicalities, post, Chap. V. as to process. Such as the omission of *l* in Middlesex having been held fatal in C. P., though not so in the Exchequer.

(b) And see the opinion of Mr. Baron Hollock in Price's Gen. Prac. 84, 85, note \*.

matters of practice. (c) When the directions of a general statute are clear and peremptory, all the Courts and every judge are alike bound to give full effect to the statute and have no discretionary power to refuse to set aside a proceeding for irregularity when it has deviated from a form prescribed by the act, as where there has been an omission in process in some matter required by the 2 W. 4, c. 39 and schedule; though when the deviation is merely from a *rule of the Court*, independent of a statute, the Court may modify the regulation and permit an amendment on just terms. (d)

It can scarcely be expected that the legislature, composed principally of persons inexperienced in the forms and practical detail of the technical proceedings in an action at law, should be competent to enact upon *mere matters of form* or the technical parts of practice; and accordingly until recently it was always considered advisable to leave those matters entirely to the judges themselves, who from their daily observations and long experience can best appreciate the expediency of any new measure of that nature. At least, if a statute is to be enacted upon such matters of practice, the same act should give the *judges power to modify and alter* the forms, without the trouble, expense, and delay of applying to the legislature; for otherwise, the judges being bound by the form prescribed by a statute without qualification, cannot promulgate a rule of their own for remedying any resulting inconvenience, and which may consequently be suffered to continue, and they are obliged to give unqualified effect to every summons or motion to set aside

Why inexpedient to prescribe rules of practice by statute.

(c) It will be observed that 14 G. 2, c. 17, s. 1, says, "Upon motion made in open Court (*due notice having been given thereof*) to give, &c." Some judges held that the act required a notice of the intended motion before it was made, whilst others thought that the service of the rule nisi was a sufficient compliance with the act. See the contradictory decisions in *Anonymous*, Loft, 265; *Gooch v. Pearson*, 1 Hen. Bl. 527; *Chessell v. Parkin*, 2 Taunt. 48, Tidd, 491, 765; Dax, Prac. 76; Price's Pr. 281. The rule 68 of Hil. T. 1832, now orders that no previous notice of motion shall be necessary; and yet, on principle, if it had been required, the giving it might have saved the costs of any motion or rule, by the plaintiff's immediately offering a peremptory undertaking; see another instance Price's Gen. Prac. 84, note\*. So upon the construction

of 12 G. 1, c. 29, as to the time within which a plaintiff may enter an appearance for the defendant *sec. stat.* (or in pursuance of that statute); in K. B. he has only two terms and the vacation of the second term to enter such appearance, *Bugden v. Burr*, 10 Bar. & Cres. 457; but in the Exchequer he has a year, *Cook v. Allen*, 3 Tyr. Rep. 378. But see observations on *Anonymous case*, A. D. 1826, Price's Gen. Prac. 84, 85; *post*, 82.

(d) *Post*, *Shirley v. Jacobs*, 5 Moore & S. 67; 3 Dowl. 102, 103, S. C.; *Cooper v. Waller*, *id.* 167, 168. This distinction reminds us of the observation in Wilson's Reports, viz. that a statute is like a powerful tyrant mowing down all before him without discrimination, but that the common law is like a nursing parent, correcting only the vices and defects when absolutely pernicious.

CHAP. II.  
INTRODUCTORY  
OBSERVATIONS,  
&c.

---

the proceeding, on account of a deviation from a statute form, and cannot permit an amendment; though if the form had merely been prescribed by a *Rule of Court* they would almost of course permit an amendment. (e) In this respect the Uniformity of Process Act, 2 W. 4, c. 39, imperatively requiring the observance of certain forms, was perhaps a less convenient mode of establishing any course of practice than a regulation left to be settled by the judges, which might from time to time, when found partially inconvenient, be changed at a trifling expense by a new rule; an observation which will perhaps be found to apply to most of the enactments in that act. (f)

By express  
written rules of  
Court.

With respect to the *express written rules* of each Court for regulating its practice and its *ancient usages*, it has been declared by all the judges in the House of Lords, that "The practice of the Courts below is matter which belongs by law to the exclusive discretion of the Court itself; it being presumed that such practice will be controlled by a sound legal discretion. It is therefore left to its own government alone, without any appeal or revision by a superior Court. And therefore it was decided that, upon a writ of error to a superior Court, the latter cannot proceed or found its judgment upon the supposed propriety or impropriety of any general or particular rule or order of the Court below, as a rule or order for leave to amend, although the same be returned and appear to be parcel of the record," (g) or "a rule or order for striking out pleas, or granting a new trial." (h) And with reference to a decision in the Privy Council, it should seem questionable whether a Court of Appeal can review or alter a rule or order of an inferior Court abroad, expelling from the bar of their Court a barrister, decided by the same Court (however erroneously) to have misconducted himself. (i) And in a recent case it was held, that the Lord Chancellor, sitting in bankruptcy, has authority in any particular case to make an order altering the practice of the Court of Chancery; and that if a solicitor be committed for not obeying such order, no action

(e) *Shirley v. Jacobs*, 5 Moore & Scott, 67, 68; 3 Dowl. 101, S. C.; *Urquhart v. Dick*, 3 Dowl. 17; *Colles v. Morpeth*, id. 23; *Cooper v. Walker*, 3 Dowl. 167; post, 54, n. (r).

(f) See more particularly post, Chap. V.

(g) Per Tindal, C. J. in *Mallish v. Richardson*, 9 Bing. 126; and ante, vol. ii. p. 572, note (k).

(h) *Id. ibid.*; *Gulley v. Bishop of Exeter*,

10 Bar. & Cress. 584.

(i) *In re The Justices of Common Pleas at Antigua*, 1 Knapp's R. 267; *R. v. Gray's Inn*, Cowper's R. 339; and *Mitchell's case*, 2 Atk. 173; *King v. Sotherton*, 6 East, 143; *sed quære*, for it seems from the course of proceeding in the first case, that if there had been *just cause* in that case, relief might have been obtained in the Court of Appeal.



can be supported against the Chancellor, and he may effectually resist the same under the plea of general issue; (k) and the same principle equally applies to any order relative to practice made by all or one of the judges of a Court.

CHAP. II.  
INTRODUCTORY  
OBSERVATIONS,  
&c.

Before the recent enactments, it was not usual for the judges of *all* the Courts to meet and concur in altering any discordant practice, by a *general* rule to be observed in *all* the Courts, but the judges of one Court, as occasion arose, without perhaps any avowed communication with those of the other Courts, from time to time made *particular rules* for their own Court, framed according to the best of their judgments, and in many cases depending on the *peculiar process* and practice of that Court, and intended only to be observed therein; and we find that in the Common Pleas it was the special duty of the prothonotaries to draw up general rules for regulating and settling the practice of that Court and proceedings therein, and to certify to the Court in matters of practice when required; (l) and although, in progress of time, the other Courts made rules somewhat similar, yet they perhaps varied in some small respect, and each Court alone construed and gave effect to its particular rules, according to what was considered to have been the object and the intent of the Court at the time such rules were pronounced; and, consequently, great variety and even contradiction in the rules and practice of the different Courts prevailed. These inconveniences, resulting in a great measure from the *great variety of forms of process* even in similar cases, nothing but an express statute or *new rule* could prevent; for as we have seen no Court of Error could interpose, and although the inconvenience, or even injustice, might be felt strongly, yet it was an established principle, that for the sake of certainty in practice, each Court should adhere to an express rule, or even ancient usage of its own; and even in Courts of Equity it was considered that a long course of practice in a particular Court is to be as binding as a positive rule or order; (m) and in the Ecclesiastical Courts it is a maxim "That old rules of practice, *which are in themselves consonant to reason and analogy*, and which have not undergone an *authoritative* alteration, ought to govern the practice of the Courts at the present day." (n) And as regards the *usage* of

Introduction of  
general rules for  
regulating the  
practice of all  
the Courts.

(k) *Dicas v. Lord Brougham*, 6 Car. & P. 249.

(l) Tidd, 47; and see Mr. Baron Hulloek's observations in Price's *Prac. of all the Courts*, p. 84, 85, note "c", upon the expediency of deputing to any officer any

influence as regards the practice of the Courts.

(m) *Brown v. Bruce*, 2 Meriv. 1.

(n) *Durant v. Durant*, 1 Addams's Rep. 114, 118, 123, where see an example in practice.

CHAP. II.  
INTRODUCTORY  
OBSERVATIONS,  
&c.

the Courts, it has been held in equity, (o) that repeated decisions, forming a series of practice, may even amount to the reversal of an order; (o) and at law it has been observed, that the *practice* of the Court is the *law* of the Court; and in *Bewdley's case*, a practice of only seven years was allowed to prevail even against an enactment in a statute, (p) a doctrine, however, which it should seem cannot be sustained, at least when the enactment is capable only of one construction. (q)

Distinction between a statutory regulation and a rule of Court, that a deviation from the latter may be amended.

Some recent decisions have established an important distinction between the *peremptory effect* of a form or practice enjoined by a *statute*, and one prescribed only by a *rule of Court*; viz. that the former must be precisely observed, and that the Court will not permit *any amendment* of deviating process, except in cases where a statute of limitations would bar the remedy. But a *rule of Court*, (even one of the most modern general rules promulgated under the 14th section of 2 W. 4, c. 39, for the very purpose of thereby the better enforcing that act,) is construed and enforced *less rigidly* than a regulation in the statute itself, and any deviation against the direction of that *rule* may be amended upon payment of costs. (r) It will, however, be observed, that the decisions of the judges, permitting amendments of deviations in process, &c. from the form prescribed by the Uniformity of Process Act, 2 W. 4, c. 39, "*when a statute of limitations would otherwise bar the remedy*," sufficiently establishes that they have *ample discretionary jurisdiction and power* to permit an *amendment* in *every* case, if they think proper to exercise it, and that their resolution on this act, not *in general* to permit

(o) *Boehm v. De Tastet*, 1 Ves. & B. 327.

(p) *Bewdley's case*, 2 Str. 755; 1 P. Wms. 207; 3 Burr. 1755; S. C. Tidd's Introd. lxxi.; and that doctrine seems to prevail in Scotland, see *Tyson v. Thomas*, M'Clel. & Young, 127; but see 1 Bla. Com. 76, 77; 1 Chit. Rep. 299 a.

(q) And see strong observations of Mr. Baron Hullock's in Price's Prac. of all the Courts, 84, 85, note \*.

(r) *Uryghart v. Dick*, 3 Dowl. 17; *Shirley v. Jacobs*, 5 Moore & Scott, 67, 68; 3 Dowl. 102, 103, S.C.; *Cooper v. Walker*, 3 Dowl. 167, 168; per Parke, B. in *Jackson v. Jackson*, 1 Crompt. M. & R. 439. Per Tindal, C. J. in *Shirley v. Jacobs*, 5 Moore & Scott, 68; 3 Dowl. 103; speaking of an indorsement under the general rule Mich. T. 3 W. 4, "The point was discussed among us in order that an uniform understanding might be come to, and it was ultimately considered that

"non-compliance with a rule of ours ought not to be visited with the same consequences as non-compliance with an act of parliament; but that, at the same time, a person who had not observed to plain a rule, should be called upon to amend on payment of costs." *Sed quere*, for this distinction is rather attributable to a diffidence and reluctance on the part of the judges to enforce their own acts, than supported by sound principle, because it will be conceded that the necessity for and expediency of enforcing rules of Court sanctioned by all the judges, and especially when made for the very purpose of enforcing an enactment, is at least as obvious as the necessity for enforcing a statute; and it is equally as essential to enforce the one as the other, with a view to compel certainty and uniformity in practice.

CHAP. II.  
INTRODUCTORY  
OBSERVATIONS,  
&c.

any amendment, is not because the statute has absolutely deprived them of the *power* to authorize *amendments*, but merely because they have considered it *better not to permit such amendments*, in order by the refusal the better to enforce the declared object of the legislature, and, in the language of the 14th section, the *more effectually cause the act to be executed*. The Courts certainly heretofore permitted most material alterations in and amendments of process, even in a *capias* in proceedings by original. (s)

By Decisions,  
and effect there-  
of.

With respect to *decisions*, they are either upon the construction of a *statute*, or of what is just and reasonable to be done under given circumstances, and what might be termed the common law. (t) It is obvious that when the intention of the legislature is *clearly* to the contrary, no current of decisions can or ought to counteract that intention; (f) but when it is *ambiguous*, then successive uniformity of decisions is usually considered obligatory; and it is the maxim *stare decisis*, (u) because *nilhil simul inventum est et perfectum*, and it is most probable that the public or legal practitioners have acted on the faith of such decisions, and it would be inconvenient, without an act of parliament declaratory of the law, and publicly promulgated (long before it is to come into operation,) to change the course of decision. (u) When there are conflicting decisions of a single judge against a decision *in banc*, the latter is to be preferred until overruled in banc; and when there are conflicting opinions of equal weight, *i. e.* both of a single judge, or both in banc, then the rule seems to be to prefer the last. (x)

How regulated  
by Usage, and  
effect thereof.

*Long usage* in the practice of the Courts, or of a particular Court, may be considered the common law of the Court; for the acquiescence in constant proceedings, as well by the judges as its experienced officers, denotes that it is reasonable, and has not been found objectionable, because if it had, it would soon have induced an immediate change; the judges of each Court have implied power to alter any inconvenient practice when

(s) *Carr v. Shaw*, 7 T. R. 299; *Talbot v. Tenant*, 1 Bos. & Pul. 481; *Stowson v. Danvers*, 2 Bos. & Pul. 109; *Tidd*, 129; and see cases, *Tidd*, 161.

(t) 1 Bla. Com. 69, 76, 77; 1 Chitty's Rep. 299 a.

(u) *Tyson v. Thomas*, M'Clel. & Young, 127; *Bewley's case*, 1 P. Wms. 207,

223; *R. v. Mann*, 2 Stra. 755; *Money v. Leach*, 3 Burr. 1755; *Combe v. Cuttill*, 3 Bing. 163; *A'Court v. Cross*, id. 331; *Snow v. Peacock*, id. 412.

(x) Per Alderson, B. in *Duncan v. Grant*, 1 Cramp. M. & R. 384; 4 Tyr. 819, S. C.; and per Parke, B. in *Jackson v. Jackson*, 1 Cramp. M. & R. 439.

CHAP. II.  
INTRODUCTORY  
OBSERVATIONS,  
&c.

Objections to  
any conventional  
practice.

they think fit. (x) And it is important that such usage should be adhered to until *expressly* altered by statute or rule, because otherwise practitioners, relying on the known practice, would be misled if there were any sudden unpromulgated change; (y) and the same principle, indeed, weighs against *any* change, unless imperatively called for by a strong necessity. (y) But the supposition that any usage can prevail against an *explicit act* of parliament would be most unconstitutional; and certainly, notwithstanding some dicta in favor of the doctrine, it cannot have weight, or at least is only applicable to statutes when *ambiguously* expressed, and ought never to fetter the decision of any Court. (x) At all events, before effect should be given to *usage*, the origin and principle of the practice in each office should be carefully examined, for it has occurred that some usages or practices have originated in a highly censurable *conventional course of practice*, fixed by officers, perhaps, rather for their own emolument or convenience, than for the benefit of the suitors; (a) thus, before 1 W. 4, c. 70, for the more effectual administration of justice, and whilst the Exchequer of Pleas was a close Court, having only four attornies, and their sixteen side clerks, who sat and transacted business in the same room in Lincoln's Inn principally, a conventional course of practice had obtained in the office of Pleas, which was on several occasions *strongly reprov'd by the Court*. (b) And holidays have been attempted to be established by some officers when called to prove a practice, which were invented merely to obtain personal indulgence, or extra fees for opening the office, even at most urgent seasons of the year. (c)

Inconveniences  
resulting from  
the great  
variety of pro-  
cess and rules  
before the re-  
cent acts 1 W. 4,  
c. 70, and 2 W.  
4, c. 39.

The great *variety* and *dissimilarity* of process in each Court, whether by Original Writ or Bill of Middlesex or Latitat, or

(x) *Ante*, 52.

(y) *Ante*, 55.

(1) *Tyson v. Thomas*, M'Clel. & Young, 127; *Combe v. Cuttill*, 3 Bing. 163; *A'Court v. Cross*, id. 351; *Snow v. Peacock*, id. 412; *Tidd's Prac. Introd.* lxxi. qualifying *Bewdley's case*, 1 P. Wms. 207, 223; *R. v. Mann*, 2 Stra. 755; *Money v. Leach*, 3 Burr. 1755; and see observations of Hullock, B. in an *Anonymous case*, reported in Price's Gen. Prac. 84, 85.

(a) See *Bulkeley v. Smith*, 1 Price's Exch. Cases, and Price's Gen. Prac. 85.

(b) Price's Gen. Prac. 85, in notes, referring to *Bulkeley v. Smith*, 1 Price's Exch. Cas. The consequence was, that formerly, in pleading a title in the Ex-

chequer against the crown, the officers, with a view no doubt to emolument, insisted that every part of every deed, lease and release, &c. must be set out *verbatim*, until Mr. Justice Dampier put an end to that expensive practice. It was also not the practice to engross the pleadings till the record was made up, but to hand over the drafts of pleadings with the pleader's marginal notes, which frequently being only partially erased, disclosed to the opponent the nature of or difficulties in his adversary's case. Nor were counsel's fees for signatures *always paid*.

(c) *Tidd*, 9th ed. 54 to 59, as to holidays now limited.

in proceedings against privileged persons, prisoners, &c. in the Court of *King's Bench*, or by original writ or by *capias ad respondendum*, or *capias quare clausum fregit* or *distringas*, or by writ of privilege by or against officers and other privileged persons in the Court of *Common Pleas*; or the proceeding by *quo minus*, *venire* and *distringas subpcena*, and other process of the Court of *Exchequer*, led to an infinite *variety of regulations*, each perhaps sensible and proper at the time they were made, but nevertheless creating such an accumulation of varieties and nice distinctions that the most cautious practitioner could scarcely take a step in a cause with certainty of being accurate. (d) Formerly also the judges of each Court evinced perhaps too strong a partiality to the rules and practice of their own particular Court, which seemed to forbid improvement; and though in modern times the judges of all the Courts, when they had ascertained that the practice of one Court differed from that of another upon any important point, met and consulted with the judges of such other Court, and they respectively endeavoured to assimilate their practice, and with that view occasionally rescinded their own rules and introduced new regulations, more conducive to the advancement of justice; yet still as these improvements occurred only in a few instances, and there was no act empowering, and in effect *requiring*, the judges of all the Courts to meet and endeavour to concur in getting rid of the inconsistencies and contradictions in the practice of the Courts, the progress to similarity and improvement was consequently slow and partial.

2. But at length the statute passed on 22d July, 1830, in session 11 G. 4 and 1 W. 4, c. 70, intituled "An Act for the more effectual Administration of Justice in England and Wales," was enacted; and section 11 enacts, that in all cases relating to the *practice* of any of the Courts of *King's Bench*, *Common Pleas*, or *Exchequer*, in matters over which the said Courts have a *common jurisdiction*, (e) or of or relating to the practice of the *Court of Error* therein before mentioned, it *shall be lawful* (f) for the judges of the said Courts jointly, or any *eight or more of them, including the chiefs of each Court*, to make *general rules* and orders for regulating the *proceedings* of

 BY RECENT  
 ACTS AND  
 RULES.

2. The first modern act, 1 W. 4, c. 70, s. 11, for the general improvement in the practice, directing the judges of all the Courts to make general rules.

(d) See observations, 1 Tyr. Rep. 21 a.

(e) See construction of these words in *R. v. Wright*, 1 Adol. & El. 442, and ante, 23.

(f) It will be observed that the terms of this enactment are only *permissive* not *imperative*, and although the Uniformity

of Process Act, 2 W. 4, c. 39, s. 14, is *peremptory* upon the judges, yet the precise rules are entirely in their discretion. The terms of 3 & 4 W. 4, c. 42, s. 1, as to *pleadings*, &c. are that the judges *shall and may*, &c.

CHAP. II.  
BY RECENT  
ACTS AND  
RULES.

all the said Courts; which said rules and orders so made *shall be observed* in all the said Courts, and no *general* rule or order regarding such matters shall be made in any manner except as *aforsaid*." This enactment, it will be observed, *authorized* and *impliedly* required, but without *enjoining* the judges of the three Courts to meet, and a majority, including the three chiefs, to concur in making *general rules of practice* to bind all the Courts. But as it contains no *prohibition* against each Court making distinct rules for itself, it is clear that the jurisdiction to make *particular rules* continues, provided they do not militate against a general rule made under the authority given by the act; and accordingly the Court of King's Bench(*f*) and Court of Exchequer(*g*) and the Court of Common Pleas(*h*) have made particular rules relative to certain proceedings in each of those Courts.

3. *General rules*  
thereon of Trin.  
T. 1831.

3. The judges did not make any general rules in pursuance of this authority until Trinity term, 1831, when a few rules were promulgated, relating as well to the forms of Declarations and Particulars of Demand as to the Practice in all the Courts, and in these fourteen judges concurred. (*i*) Those rules, in order that practitioners might have ample notice, concluded with a declaration that they should not take effect until the first day of Michaelmas term, A.D. 1831, excepting one rule relating to the service of declarations in ejectment, which took effect from the 25th day of October in that year.

General rules  
thereon of Hil.  
Term, 1832.

All the judges of the three Courts again in Hilary term, 1832, under the authority of the same act, 11 G. 4 and 1 W. 4, c. 70, s. 11, concurred in promulgating one hundred and seventeen important other new rules, the *recited* object of which was to *assimilate* and render *uniform* the practice of all the Courts, and certainly have so operated to a great extent; and the last seven and some others contain *entirely new* and very important alterations, and very extensively affected and improved the practice of all the Courts, especially in expediting the proceedings in an action, and rendering them much less expensive; and those rules commenced in operation on the 1st day of the following Easter term, viz., on 15th April, A.D. 1832. (*k*)

(*f*) Rule M. T. 3 W. 4, K. B., but annulled by 3 & 4 W. 4, c. 42, s. 1.

(*g*) See Rules of Exchequer, A. D. 1830, M. T. 1 W. 4, 1 Cramp. & J. 279 to 285; 1 Tyr. R. 154 to 166. But note that section 10 of the act impliedly required the judges of the Court of Exchequer to make particular rules for that Court in consequence of the admission of

attornies to practise therein and the transfer of business from the Welsh Courts.

(*h*) Rules C. P. M. T. 1833 and Hil. T. 1834 and Trin. T. 1834; see Bingham's New Cas. vol. i. 242.

(*i*) See Rules, Trin. T. 1 W. 4, A.D. 1831, *post*, Appendix.

(*k*) See the Rules at length, *post*, Appendix.

All the judges again concurred in promulgating another general rule, though of less general importance, in Easter term, 1832, founded on the same act, 1 W. 4, c. 70, s. 11, ordering that the days between Thursday next before, and the Wednesday next after Easter day, (viz., from the day before Good Friday until the day after Easter Tuesday,) should not be reckoned or included in any rules or notices, or other proceedings, except notices of trial and notices of inquiry, in any Court of law at Westminster. And a similar regulation is to be found in the 11th section of 2 W. 4, c. 39. It is essential to observe, that these rules of Hilary term, 1832, and indeed many other rules promulgated before the Uniformity of Process Act, (2 W. 4, c. 39,) must be examined and acted upon *with great caution*, because it will be found that many of them have been by that act or by subsequent rules *expressly* or *virtually* annulled.

CHAP. II.  
By Recent  
Acts and  
Rules.

General rule  
thereon of  
Easter term,  
2 W. 4, 1832.

4. Other extensive alterations in the *Practice and Pleadings* of the Courts, either general or particular, were introduced by *subsequent statutes*, viz. by 1 W. 4, c. 3, (passed 23d December, 1830,) for amending the administration of justice, and especially in altering the commencement and termination of the terms, and in fixing the before moveable terms of Easter and Trinity; and by 1 W. 4, c. 7, (passed 11th March, 1831,) relating principally to expediting executions in vacations immediately after a trial; and by 1 W. 4, c. 21, (passed 30th March, 1831,) improving the proceedings in prohibition and mandamus; and by 1 W. 4, c. 22, (passed on the same day,) authorizing the examination of witnesses upon commission or interrogatories; and by 1 & 2 W. 4, c. 58, affording relief upon motion in Courts of law, in case of adverse claims, and called the Interpleader Act. But as regards the general process and practice of the Courts, the principal enactments have been in 2 W. 4, c. 39, (passed 23d May, 1832,) called the *Uniformity of Process Act*, (1) and the rules promulgated under the 14th section thereof of 2d November, 1832; also by the 2 & 3 W. 4, c. 71, passed 1st August, 1832, for limiting prescriptions; and by 2 & 3 W. 4, c. 100, limiting moduses and claims for tithes; and by 3 & 4, W. 4, c. 27, passed 24th July, 1833, relating to real property, and limiting claims and abolishing real actions and all mixed actions, excepting ejectment, dower and quare impedit. The

4. Enumeration  
of the subse-  
quent statutes  
for improving  
the practice,  
pleadings and  
evidence in the  
Courts.

(1) The act 4 & 5 W. 4, c. 62, for amending the Practice of the Court of Common Pleas at Lancaster, will be found a lucid and useful consolidation and im-

provement of this and some other of the recent acts for improving the administration of justice.

CHAP. II.  
BY RECENT  
ACTS AND  
RULES.

3 & 4 W. 4, c. 74, abolishes fines and recoveries, and substitutes more simple modes of assurance, and introducing in that respect a new course of practice in the Court of Common Pleas. (m) The 3 & 4 W. 4, c. 42, passed 14th August, 1833, called the *Law Amendment Act*, contains the *most numerous* and *extensive improvements*. The 3 & 4 W. 4, c. 67, was passed on 28th August, 1833, for the *amendment of the Uniformity of Process Act*. The 4 & 5 W. 4, c. 39, gives costs in actions of quare impedit; and the 4 & 5 W. 4, c. 82, for altering the 2 & 3 W. 4, c. 100, limits suits for tithes, and authorizes the Courts to stay proceedings therein upon payment of costs. All these enactments of a *practical* nature will be found arranged in their natural order in the following pages; but it is expedient here to notice those enactments as apply to the practice of the Courts *in general*, and particularly those upon which certain *general rules* have been and may continue to be promulgated, together with the most important of those rules.

The Uniformity of Process Act, 2 Will. 4, c. 39, in particular, and amended by 3 and 4 Will. 4, c. 67.

To put an end to the *perplexity* and frequent errors occasioned by the great *variety* of process antecedently in use, the 2 Will. 4, c. 39, s. 1, (passed 23d May, 1832,) after reciting that the process for the commencement of *personal actions* in his majesty's superior Courts of Law at Westminster, is by reason of its *great variety* and *multiplicity very inconvenient* in practice, then prescribes only *five new forms of writ* (set forth in the schedule) and in substance applicable to every case that in a *personal* action can arise, and one of which is to be imperatively adopted in all those Courts, and also regulates the course of proceeding thereon, and which will presently form the subject of a distinct chapter; and as if the general powers given by 1 Will. 4, c. 70. s. 11, were inadequate, the same act, section 14, repeats and enacts "that it shall and may be lawful to and for the judges of the said Courts, *and they are hereby required*, (n) from time to time to make all such general rules and orders for the effectual execution of this act, and of the intention and object hereof, and for fixing the *costs* to be allowed for and in respect of the matters herein contained, and the performance thereof, as in their judgment shall be deemed

(m) See Rules of C. P. M. T. 1833; and Rules Hilary, 1834, *post*, Appendix, especially as to acknowledgment of deeds by married women.

(n) The statute 1 Will. 4, c. 78, s. 11, does not contain these enjoining terms; see *ante*, 57, note (f).



necessary and proper ; and for that purpose to meet as soon as conveniently may be after the passing hereof." And section 15 enacts, " that it shall be lawful *in term time* for the Court out of which any writ issued by authority of this act, or any writ of *capias ad satisfaciendum*, *fieri facias*, or *elegit* shall have issued, to make rules ; and also for *any judge* of either of the said Courts *in vacation* to make orders for the return of any such writ ; and every such order shall be of the same force and effect as a rule of Court made for the like purpose : provided always, that no *attachment* shall issue for disobedience thereof until the same shall have been made a rule of Court." This latter enactment was to enforce the *immediate* return of what had been done by virtue of enumerated writs, so as to avoid unnecessary delay on the part of the officer whose duty it was promptly to execute it. (o) The 18th section of the same act also empowers the judges of each of the said Courts to make such rules and orders for the government and conduct of the ministers and officers of their respective Courts, in and relating to the *distribution* and performance of the duties and business to be done and performed in the execution of that act, as such judges may think fit and reasonable ; but it is provided that no additional charge shall be thereby imposed on the suitors.

It is necessary constantly to keep in view that the enactments in the Uniformity of Process Act and the subsequent acts, and the rules made in virtue thereof, merely relate to and affect the process and pleadings in *personal* actions, and do not in any respect affect *real* or *mixed* actions, such as *ejectment*, either as respects the process or pleadings, and which are therefore still governed by antecedent enactments and rules. (p)

5. In pursuance of the 2 W. 4, c. 39, s. 14, all the judges in Mich. T. following (viz. on 2d November, 1832,) promulgated several rules relating to the *new processes*, requiring each to contain all and no more than the *names* of the defendants to be afterwards declared against, prescribing the *fees* to be charged for signing and sealing such process, and for entering appearances and certain *indorsements* on writs of summons and *capias*, and the forms of alias writs of summons and *capias*, and provides that every writ of *distringas* may contain a non-omittas

5. General Rules founded on Uniformity of Process Act, 2 Will. 4, c. 39, 2d Nov. 1832.

(o) And see the Rules of Court to enforce this enactment ; Rule Hil. T. 2 W. 4, 11th and 12th rules. Rule Mich. T. 3 Will. 4 ; Rule Hil. T. 3 Will. 4, post, of *meane process* in general.

(p) This was doubted ; see *Doe dem.*

*Harries v. Roe*, 2 Moo. & S. 619 ; *Tidd's Supp.* 122, 196, but afterwards settled per *Parke, B. Doe dem. Gillett v. Roe*, *Crompt. M. & R.* 19 ; *Doe dem. Fry v. Roe*, 3 Moo. & Sc. 376.

CMAP. II.  
BY RECENT  
ACTS AND  
RULES.

clause without the payment of any additional fee; and then contains the most important order, that any *omission* in a writ or copy, or any indorsement thereon, of matter prescribed by 2 W. 4, c. 39, shall not render the process void but merely *irregular*, to be set aside by the Court or judge on application for that purpose. The same rules then order when a plaintiff may declare, and the consequences of a sheriff not obeying a judge's order for the return of any writ in vacation, and requires the supposed plaintiff's attorney to declare whether the writ was issued with his authority; and then prescribes how declarations shall be entitled and how they shall commence and conclude, and then by distinct rules prescribes the requisites and forms of writs to be issued into the counties palatine, and indorsements thereon.

General Rules  
thereon of Hil.  
T. 1833,

In *Hilary* T. 3 Will. 4, 1833, another rule was pronounced, giving effect to the latter part of section 15 of 2 Will. 4, c. 39, where a rule or order has been made for returning process.

—and of Trin.  
T. 1833.

In the following Trinity T. 3 Will. 4, 1833, another rule was promulgated under the same act, rendering it imperative to declare against a *prisoner* before the end of the term next after the arrest or detainer, or render and notice thereof, and that otherwise the defendant should be discharged upon entering an appearance in the form required by the act, *unless further time to declare has been given* by rule of Court or a judge's order; also that the time for a prisoner's pleading shall be the same as where a defendant is not in custody; also regulating the time for the bail to render after service of process against them, and as to the payment of the costs of proceedings against bail.

The general  
rules of Hil. T.  
1834, partly  
under 1 Will. 4,  
c. 70, s. 11,  
2 Will. 4, c. 39,  
s. 14, and  
partly under  
3 and 4 Will. 4,  
c. 42, s. 1.

Again, all the judges under the powers to make rules given as well by the 11 Geo. 4 and 1 Will. 4, c. 70, s. 11, as the 2 Will. 4, c. 39, s. 14, by rules of Hil. T. 4 Will. 4, A. D. 1834, relating to *practice*, introduced numerous miscellaneous orders materially affecting various stages in a cause, and which will be found dispersed in proper order throughout the following work; and also prescribing certain rules and forms calculated to save much expense in *evidence*. (q)

The 3 and 4  
Will. 4, c. 42,  
s. 1, and rules  
thereon relative  
to *pleading*.

Although the rule of Trin. T. 1 Will. 4, A. D. 1831, and Hil. T. 2 Will. 4, Reg. IV. certainly supposed that the 1 Will. 4, c. 70, s. 11, had authorized the judges to make rules not

only respecting practice but also *pleading*; (r) yet, for greater caution, especially when introducing many extensive and important alterations, it was deemed expedient to enact the 3 & 4 Will. 4, c. 42, which not only in itself contains very important changes in the law, but also gives authority to the judges, in section 1, to make rules for *altering pleadings and forms of entry* and allowance of *costs*, but not so as to affect the right to plead the general issue, when authorized by any particular statute; and section 15 authorizes the judges to make regulations as to the admission of written documents; and section 23 to make amendments *during a trial* in the *pleadings* in cases of *variance*; and by section 24, power is given by consent to state a special case before trial. Thus the *first section* expressly authorizes the judges from time to time, within five years, to make rules for alterations in the *mode of pleading*, of *entering*, and *transcribing pleadings, judgments*, and other proceedings at law, and as to the payment of costs; such rules, orders and regulations nevertheless to be laid before parliament a specified time (*viz.*, six weeks,) before they are to begin to operate. The 18th and 23d sections extend the powers of the judge or sheriff in *amending* the record to all cases of variance appearing during a trial.

In virtue of this enactment authorizing rules to alter the *mode of pleading* and the forms of *entries, &c.*, the judges unanimously, in Hil. T. 1834, promulgated numerous rules of very great importance in practical effect as regards *pleadings* in *personal* actions, 1st. Requiring declarations and all other pleadings to be entitled of the day, month and year when pleaded, and which is to be observed in all subsequent entries; 2dly. That no entry of continuances by way of imparlance, &c., shall be entered; subject, however, to certain exceptions; 3dly. That judgment shall be entered of the day when signed; 4thly. That there shall be no entry on record of warrants of attorney to sue, &c.; 5thly. That *several counts* upon the same cause of action, and *several pleas*, avowries, or cognizances, on the same ground of defence, *shall not be allowed*; and then gives *instances* when or not two or more counts or pleas, &c., shall be admissible, and declares that such examples shall only be received *as instances* of the application of the rules to which they relate, and that the *principles* contained in the rules are

General Rules of Hil. T. 1834, as to pleadings and entries on record, founded on 3 and 4 Will. 4, c. 42, s. 1.

(r) It may be important to keep this power in view, as the judges might make rules respecting *pleading* without the ne-

cessity for laying the same before parliament, under the 3 and 4 Will. 4, c. 42, s. 1. *Semble*.

CHAP. II.  
BY RECENT  
ACTS AND  
RULES.

not to be considered as *restricted* by such examples. The 6th and 7th rules were intended *rigidly and without exception*, other than therein expressed, to *enforce the observance of the fifth rule*, it having been anticipated that if, even by leave of the Court or a judge, the introduction of *several varying counts* upon the same cause of action were in any case admissible, there would be no limit to incessant applications, and the principle of the rule would soon become obsolete in practice. (s) The 8th rule, keeping in view the same object of avoiding unnecessary statement and repetition, declares that the statement of venue in the *margin* shall suffice, and that *no venue* shall be stated in the *body* of the declaration, or any subsequent pleading, except where local description is requisite. There are then a great many rules as well respecting pleading in general as pleading in particular actions, and some forms are prescribed as well of pleadings as of issues, nisi prius records, judgments and issues to be tried before the sheriff, writs of trial and indorsements thereon of a verdict or a nonsuit. All these rules of constant importance in practice it will be essential in the following pages more fully to consider in proper order.

CONSIDERA-  
TION OF  
PRESENT  
PRACTICE.

6. Consequent improvement in practice, and powers to continue ameliorations.

6. These several recent express *enactments* have themselves in many respects materially improved the practice, and the *rules* already promulgated have most extensively so operated; and as the 1 W. 4, c. 70, s. 11, the 2 W. 4, c. 39, s. 14, and the 3 & 4 W. 4, c. 42, s. 11, enable, and as it would seem, *impliedly require* the judges from *time to time*, when they think it necessary, to make new rules as well respecting *practice* as *pleading*, until the expiration of five years, it may be anticipated, that before the expiration of that time whatever may still be found objectionable either in practice or pleading will be effectually altered.

In what respects the present practice is objectionable.

Although these exertions of the legislature and the judges have greatly improved the practice of the Courts, the machinery of that practice, and the proceedings in bringing an action to trial are still too much subject to technical objections, and there are suffered to continue some diversities in the practice of the three principal Courts, (t) and it might be desirable that a *new general and comprehensive code* should be rendered impera-

(s) I have the highest authority for stating that such was the object of the rules.

(t) See *post*, *Bourne v. Walker*, 2

*Crompt. & Mee.* 338, 339; *Stainland v. Ogle*, 3 Dowl. 99; *Mayfield v. Davison*, 10 B. & C. 323.

tive, and that all previous enactments and rules should be annulled; and as the *process* returnable in all the Courts has been now rendered uniform, it would be desirable that, instead of *separate offices* for each Court, from whence the proceedings issue and chamber business is transacted, there should be only one *general office*, from and out of which all writs and business of the same nature should be issued or transacted, without regard to the Court in which the writ (now to be the same in each Court) is to be returnable, by which means much expense in keeping up separate establishments for each Court would be saved, and there would be greater probability of an uniform practice prevailing. At the same time taking care not to subtract from the number of officers *usefully* attendant on each of the Courts, or essential even for supporting due decorum or proper dignity. (u)

6. Since these several enactments and rules the antecedent practice, especially all rules antecedent to 2 W. 4, c. 39, must be considered and applied with great caution, because, although there may not have been any *express* alteration of the antecedent practice, yet a change or modification may under circumstances be *implied*; thus, although the general rule of H. T. 2 W. 4, c. 24, expressly directed that no bail-bond should be put in suit until after the expiration of four days, exclusive from the appearance day of the process, viz. in effect in London or Middlesex twelve days after the return day, it was held, that as the Uniformity of Process Act, 2 W. 4, c. 39, schedule No. 4, requires the defendant to put in bail within eight days after arrest, the above rule was thereby virtually annulled. (x) So, on the other hand, unless it be manifest that a repeal of prior practice was intended, it may continue

6. The general consequences of the recent statutes and rules, and of the judges conferring, and the implied alterations in practice in cases not expressed.

(u) It will be observed, that as respects *different officers and offices for taxing costs* in the 3 & 4 W. 4, c. 42, s. 36, the legislature have supposed that either of the three officers is as competent as the other. It will be observed that writs, whether issued in *King's Bench* or *Common Pleas*, are alike sealed at the same office, viz. the Seal Office in Inner Temple Lane; and why should not process out of the *Exchequer* be also sealed there? and why should not all process of the same nature in all cases be transacted at *one general office*? (see Price's *Gen. Practice*, Preface, vi.) which would not only avoid the expense of several establishments, but also the variation in practice, and even in fees, in which there

is some difference, (Price's *Prac.* 26, 27.) But the difficulty would be in annulling vested rights and interests in certain public offices without an adequate fund to purchase the value of the permanent interests in each office. Other objections have been made against the Uniformity of Process Act, 2 W. 4, c. 39, requiring so much particularity in process, and giving rise to so many trifling objections in respect of irregularities in process, and which will be considered in the fifth chapter.

(x) *Hillary v. Rowles and others*, 5 B. & Adol. 460; and *S. P. Alston v. Underhill*, 3 Tyr. 427; 1 *Crompt. & Mee*. 492, S. C.; *Woosnam v. Pryce*, 3 Tyr. 375.

CHAP. II.  
CONSIDERATIONS OF  
PRESENT  
PRACTICE.

*as an appendage* to the new law, as in the instance of the right of a defendant under the 43 G. 3, c. 46, s. 2, to deposit with the sheriff the sum sworn to, and £10 to cover costs, instead of giving a bail-bond, such right and practice, though not noticed in the Uniformity of Process Act, 2 W. 4, c. 39, *still continues* as an implied appendage of that act.<sup>(y)</sup> Again, we have seen that irregularities and other matters, which formerly must have been decided upon in *banc*, may now either expressly or *impliedly* be decided upon by a *single judge*, in consequence of the recent acts, and of the rule M. T. 3 W. 4, having authorized so many proceedings in a cause to be taken *in vacation* or before a judge; and on that ground it has been considered by Tindal, C. J. and Bayley, B. that a single judge at chambers *impliedly* has power upon summons and order to award costs;<sup>(z)</sup> and for this reason the former rule, that if an act of parliament give to the *Court* only power over a matter, a judge at chambers has no jurisdiction over it,<sup>(a)</sup> will not always apply, especially when the matter has arisen in the vacation.<sup>(b)</sup> And, it should seem, that whenever an old rule of practice would be inconsistent, even in part, with a more recent rule, and contrary to the spirit of the new enactment or rule for assimilating or rendering uniform the practice of the Courts, then there may be strong ground for considering such ancient rule *impliedly* abrogated; thus in a recent case, even in ejectment, an ancient proceeding in the Court of Exchequer, termed a subpœna solvas, was decided by that Court to be no longer necessary, in consequence of the *implied* alteration in the practice of the Court.<sup>(c)</sup> But still, however desirable an assimilation of the practice of all the three superior Courts may be, it must not be supposed that there is any *virtual* change in the practice of a *particular* Court varying from the practice in the other Courts, unless actually *so expressed*, or some *virtual general abolition* of the prior practice, as in the instance just referred to. And, therefore, in a recent case the Court of Exchequer declared, that as there was not in that Court any rule as in King's Bench requiring an affidavit of merits, or stating on whose behalf the motion was made, in support of

(y) Per Littledale, J. in *Gench v. Coppin*, 3 Dowl. 79.

(z) *Ante*, 21; *Doe d. Prescott v. Roe*, 9 Bing. 104. N.B. The case in 2 Barn. & Adol. 415; 1 Dowl. P. C. 52, to the contrary, was decided before the Uniformity of Process Act; and Lord Ten-terden even there intimated that it might be found that the judge had the power.

(a) *Jones v. Fitzaddams*, 2 Dowl. P. C. 111; *Shaw v. Roberts*, *id.* 25; *Ex parte Owen*, 1 Dowl. P. C. 511; Arch. Prac. K.B. by T. Chit. page 12, 4th ed. 1834; and Bagl. Prac. p. 14; *ante*, 29.

(b) *Ante*, 24, 29.

(c) *Doe d. Fry v. Fry*, 2 Crompt. & Mee. 284; *Doe d. Floyd v. Roe*, 4 Tyr. Rep. 85.

an application to stay proceedings on a bail-bond, the proceedings should be stayed without such affidavit, and this even prospectively, as soon as bail above should have been perfected, although in the King's Bench in general the bail must have been perfected before any such motion can be made. (d)

CHAP. II.  
CONSIDERATIONS  
OF  
PRESENT  
PRACTICE.

It is certainly to be regretted that there are still a few instances in which the practice of the three Courts materially differs, and this even in giving effect to a statute. Thus very recently, and still under the 12 Geo. 1, c. 29, a plaintiff in the King's Bench has only *two* terms and a vacation to enter an appearance for the defendant sec. stat. (e), whilst in the Exchequer the plaintiff is allowed *four* terms or a *year* for that purpose. (f) And we have seen, that in the Exchequer one motion only is required in making a judge's order a rule of Court, and for an attachment for its disobedience, whilst in King's Bench two motions are still required; (g) and in King's Bench an affidavit of merits is essential in support of a motion to stay proceedings on a bail-bond, but is not required in the Exchequer, (h) and many other instances of varying practice might be adduced. These contrary decisions are in a great measure attributable to the Courts having consulted their officers as to the practice *in fact*, instead of consulting the terms of the enactment or its principle. (i) It would be desirable if all the differences were noted from time to time, and there were an occasional meeting of all the judges, when new declaratory rules might be pronounced according to the opinion of the majority, including always the chiefs, and thereby for the future settling all differences.

A few instances in which the practice of the three Courts still differs, and some suggestions to rectify the dissimilarity.

Formerly, when there were distinct and frequently dissimilar rules for each Court, it was rarely the practice of the judges of one Court to confer with those of another; but since the Uniformity of Process Act, 2 W. 4, c. 39, it is an established general principle that it is of importance to observe a *similarity of practice* in all the three superior Courts; and it is hence the practice for the judges of one Court, before they decide upon a question of general practice, arising upon a recent *general*

Consequences of the judges of each Court conferring with those of another Court.

(d) *Bourne v. Walker*, 2 Crompt. & Mee. 338.

(e) *Bridges v. Burn*, 10 B. & C. 456.

(f) *Cook v. Allen*, 3 Tyr. Rep. 378. But see observations of Hullock, B. in Price's Gen. Prac. 84, 85, post, 82, n. (1).

(g) *Howell v. Bullock*, 2 Crompt. &

Mee. 339; *Steinland v. Ogle*, 3 Dowl. 99.

(h) *Bourne v. Walker*, 2 Crompt. & Mee. 338; but see *Res v. Middlesex*, 3 Dowl. 194.

(i) Per Hullock, B. in an anonymous case, Price's Gen. Prac. 84, 85; and ante, 28.

CHAP. II.  
CONSIDERATIONS OF  
PRESENT  
PRACTICE.

act or a *general* rule, and when there is a supposed difficulty or contrary decision, "*to confer with the other judges*, in order to secure an uniformity of practice;" (k) and hence it will be found that the inconvenience of conflicting decisions will in future rarely exist, at least for any considerable time, and that due exertion in bringing to the knowledge of either Court such contrary decisions, will soon lead to the best general settlement of the point.

7. Why an exact observance of the fixed practice is or should be rigidly exacted.

7. Individuals, who are not aware of or have not sufficiently appreciated the advantages resulting from the exact and constant observance of prescribed rules and forms, naturally complain of and condemn all technicalities independent of the substantial merits to be tried, and unquestionably that course of practice and of forms would be the best that would be found less subject to error or irregularity, arising even from negligence, since it is always to be regretted that *suitors* should be delayed or put to expense by the default of their legal agent. In this view the *new system* of practice, with the numerous particulars either in the body of the writ or the indorsement, *peremptorily* to be observed at the peril either *expressly* (as by rule Michaelmas term, 1832,) or *impliedly*, of the proceeding being set aside for *irregularity*, thereby occasioning a great increase of trivial objections, has been objected to by some as injudicious; and certainly it would be desirable if practicable to prescribe a form of proceeding sufficiently intelligible to a defendant of what he is required to observe, but at the same time susceptible of the fewest (if any) formal objections, and moreover taking away the temptation to object, by depriving the party objecting of any costs, unless it appear that the defendant has *really* been misled by the defect complained of. But whilst the present system stands unrepealed, *the Courts in Banc* and the *judges* individually have only one straightforward course to pursue, viz., when a prescribed proceeding has not been observed, to treat the same, when called upon to do so, as a *fatal irregularity*. And it must be especially kept in view that the judges, so far from desiring to *punish* practitioners for deviations from practice they ought to pursue, have by their rule of Michaelmas term, 3 W. 4, r. 10, endeavoured to mitigate or lessen the ill consequences of deviations from the forms prescribed by the legislature, by declaring under the

(k) See instances *Macalpine v. Powles*, 212; *Pickup v. Wharton*, 2 Cr. & M. 3 Tyr. 872; *Rex v. Price*, 2 Crom. & M. 406.



authority of 2 W. 4, c. 39, s. 14, that such deviations shall only constitute *irregularities*, and not render the process *void*; so that if in truth the modern forms are more full of technicalities then is essential, the defect in the system is attributable to the *legislature* and not to the *judges*. In general it will be found that most judges, when they have a *discretionary power* to prevent the mistake of the practitioner becoming injurious to the suitor, will exercise that power liberally, by allowing an amendment on payment of costs, to be borne by the practitioner guilty of the blunder; but it must be admitted, that unfortunately no amendment of *mesne* process is now permitted, and that sometimes it has occurred that even the most eminent judges have, for the sake of rigidly enforcing a particular statute or practice, refused an amendment, which might and ought to have been admitted. (l)

With respect to the necessity of enforcing a strict observance of prescribed forms, the observations of Eyre, C. J., relative to *pleadings*, are in this respect forcible and apposite, viz., "*infinite mischief has been produced by the facility of the Courts, in overlooking errors in form, thereby encouraging carelessness and placing ignorance too much upon a footing with knowledge;*" (m) or as the expression has since been, the permitting deviation from prescribed rules, would be a *bounty on negligence*. (n) So as regards the deviations, however small, from the forms of *process* prescribed by the Uniformity of Process Act, 2 W. 4, c. 39, even in cases where it is impossible that the defendant can have been misled, they are now deemed and treated as fatal, if objected to in due time and manner, and neither the Court nor the judge can, consistently, refuse to give full effect to the objection. (o) Thus in a late case, where the copy of a bailable *capias* had been delivered to the defendant, as in pursuance of 2 W. 4, c. 39, s. 4, but which left a blank for the day of the month, when the writ was supposed to have been issued, and was dated in the ninth year of William the Fourth instead of the third year, the Court refused to make absolute a rule for amending such *copy*, and made absolute a cross rule for discharging the defendant out of custody; because, as observed by Tindal, C. J.,

(l) *Ante*, 43; *Jelf v. Oriell*, 4 Car. & P. 22; *Parker v. Ade*, 1 Dowl. 643.

(m) Per Eyre, Ch. J., in *Morgan v. Sargent*, 1 Bos. & Pul. 59.

(n) Per Ld. Lyndhurst, in *Rex v. Calvert*, 2 Crompt. & M. 190.

(o) See *post*, V., Chapter on Process.

The Rule Mich. T. 1832, r. 10, founded on Uniformity Act, 2 W. 4, c. 39, expressly provides that any omission in the body of process or in indorsements prescribed by that act, shall be an *irregularity* and ground of application to the Court or a judge to set the same aside.

CHAP. II.  
CONSIDERA-  
TIONS OF  
PRESENT  
PRACTICE.

" the statutory regulation impliedly rendered an arrest incom-  
plete, unless a *copy* of the writ were forthwith delivered to  
the defendant, and here the paper delivered was not a *copy*;  
and that if the judges were to relax in the construction of the  
word *copy*, motions might be made to amend, when the in-  
formation intended to be given to the defendant would come  
too late." (p) So in another case, where the copy of a bail-  
able *capias* stated the writ to have been directed to the Sheriff  
of *Middesex*, omitting the *l*, the full Court of King's Bench  
discharged the defendant out of custody, (q) and Lord Den-  
man, C. J., said, if either the *sound* or the *sense* be varied by  
the deviation from the prescribed form, the *copy* is not to be  
considered a *true copy*, and though the Court do not like such  
minute objections, still if they were to say that the taking away  
*one* letter was immaterial, then *two* would be omitted, and then  
*three*, and then *four*, so that at last the rule would be entirely  
lost sight of; (q) and where the writ having been directed to  
the Sheriffs of London, the copy delivered to the defendant  
described the writ as directed to the sheriff, omitting the *s*,  
the Court discharged the defendant upon entering a common  
appearance, (r) saying, " it is better to adhere to general rules,  
capable of application *in all cases*, than to raise an argument  
on every imperfection in a copy; (r) we do not say that the  
omission of a single letter will in *every* case be a conclusive  
objection to the sufficiency of the copy; but here, according to  
the copy, the writ is directed to the Sheriff of London, and we  
know that there are *two* sheriffs." (r) So where in a writ of  
summons, after having once set forth the christian and surname  
of the plaintiff, it was stated that "*the plaintiff*" (instead of  
repeating the christian and surnames as required in the form  
prescribed by 2 W. 4, c. 39,) " would enter an appearance for  
the defendant," after cause had been shewn against a rule for  
setting aside the summons for irregularity, Parke, J., in the  
Practice Court, said, " the omission was an irregularity; the  
statute provides a form in which the summons is to be drawn;  
and if parties will not take the trouble of looking at the act be-  
fore they proceed, they must take the consequences; *if we*  
*once enter into the question* as to what is *material* or what is  
*immaterial* in the process, we shall have innumerable questions

(p) *Byfield v. Street*, 10 Bing. 27; 2 Dowl. Pr. C. 739; and see *Smith v. Pennell*, 2 Dowl. Pr. C. 654, where "London" was omitted in the copy of the writ; and see *Street v. Carter*, *id.* 671.

(q) *Hodgkinson v. Hodgkinson*, 3 Nev.

& Mann, 564; 2 Dowl. 535, S. C.; see *quare*, see *post*, Chap. V.; and *Colston v. Berens*, 3 Dowl. 253, *contra*.

(r) *Nicol v. Bogn*, 10 Bing. 339; 2 Dowl. 761, S. C.

of that sort coming before the Court; the best way is to make parties remember the course they ought to pursue, by setting aside their proceedings, for not doing what they ought."<sup>(s)</sup> And in another case the full Court of Common Pleas declared, "*It is much better for the public to adhere in all practical cases to the strict, close, literal compliance with the forms prescribed by the act, rather than yield to particular cases of supposed hardship on individuals, when those requisites have not been formally complied with;*"<sup>(t)</sup> and in another case the same Court said, "where a form is given, there can be no difficulty in pursuing it, and it is best in such a case to enforce a *literal* compliance with the directions of the legislature."<sup>(u)</sup> And where the writ of summons was "in an action of *trespass on the case* upon promises," instead of observing the exact form prescribed in 2 W. 4, c. 39, (*viz.*, "*action on promises,*") the Court set aside the proceedings, saying, "it is better to adhere to the strict form prescribed, otherwise the Court would be always discussing what deviation was allowable."<sup>(x)</sup> So if there be a blank left in a writ of summons for the residence of the defendant, or if such residence be *indorsed*, and not set forth in the *body* of the writ, it may be set aside, although in the first instance the residence was unknown.<sup>(y)</sup>

But still it has sometimes occurred, that in cases where the form adopted has deviated from that prescribed, but has in ordinary acceptation been synonymous, the Courts have departed somewhat from such strict decisions, and overruled the objection; and the consequence in practice is that constantly attempts have been and will continue to be made, at least under circumstances when there is no case *precisely* similar, or directly in point, to sustain the deviating proceeding. Thus in a recent case an application was made by the Court of Common Pleas<sup>(z)</sup> to discharge a defendant from custody on filing common bail, on the ground of irregularity in the process served upon him; the Uniformity of Process Act required a copy of the process to be served upon the defendant, and set out a form in which such process

(s) *Smith v. Crump*, 1 Dowl. Pr. Cas. 519.

(t) *Roberts v. Wedderburne*, 1 Bing. N. C. 6.

(u) *Lindredge v. Roe*, 1 Bing. N. C. 7; *Papper v. Whalley*, *id.* 71. It will be remembered also that in one case a judge declared that if a statute be, though unnecessarily, set out in pleading, and be misrecited, he would hold the party even to

half a letter, and treat the variance as fatal. *Boyce v. Whitaker*, Doug. 97; *King v. Marsack*, 6 T. R. 776.

(x) *King v. Shaffington*, 1 Crompt. & M. 363.

(y) *Roberts v. Wedderburne*, 1 Bing. N. C. 4; *Lindredge v. Roe*, *id.* 6.

(z) *Pecock v. Mason*, C. P. 4 Nov. 1834, MS.; and see 1 Bing. N. C. 245, S. C.

CHAP. II.  
CONSIDERA-  
TIONS OF  
PRESENT  
PRACTICE.

should be drawn up. In the present case, however, there had been two deviations from that form—viz., instead of the words “within four days from *the* execution hereof,” the copy served contained these words, “within four days from execution hereof,” omitting the word “*the*.” The other deviation consisted in this: instead of the words “in pursuance of any order pronounced by the Court, or by a judge thereof,” were inserted the words “in pursuance of any order pronounced by the Court or a judge thereof,” omitting the word “*by*.” The counsel contended that great strictness had been observed by the Courts in adhering to the exact forms given by the act, and that if a deviation were once allowed in a trifling respect, it would be difficult to draw the line in future; but Tindal, C. J., said, that if the omission in question could make any possible alteration in the meaning, there might be some ground for the application; but as such was not the case, the Court did not feel that they were opening the door to any looseness of practice by refusing the motion.

8. Inconveniences in consequence of the distinctions between what is to be deemed *imperative* and what to be deemed only *directory*.

8. Much confusion has also arisen in some departments of practice by the Courts having admitted a distinction between a statute or rule being deemed *imperative* or only *directory*, so that similar expressions in different statutes have been construed either way, according to the supposed object or importance of the regulation. (a) Thus the statute 5 & 6 W. & M. c. 21 and 9 & 10 W. 3, c. 25, (now virtually repealed,) requiring the officer who signs bailable process at the same time to *indorse* the day and year of so doing, was treated as only *directory*, and that therefore, although the officer was censurable, still the omission did not vitiate. (b) So the 12 G. 1, c. 29, relating to the *indorsement* of the sum sworn to on the process before it was issued, was also held only *directory*, and that consequently the neglect to make it was not fatal. (c) But on the other hand it was decided that the statute 2 G. 2, c. 23, s. 22, directing that the name of the attorney immediately retained by the plaintiff should be indorsed on the process, or a label annexed, ought to be considered *imperative* and the omis-

(a) See *Whiskard v. Wilder*, 1 Burr. Rep. 330; but that was a mere obiter opinion not necessary for the determination of the point before the Court, and Sir J. Mansfield, in *Hill v. Hoale*, 2 New R. 196, expressed a different opinion.

(b) *Imp. C. P.* 154; *Coleby v. Norris*, 1 Wils. 91; *Windle v. Ricardo*, 3 J. B. Moore, 249; *Millar v. Bowden*, 1 Crompt. & Jerv. 563; *Perry v. Turner*, 2 Crompt.

& J. 93; Tidd's Supplement, 1832, p. 15, note (d).

(c) *Supra*, *Whiskard v. Wilder* 1 Burr. 330; *Evans v. Bidgood*, 4 Bing. 63; but see *Hill v. Hoale*, 2 New Rep. 202; Tidd, 159; and yet probably the object of that rule was to apprise the defendant of the amount of the debt, so that he might prepare to pay.

sion fatal, because that regulation was intended to enable the defendant to know who to apply to, and by the omission he *might* be prevented or delayed in taking proceedings to prevent the incurring of further costs. (d) So a non-compliance with the rule H. 2 & 3 G. 4, in the King's Bench, requiring the place of abode and addition of the defendant, or some other best description, to be indorsed on a bailable writ, was only considered an irregularity, when by the omission or mis-description the sheriff might be subjected to an action. (e) In a recent case counsel having contended that the general rule of Hil. T. 2 W. 4, as to the indorsement on process of the amount of the *debt and costs was merely* directory, and not compulsory, Taunton, J. forcibly observed, "*To say that it is only directory is only in other words to say that it means nothing; this must be considered as an irregularity. We have determined to treat the dereliction of it as an irregularity.*" It is a very important rule, and the object of it, which is to enable the defendant to pay debt and costs before any unnecessary expense is incurred, would be disappointed if this were not considered as an irregularity; (f) and the same judge in a subsequent case (overruling a decision in the Exchequer to the contrary but on another similar rule) decided to the same effect even in an action against an attorney, and although the intimation to him, being a lawyer, might not be so essential. (g) Upon the whole it should seem that when a *rule* or a *statute* prescribes any form or course of proceeding without expressly declaring the consequences of non-observance or deviation, the only certain course is to decide that every deviation is at least an irregularity, rendering the proceeding abortive if objected to in due time and manner. However, in one of the latest cases, where no notice of taxing costs had been given, pursuant to *Reg. Gen. Trin.* 1831, requiring a day's notice of taxing costs, the Court of Exchequer considered it to be discretionary to treat such omission as an irregularity. (h)

(d) *Gine v. Allen*, Barnes, 415; *Williams v. Lewis*, 1 Chit. Rep. 611; *Sheppard v. Shum*, 2 Tyr. R. 742; Tidd, 160.

(e) *Clarke v. Palmer*, 4 Man. & Ry. 141; 5 B. & Ald. 560. See other conflicting decisions upon the question when an act or rule should be deemed merely *directory* or *peremptory*, Tidd, 9th ed. 159, 160; Tidd's Supplement, 1833, p. 92, 93, note (k); *Gine v. Allen*, Barnes, 414, 415; *Whiskard v. Wilder*, 1 Burr. 330; *Coleby v. Norris*, 1 Wils. 91; *Mitchell v. Gibbons*, 1 Hen. Bl. 76; *Evans v. Bidgood*, 4 Bing. 63; *Windle v. Ricardo*, 3 Moore, 249; *Williams v. Lewis*, 1 Chit.

Rep. 611; *Millar v. Bowden*, 1 Crompt. & J. 563; *Sheppard v. Shaw*, 2 Tyrw. R. 742. But see *Ryley v. Boissomas*, 1 Dowl. P. C. 383, and *Tomkins v. Chilcote*, 2 Dowl. 187.

(f) *Ryley v. Boissomas*, 1 Dowl. Pr. C. 383; *Tomkins v. Chilcote*, 2 Dowl. Pr. C. 187, overruling *Millar v. Bowden*, 1 Crompt. & J. 563; and see per Parke, J. in *Smith v. Crump*, 1 Dowl. Pr. C. 519, ante, 71.

(g) *Tomkins v. Chilcote*, 2 Dowl. 187.

(h) *Perry v. Turner*, 2 Tyr. 128; 2 Crompt. & Jer. 89, 1 Dowl. 300.

CHAP. II.  
CONSIDERA-  
TIONS OF  
PRESENT  
PRACTICE.

9. Express rule, Mich. T. 3 W. 4, declaring that omissions in a writ or indorsement thereon, contrary to 2 W. 4, c. 39, shall be deemed an irregularity, to be set aside on application to the Court or a judge, but not to render the writ void.

9. To prevent all discussion whether the direction of the Uniformity of Process Act, 2 W. 4, c. 39, s. 1, 3, 4, 8, 12, and 21, and the forms in the schedule to that act, as to the requisites of the *writ* itself, or the *copy* or the *indorsements*, should be construed peremptory or merely directory, or be construed to render the process *void* and subject the parties acting under it to an action of trespass; the rules thereon of Mich. T. 1832, expressly ordered "that if the plaintiff or his attorney shall *omit* to insert in or indorse on any *writ or copy thereof* any of the matters required by the Uniformity of Process Act, 2 W. 4, c. 39, to be inserted therein or indorsed thereon, such writ or copy shall not on that account be held void, but may be set aside *as irregular*, upon application to be made to the Court out of which the same shall issue or to any judge." So that in cases of *any deviation* from the form of process or *indorsement thereon*, at least when prescribed by the *statute*, the objection is fatal, without regard to the degree of importance, if made in due time. (*h*) And although it will be observed that such rule is confined to defects in the several *writs therein mentioned*, the judges have recently expressed a resolution to consider the non-observance even of *their own rule*, requiring the amount of the *debts and costs* to be indorsed, to constitute an irregularity, but amendable; (*i*) and it is probable that a similar construction would now be given to *all other rules* requiring something to be done. But still it is to be regretted that there is no *express general rule* extending to *all deviations* from the regular course of practice. The general principle and inclination of the Courts are against objections, unless the opponent *has been* or at least *might* have been *really* misled or prejudiced by the mistake; but they must, though reluctantly, enforce the express directions of a *statute*.

It has been known that some practitioners have even purposely by designed deviations from prescribed or approved forms tried experiments in proceedings which ought not to be

(*h*) In 1 Archbold's Pr. C. P. [25], it is merely supposed that if any *material* part of the writ or copy of the indorsement on them be omitted, the Court or a judge will set aside the writ or service for irregularity. But it should seem from the decisions that an omission even in *some immaterial* matters would be holden equally irregular and fatal. The case of *King v. Skeffington*, 1 Crompt. & M. 363, there referred to, was an *immaterial* deviation, viz. instead of "action on pro-

mises," "action of trespass on the case upon promises," and yet the defect was held fatal. And see *Smith v. Crump*, 1 Dowl. Pr. C. 519, where Parke, J. expressly objects to any attempted distinction between what is a material or immaterial deviation.

(*i*) *Ryley v. Boissomas*, 1 Dowl. Pr. C. 383; *Tomkins v. Chilcote*, 2 Dowl. Pr. C. 187; *Shirley v. Jacobs*, 5 Moore & Scott, 67, 68.

tolerated, as wasting the valuable time of the judges in listening to subtle arguments in support of such speculative deviations; and such practitioner should be properly punished with the payment of costs.

CHAP. II.  
CONSIDERATIONS OF  
PRESENT  
PRACTICE.

It may perhaps be here expedient to attempt to explain the practical difference between acts *void* or merely *irregular* as used in this rule and elsewhere, and also the difference between them and proceedings *against good faith*. When a writ or other proceeding is *void*, as was the case before the Uniformity of Process Act if it were returnable on a *dies non*, (k) or if a term intervened between the teste and return of meane process, it being defective on the *face of it*, was so utterly *void* that an action of trespass might be sustained against the attorney, sheriff, and officer for making an arrest under it, and an omission to object in the first instance would not in all cases prevent the party from taking advantage of the mistake. (l) So if a writ be executed on a Sunday the proceeding is by statute declared *void* to all intents and purposes, and the objection cannot be waived. (m) But if the proceeding be merely *irregular*, as if a judgment has been signed without a previous demand of a plea when requisite, the judgment is not void but stands until the Court on motion has set it aside as *irregular*; and the sheriff and his officers being ignorant of the defect are free from liability; but if the Court, *without imposing* terms, make absolute a rule for setting the same aside, then the plaintiff and his attorney (though not the sheriff) are liable to an action of trespass for any act done under an execution enforcing such irregular judgment. (n) So most irregularities must be objected to in the *first instance* after knowledge thereof, in order that the plaintiff may not incur expense by further proceedings. (o) In setting aside proceedings for irregularity, it is so far *discretionary* in the Court to interfere as regards the latter, that although they could not legally refuse to interfere, yet they may *disallow costs*, unless the applicant will consent not to bring any action for what has been done. (p) Another distinction is, that on account of *all* irregularities the party complaining must, as well by the uniform practice and decisions

The distinction between acts void or merely irregular.

Proceeding when void, and consequence.

Proceeding when irregular, and consequence.

(k) *Kenworthy v. Peppiat*, 4 Bar. & Ald. 288. And the Courts would not permit an amendment of such void process; but see *Adams v. Luck*, 6 Moore, 113; 3 Brod. & B. 25, S. C.

(l) *Price's Pr.* 300; *Ballentine v. Wilson*, Forest's R. 31; *Weston v. Faulkner*, 2 Price, 2; *Osborne v. Taylor*, 1 Chit. R. 400; *Hodson v. Garrett*, id. 174; *Anon.* 2 Chit. R. 237; *R. v. Sheriff of Middle-*

*sex*, 5 Bar. & Cres. 389; *Tidd*, 515.

(m) *Taylor v. Phillip*, 13 East, 155; *Roberts v. Monkhouse*, 8 East, 547.

(n) *Philips v. Biron*, 1 Stra. 588.

(o) *Tidd*, 515; *Chitty's Summary of Practice*, 96 to 99, and *post*, as to the time of objecting to irregularities.

(p) *Lorimer v. Lule*, 1 Chitty's Rep. 134, cited in *Cash v. Wells*, 1 B. & Adolp. 375, *ante*, 29 to 32.

CHAP. II.  
CONSIDERA-  
TIONS OF  
PRESENT  
PRACTICE.

of the Courts as by an express rule, (q) apply to the Court or a judge within a *reasonable* time, or at least so soon after knowledge of the defect as to prevent the plaintiff from incurring expense by a further proceeding founded on the irregular step ; (q) and also before the party applying has himself taken a fresh step after knowledge of the irregularity. (q)

10. Breach of good faith, and consequence.

10. But an application for setting aside a judgment signed against *good faith* is *debito justitiæ*, and the Court will therefore not impose on the defendant as a condition for setting it aside that he bring no action. (r) The Court however will, in case defendant should refuse to submit to those terms, sometimes refuse the costs of the application, though usually it is considered advisable for the plaintiff's counsel to consent to the rule being made absolute with costs, to prevent their being laid as special damage in any action which the defendant might bring for the trespass, and by which means probably, if the damages recovered should be under 40*s.*, the judge may certify, so as to deprive the plaintiff in such action of more costs than damages. (r) It will be expedient hereafter to introduce a distinct section taking a consolidated and comparative view of irregularities in different stages of a cause, and how to be taken advantage of, and therefore this general allusion to such objectionable proceedings may here suffice.

11. Whether it is imperative or discretionary in the Court or judge to set aside proceedings.

11. It has been decided that an application for setting aside a judgment as signed against *good faith* is *debito justitiæ*, and that the Court cannot, without the concurrence of the party applying, impose the terms that he shall not bring any action for what has been done under such judgment, but that having a general discretion over the costs of the application they may refuse them, unless the party consent to those terms ; (s) and it seems equally imperative on the Court to give effect to an application to set aside proceedings in respect of a clear irregularity, (t) although they may refuse the costs of the application ; (t) and when they have actually decided to refuse such costs, they cannot be recovered as special damages in an action of trespass or otherwise. (u)

12. Still it is not advisable to take advantage of small immaterial mistakes.

12. But although the legislature and the judges, in order to enforce *uniformity* and regularity, have deemed it expedient to

(q) Rule Hil. T. 2 W. 4, 1832, s. 33.

(r) *Cash v. Wells*, 1 Bar. & Adolp. 375.

(s) *Ibid.*

(t) *Semble, id.* and *Loton v. Devereux*, 3 Bar. & Adol. 343.

(u) *Loton v. Devereux*, 3 B. & Adolp. 343.



make and enforce the several enactments and regulations respecting process and practice, it is not thence to be supposed that the indiscriminately taking advantage of trifling deviations from the prescribed forms, not really misleading or occasioning prejudice to a defendant, is to be considered worthy of a liberal profession (x) or even judicious; on the contrary, the *judges* collectively and individually always condemn such objections; (y) and it is frequently most injudicious and *injurious* to the client's interest for a practitioner to take advantage of such defects; for when taken on the behalf of a *plaintiff*, they are generally "in his own delay," and without any real advantage to the client; (y) and when taken on behalf of a *defendant*, although they may succeed in occasioning trouble, amoyance, delay, or expense, it is not afterwards to be expected that either the plaintiff or his attorney will be disposed, pending the subsequent proceedings in the action, to permit any accidental irregularity on the part of the defendant to pass unnoticed, or by candid admission to save some difficult proof, or the stamping a deed or other instrument on payment of a penalty, but will watch every opportunity to snap a judgment or other advantage, and after judgment has been obtained, he will not give any quarter or accept any compromise, which probably might have been granted if the cause had been defended with liberality. The same reasons should induce the avoidance of a *special demurrer* on the ground of a defect in *form*, which naturally irritates the opponent and his pleader or counsel and attorney. One of our most talented lawyers, the amiable and excellent instructor of more than half the bar, at the same time that he invariably inculcated the necessity for acuteness, astuteness, and full knowledge as well of technical rules as of scientific principles, as essential for the protection of the client's interest, and as weapons of defence against the technical objections of an opponent, even more impressively advised *the waiving of all petty objections*, and when time was required by a defendant, then in the choice of two evils, he recommended the adoption of a tolerated dilatory plea, to a demurrer however well founded, because the latter would create an unconquerable hostility on the part of the opponent, inclining him in his turn to take a technical objection whereby the time of trial was delayed by petty contests upon collateral points wholly immaterial to the merits. He truly suggested that the client on each side suf-

(x) See *Hodgkinson v. Hodgkinson*, 3 Nev. & Man. 564; and per Parke, B. in *Garney v. Hopkins*, 3 Dowl. 193.

(y) It very frequently occurs that judgments are signed for want of a plea in an action which may be disputable, and upon which the defendant frequently

succeeds in moving to set aside such judgment upon an affidavit of merits, and then it is too late for the plaintiff to try at the sittings in or after term, and a delay of several months may arise, and ultimately the loss of the debt.

CHAP. II.  
CONSIDERA-  
TIONS OF  
PRESENT  
PRACTICE.

fers as much or more from the *sharpness* of his own attorney as from that of the opponent, in consequence of such petty exhibitions of *acuteness* in trifles rather than in extended or scientific knowledge, and thus parties, who might have been reconciled, become determined enemies. It frequently occurs that a practitioner, though sharp in his practice, is prone himself to blunder, and when he has obtained a rule for setting aside his opponent's proceeding for irregularity, his own rule is discharged with costs, on account of some defect in his own affidavit or in the terms of his own rule; (s) and when a *technical* objection has been taken before a jury, they have been known to find their verdict against the party principally on that account. This view of the consequences of taking advantage of technical objections renders it desirable that some forms should be prescribed more exempt from similar objections, and that if such objections be tolerated, it should be in the discretion of the judge even to make the party taking them pay the costs, unless it appear that the client has really been misled or prejudiced by the deviation. (a) If any exception be allowed, it is in actions where the plaintiff has unnecessarily and vexatiously proceeded by *arrest*, in which case it is natural for a defendant to endeavour to obtain release from imprisonment, or to relieve his bail from liability, by endeavouring to set aside the plaintiff's proceeding for irregularity, and he may sometimes be morally justified in availing himself of the plaintiff's blunder in cases where the arrest has been vexatious and unnecessary. But such a motion can rarely be excused when the action has been commenced by serviceable process. In a moral view that system of prac-

(s) See an instance *Smith v. Crump*, 1 Dowl. Pr. 519; and *Macher v. Billing*, 4 Tyr. 812. Lord Coke observes *qui hæret in litera hæret in cortice*; and the late Lord Chief Justice Ellenborough observed to a counsel, who appeared too much attached to small objections, "Sir, if you cannot elevate your mind above such trumpery objections, you will never rise in your profession." It will be found of the utmost importance to a young barrister, especially if he has previously practised as a *pleader*, to avoid in Court the least appearance of pleasure when moving to set aside proceedings for irregularities, or any exultation on account of his success on such points, and as the Court very reluctantly give effect to such motions, it is particularly important, when compelled to move by professional duty, to be fortified by the strongest decisions exactly in point, and by affidavits themselves free from objections. The late Ch. J. Ellenborough, though himself eminently

qualified as a special pleader, thus expressed to a barrister on the home circuit his dislike to technical objections: "I confess I always entertain strong prejudice against a special pleader called to the bar after long practice under it, because their habits appear to attach them too much to technicalities. I am happy as regards yourself that you have so soon removed that prejudice."

(a) There are many instances in which the Courts have so decided as to costs, even when a rule has been made absolute on the terms prayed, and there is no reason why the jurisdiction should not extend to a single judge. It would repress such motions and summons if the objection were allowed to prevail, but without costs, or on the terms of the party objecting paying costs of the summons and order, so that his laudable anxiety to have the strict practice of the Courts observed, would be gratified, though at his own expense and trouble.

tice would unquestionably be preferable that best avoids technical objections and acrimony between the respective attorneys, usually also extending to the clients, but unfortunately when the innumerable technical objections that have of late been made, especially under the authority of the uniformity of process act, 2 W. 4, c. 39, in the Practice Courts, and still more before a single judge, are considered, the new statutes and rules seem to have increased rather than diminished the number of annoying motions and summonses in a vexatious degree. Unfortunately, with but a very few exceptions, when a complainant thinks he has received an injury, or when an alleged wrongdoer is called upon to pay or make compensation, a malignant feeling, if not a spirit of animosity or revenge, influences each, and *not all* practitioners sufficiently think it their duty to repress such unworthy and injurious spirit. The complainant even expresses his desire to *punish* his opponent by *arresting* him, though he be notoriously solvent, or at least very unlikely to run away; such arrest stimulates to revenge, and every petty irregularity is afterwards greedily taken advantage of; and whilst the plaintiff improperly meditates annoyance, the latter becomes fraudulent and wastes the wreck of his property in expensive protraction of the suit, and then endeavours to avoid lengthened imprisonment by a concerted bankruptcy, or attempts to obtain his discharge under an insolvent act. It is the duty of the legislature, and it is the anxious desire of the judges, to repress these disgraceful proceedings; but the legislature have not adopted any adequate direct system for the purpose, nor even left power to the judges to modify the evil. It is true that the Insolvent Act, 7 G. 4, c. 57, s. 49, enacts, "That if it shall appear to the Court that a prisoner petitioning for his discharge, shall have put any one of his creditors to any *unnecessary expense, by any vexatious or frivolous defence* or *delay*, to any suit for recovering any debt or sum of *money due from such prisoner*," then the Court may adjudge that the prisoner shall, as to such debt, not be discharged until the expiration of a term not exceeding two years. But this, perhaps, only extends to *sham pleading*, or other pretences not founded *in fact*, and does not apply to the taking *trifling objections* well founded *in law*; and if it were otherwise the act can only extend to a very limited number of defendants. Some judges also discountenance such objections by sometimes refusing *at chambers* costs to the party taking them. (b) But there

(b) *Quere*, notwithstanding the decisions that a judge now has a general juris-

diction to give costs at chambers, *ante*, 29 to 32, and Lord Denman's observations in

CHAP. II.  
CONSIDERA-  
TIONS OF  
PRESENT  
PRACTICE.

Suggested no-  
tices of object-  
ing to process,  
&c. before sum-  
mons or motion  
allowed.

is no other restriction, and it might be wished that there were some regulations preventing all objections on account of mere form from delaying or interrupting the progress of the suit, unless it appear to the satisfaction of the Court or a judge that the opponent was *really misled and prejudiced* by the error, but at the same time sufficiently repressing deviation from prescribed forms or other negligence, by subjecting the party guilty of it to summary proceeding for a small penalty or temporary suspension from practice, but from which the captious opponent should derive no advantage either in time or costs. This would effectually relieve the administration of law from the aspersion, that it unnecessarily encourages the indulgence of unjust resentment and the spirit of litigation, and at the same time protect it from the confusion that would ensue from the indulgence of negligence. (c) Perhaps as motions and summonses for irregularity are generally made on behalf of a *defendant* for the *purposes of delay and for costs*, it might tend to lessen the number of trifling objections, and avoid delay and expense, if before a party were allowed to move the Court or obtain a summons, for any purpose excepting release from actual imprisonment, he were required to give *two days' notice* of motion or summons, specifying the objections, and be allowed a small sum for the costs of such notice, so as to afford an opportunity to the opponent to rectify the mistake; and unless such notice has been given, and the irregularity be persisted in, no costs should be allowed except in cases where it is established that *actual prejudice* has already arisen from the irregularity. (d)

13. Discretion  
of Court and  
judge over in-  
terlocutory costs.

13. In general, by statutes either general, or limited to the particular proceeding, *costs* are recoverable by a successful plaintiff or defendant upon a *judgment*, or other termination of a suit in his favor; and in some cases, even upon *interlocutory* proceedings, costs either follow the result, or the Court has an express jurisdiction over them. But almost universally, the *costs of summons, motions, proceedings relative to irregularities*, and other interlocutory proceedings, are entirely in the *discretion* of the Court or judge, as an incident of his jurisdiction over the

*Shirley v. Jacobs*, 8 Law Journal, 487, that it is imperative on a judge at chambers to give costs in cases of irregularity; it is stated that another learned judge, on setting aside a *capias* for irregularity, refused costs, saying, "Had you applied to the Court, costs might have been ordered, but if you come to this cheap and summary tribunal you cannot have them." 9 Legal Observer, 9. *Sed quare, ante*,

31, 32.

(c) In support of the proceedings, even in inferior tribunals, there are in general enactments to prevent or limit technical objections, as in convictions of justices, by 3 G. 4, c. 23; and in orders and judgments of justices, by 5 G. 2, c. 19, s. 1.

(d) And see the principle in *Beeton v. Beckett*, 1 Man. & Ry. 100; *Stephens v. Pell*, 4 Tyr. 267, 269.

principal matter ; (e) and where a party applied by *motion* instead of *summons* to inspect an agreement, the Court refused costs. (f) In these cases, when the Court or a judge has refused costs at the instance of a party applying to set aside a proceeding for irregularity, then he cannot afterwards, in an action of trespass or otherwise, recover the amount of such costs as special damage occasioned by the irregularity ; (g) and therefore it has been held that a defendant, on whose application a judgment has been set aside for irregularity in practice, but expressly without costs, cannot recover such costs as damages in an action of trespass against the plaintiff's attorney, for taking his goods under colour of such judgment ; (g) and Lord Tenterden observed, " The irregularity was only a " violation of a rule of practice. In such a case the Court has " jurisdiction to say definitively whether there should or should " not be costs, and they ordered the judgment to be set aside " without costs. If costs might be recovered in this case, " actions would frequently be brought for costs after the Court " had refused to allow them." (g) In cases of clear and undoubted *irregularity*, it should seem to be imperative on the Court or a judge to give effect to the *objection* if taken in time, but it is *entirely discretionary* to allow or refuse costs. (g) Frequently the Court or a judge, in order to prevent trifling litigation, will refuse costs unless the defendant will undertake not to bring an action for the trespass or conversion committed under colour of the irregular proceedings ; (h) and yet although the legislature have not allowed a defendant in error the costs of that vexatious proceeding, and the Court therefore have no direct jurisdiction to award them to the original plaintiff, yet where in an action of ejectment, the plaintiff succeeded in reversing a judgment in favor of the defendant, he was allowed afterwards to recover his costs in error in an action of trespass for mesne profits, alleging as special damage the costs and expenses he had been put to in endeavouring to recover possession. (i)

Sometimes the Court or a judge make a rule or order for setting aside the proceedings without saying anything about costs, or imposing any terms on the party applying not to bring an action ; and in that case, if a trespass has been com-

(e) *Loton v. Devereux*, 3 Bar. & Adol. 343, 345 ; and see *Cash v. Wells*, 1 Bar. & Adol. 375, as to discretionary power of awarding costs, *id. ibid.*

(f) *Reid v. Coleman*, 4 Tyr. 274.

(g) *Supra*, note (e).

(h) *Ante*, 28 ; *Lorimer v. Lule*, 1 Chit. Rep. 134, and *Cash v. Wells*, 1 Bar. & Adol. 375.

(i) *Norcoll v. Roak and others*, K. B. 10 Nov. 1827, Chitty's Col. Stat. 274, note (g).

CHAP. II.  
CONSIDERA-  
TION OF  
PRESENT  
PRACTICE.

mitted under the irregular proceeding, the party thereby injured may bring an action of trespass, and lay as special damage that he thereby incurred and became liable to pay, and did pay to his own attorney, the costs of summons or motion for setting aside the proceeding, and on proof of his having paid such costs, may recover the same. (h) In other cases, sometimes the Court make such a rule absolute, but expressly declaring "without costs," in which case such costs could not afterwards be recovered by such action. (h) If a judge at chambers discharge a party from arrest on the ground of irregularity in the proceedings, and offer to give the defendant the costs if he will undertake not to bring an action, and the defendant refuse to give such undertaking, and therefore does not obtain an order for costs, he may in that case, in an action for the imprisonment, recover the costs of the summons, &c. as special damage. (h) Upon a new point, or where there have been contrary decisions, the Courts frequently discharge a rule without costs on either side. (i)

Practice of a  
Court how to  
be ascertained  
and proved.

As connected with the subject of this chapter, "*Practice*," we may here properly consider how the *practice* of the principal Courts, or of an inferior or other Court, is to be ascertained or proved to the satisfaction of another Court, or before a jury. In general, when a question arises in either of the superior Courts of Law or Equity at Westminster relative to the practice of its *own Court*, in the absence of any statute or written rule or decision on the subject, the ordinary course of proceeding is ascertained *by inquiry of the officers* of the Court, to whom that branch of jurisdiction is most familiar, and who promptly in open Court state their knowledge of the practice; (k) and whilst the respective offices are filled by the present individuals, of great practical knowledge, experience, and integrity, no inconvenience can result from such inquiries; but, as a general principle, it is *better that the judges themselves should decide*, (l) especially in any case whether one or

(h) *Pritchett v. Boevey*, 1 Crompt. & Meeson, 777, per Bayley, B.; *Loton v. Devereux*, 3 Bar. & Adol. 543.

(i) *Nurse v. Greeling*, 3 Dowl. 158.

(k) *Re Perring*, 3 Dowl. 98; *Stainland v. Ogle*, *id.* 99; *Bugden v. Burr*, 10 Bar. & Cres. 457; *Cook v. Allen*, 3 Tyr. 378.

(l) See the statement of a case in Price's Gen. Prac. 84, note \*, where the officers of the Court differed in their report of the practice, and Mr. Baron Hullock thereupon observed, "With deference to those judges who have been conversant with the practice of Courts of Equity, I must be allowed to say, that it is in my opi-

nion no part of the duty of a Court to take the practice from their officers in any case involving principle, however convenient it may be when the point made is mere matter of official course, depending on mere usage, of which it is not to be assumed that judges, unless of very long experience in the particular Court, are always cognizant.

"Since I have sat here I have found that there is anything but uniformity of practice or of opinion amongst the officers themselves. On a question of this sort, I will say further, that had the official report of the practice been made to us

two motions may be necessary, or large or small fees be paid. (m) In either of those Courts it is the practice for one or more of the judges of the Court, desirous of ascertaining the affirmative or negative, privately to confer with the judges or judge of such other Court, and thus establish the result. But it is obvious that where Courts are at a distance from each other, or inferior, so as to render it inconvenient for them to communicate so directly, then the proper course is to issue a *certiorari* to the inferior Court, directing the judge thereof to return the established practice of his Court. (n) We have seen that in one case, where a Court has in return to a reference or *certiorari* certified its practice, the same cannot be disputed unless a petition praying for a fresh reference or *certiorari* be presented, and supported by affidavit disputing the accuracy of the certificate. (o) The practice of the Ecclesiastical Court is matter of fact to be proved by evidence. (p)

CHAP. II.  
CONSIDERATION  
OF  
PRESENT  
PRACTICE.

Where the parties to a common law action are disposed to try a question of fact or law fairly, it will be found that the proceedings under the improved system are free from difficulty; but by technical objections and oppositions, the collateral proceedings may become numerous, dilatory, and expensive.

Of the simplicity of the practice of the superior Courts when the parties are disposed to try a question fairly.

Thus, in actions liberally conducted, and opposed merely in order to bring a point fairly before a jury or Court, the plaintiff's attorney has merely to fill up one of the prescribed forms

Summary of the proceedings in a regular uninterrupted action.

without difference of opinion, I for one should not consider myself bound by it; and as in the case of the other day, where my brothers considered themselves fettered by what is termed the practice, I would have exerted myself in the endeavour to prevail on them to declare at once that such practice should no longer be observed.

"But what is this case? It is nothing like a mere practical question, such as whether a party has four or five days for taking a proceeding. It is a question of judicial construction of a modern act of parliament; and if the practice of any Court should be found to be inconsistent with what ought to be the course according to the true construction of any statute, it must be a practice which the Courts cannot uphold. A statute must be read with some regard to common sense, and this act of parliament was made to enable the plaintiff to act immediately on the defendant's default, and to advance his own proceedings.

"Then what reason is there why in this Court the plaintiff should be allowed to sleep over his rights, and keep dormant a process which he has called into action? Is it because in this Court the plaintiff sues not for himself, but for the king? and is it because this Court derives jurisdiction of pleas from the duty which belongs to it, of expediting the king's suits?

"I will only observe in conclusion, that if any such practice has prevailed in the office of the Court, it is not warranted by any, and is opposed to all principle; it cannot be considered by us as the practice of the Court in a matter in which there ought not to be any difference between the different Courts."

(m) *Staniland v. Ogle*, 3 Dowl. 99; *Howall v. Bulleel*, 2 Cr. & M. 339.

(n) *Williams v. Bagot*, 3 Bar. & Cres. 772; 5 Dowl. & Ry. 719, 8. C. where see the forms of *certiorari* and return.

(o) *Quene v. Nicolls*, 1 Knapp's Rep. 237, ante, vol. ii. 4th part, 584.

(p) *Bezarain v. Scott*, 3 Campb. 368.

CHAP. II.  
CONSIDERA-  
TION OF  
PRESENT  
PRACTICE.

---

of *writs*, usually either a writ of summons or a *capias*, the former serviceable, the latter to arrest the party; he must then carefully *indorse* certain intimations to the defendant on the writ, and should, for fear of loss, prepare a *precipe* or short memorandum of the substance of the process; and when he has had the writ signed by the proper officer, should leave such *precipe* with him to be there filed. Such process is then to be *served* in the proper county, or a written *undertaking* obtained from the defendant's attorney to *appear* for him, and in eight days afterwards the defendant must enter his *appearance*. The plaintiff is thereupon to deliver his *declaration*, accompanied in some cases with particulars of his demand; he is also to give a written *notice to plead* in a specified number of days, and rule the defendant to plead and demand a plea. The defendant is thereupon to deliver or file *his plea*, and the plaintiff is to deliver his *replication*, either joining issue, or if special, concluding with a verification, in which latter case the defendant is to deliver his rejoinder, whereupon, or even before, *issue* is said to be *joined*. The plaintiff is then to deliver the issue, being a copy of all the pleadings, and serve a *notice of trial*. The *nisi prius record* is then prepared and delivered to the proper officer, and the process to convene the jury is delivered to the sheriff, who summons the party to attend at the proper time and place, whilst in the interim the respective attornies collect and adduce, or subpoena the *evidence* and *witnesses*, and prepare and deliver their *briefs* to the selected counsel; and on the appointed day and place, usually called at *nisi prius*, the judge with his officers attends, and the jury are sworn, the junior counsel for the plaintiff concisely opens or states the nature of the pleadings, and in particular the issues joined, and his leading counsel states fully to the judge and jury the nature of the plaintiff's case, and sometimes the anticipated defence, and argues upon the sustainability of the former, and the futility and injustice of the latter; the next counsel in seniority, or if there be only two, then the junior, who opened the pleadings, calls the first witness, who is then sworn by the proper officer, after which the last-mentioned counsel examines him, taking care to avoid all dangerous or leading questions, and the leading counsel takes notes of the evidence; the leading counsel for the defendant then usually cross-examines such witness, and the junior, or sometimes the leader for the plaintiff, when deemed advisable, *re-examines* such first witness. The next counsel for the plaintiff, or the leader, (if there be only two,) then calls and examines another



witness, whilst the other counsel takes notes of his evidence, and so on. When all the evidence for the plaintiff has been examined, the defendant's leading counsel observes upon the weakness of the plaintiff's case as proved, and states the strength of his own, in case he intends to give any evidence in support of the defence, and then the evidence for the defendant is given, and cross-examined in like manner. The plaintiff's leading counsel then *replies*; and in conclusion, the judge states to the jury a brief analysis of the pleadings and issue, and the facts as proved, and the law either for or against the claim or defence, and the questions of fact upon which the jury are to decide. The jury then find their *verdict*. If for the plaintiff, his counsel may then in certain cases pray an *immediate execution*, but otherwise no execution is issued until after the first four days of the ensuing term; within which the defendant must either move in arrest of judgment or for a new trial, or according to the terms of permission sometimes given by a judge, for leave to enter a nonsuit on the ground of the insufficiency of the case or evidence as given on the trial. If no such motion should succeed, then on the fifth day of the term or afterwards the *costs* are *taxed*, and a proportion allowed, and final judgment is *signed*; after which is issued a *writ of execution* either fieri facias against the plaintiff's goods, capias ad satisfaciendum against his person, or an *elegit* against a moiety of his lands and his goods, unless the same be delayed by a *writ of error*, which must now in general be returnable in the Court of Exchequer Chamber.

But although the proceedings in a suit may be thus seemingly simple and comparatively few, yet by very numerous irregularities and blunders and *occasional proceedings* they may be greatly interrupted. These irregularities and blunders may arise in almost every stage of the suit and on either side, as in the writ or indorsement, or in the served copy, or in the service or mode of executing the writ, or in the appearance or bail, or the declaration or notice thereof; in the notice to plead, and rule for or demand of plea, or in signing judgment for want of a plea, or in the inquiry or notice thereof, or in the notice of trial, &c. Irregularities in practice are usually taken advantage of in K. B. by affidavit, motion, rule nisi, and rule absolute, in the Practice Court during the terms, or by summons and order of a single judge in the vacation. But when the defect is in the form of *pleading*, either in a declaration, plea, replication, &c., the objection is usually to be taken

Irregularities  
and collateral  
or occasional  
proceedings in a  
suit.

CHAP. II.  
CONSIDERA-  
TION OF  
PRESENT  
PRACTICE.

by *demurrer*, though sometimes it constitutes an irregularity that may be objected to by *motion*. If by *demurrer*, then the party whose pleading has been objected to either obtains leave to amend or he joins in *demurrer*, and paper books are delivered to four of the judges of each Court, and the party proceeds to argument and the Court gives judgment. But besides these irregularities there are many other *occasional proceedings* on either side, as motions and rules for security for costs, summons and orders for particulars or better particulars of the plaintiff's demand, or the defendant's set-off, demands of oyer, or summons for inspection of documents or to compel a party to produce an original instrument at the stamp office to be stamped and delivering a copy to the applicant; (q) motions for changing or bringing back the venue; special cases stated by consent after issue joined or after trial; demurrers to evidence and bills of exception pending a trial; and various other proceedings to be noticed in the following pages.

Proceedings of  
less frequent  
occurrence.

There are also other occasional descriptions of business, some of which occur in the course of an action, but which are less frequent than those just mentioned; such as proceedings by habeas corpus, on awards, annuities, mortgage-deeds, bail-bonds, replevin-bonds, warrants of attorney, respecting officers of the Courts and attornies and their clerks; also proceedings under the Interpleader Act in relief of sheriffs or other third persons, the examination of witnesses under a commission or on interrogatories, and various other occasional proceedings.

Practical pro-  
ceedings pecu-  
liar to one of the  
three Courts.

There are also in each of the three superior Courts occasionally certain proceedings *peculiar* to that particular Court, as in the King's Bench, incidents of its *criminal* and superintending jurisdiction over indictments, criminal informations, articles of the peace, *quo warranto*, *mandamus*, and prohibition; the removal by *certiorari* of indictments and presentments, convictions, or orders from inferior Courts and commissioners of sewers; and by writs of error; and of the hearing of special cases from the sessions relative to poor rates, settlements and orders of removal. In the Common Pleas, proceedings on writs of dower or in *quare impedit*, and relating to the forms of conveyances substituted for abolished fines and recoveries; and in the Exchequer, as incidents of its *revenue jurisdiction*, certain peculiar proceedings by extent in chief or in aid, the recovery of legacy duties, taxes, custom duties, and its exclu-

(q) *Ante*, 81, note (f).

sive jurisdiction over informations upon seizures made under the revenue laws.

CHAP. II.  
CONSIDERA-  
TION OF  
PRESENT  
PRACTICE.

---

The practice, as respects these subjects, will be stated in this volume in the same order as, *first*, the ordinary proceedings in an action by *serviceable* process where there is no interruption; *secondly*, the proceedings in *bailable* actions, and of irregularities taken advantage of by summons or motion or demurrer, and also the occasional proceedings without irregularity; *thirdly*, the still less frequent proceedings, but which sometimes occur; and *fourthly*, the particular proceedings confined only to one Court.

The practice in the superior Courts of *Law* at Westminster differs from that in the Courts of *Equity* principally in two particulars, viz. that at law (with the exception of the now abolished commencement of an action by *special original* in *assumpsit* and trespass, when the whole causes of action were set forth,) the defendant had no information, until after he had appeared, of the particulars of the plaintiff's complaint, but was brought into Court to answer a very concise process even in *bailable* actions, merely stating the form of action, (except in an action on a recognizance, and then merely referring to "a recognizance of bail,") and in *serviceable* process the defendant had not, before the declaration, the least intimation of the form still less of the subject-matter of the dispute; and although the Uniformity of Process Act, 2 W. 4, c. 39, requires *serviceable* process to state in the body of the writ the *form* of action, and the rule Hil. T. 2 W. 4, 1832, s. 2, requires that on all process or copy of process for a *debt* the amount of the debt and costs claimed shall be indorsed, and that upon payment thereof, within four days, to the plaintiff or his attorney, further proceedings shall be stayed, and the same rule prescribes the form of such indorsement; (r) yet the information thus afforded is very limited, and in all other cases the proceedings do not before the declaration inform the defendant of the exact nature of the plaintiff's claim, though in *some* cases, even before appearance, the defendant may on summons compel the plaintiff to state the *particulars* of his claim, so as to enable him to offer compensation before he has incurred the expense of declaration. But in *equity* the statute for the amendment of the law, 4 Ann. c. 16, s. 122, expressly enacts

Of the differences between the practice at law and in Courts of Equity.

---

(r) *Post*, Appendix.

CHAP. II.  
CONSIDERA-  
TION OF  
PRESENT  
PRACTICE.

that no *subpœna* or other process for *appearance* shall issue out of any Court of Equity till *after the bill has* been filed with the proper officer, excepting however cases of bills for injunction to stay waste or stay suits at law already commenced. (s) So that in general a *bill in equity*, fully stating the complaint and all its circumstances, must be filed in the first instance, and the *subpœna* is merely issued to inform the defendant thereof and require him to appear in Court and answer the same; and he may obtain a copy of such bill and thereby know the full subject of complaint.

Another difference is, that in equity *no arrest* of the defendant is permitted, except in the instance of *ne exeat regno*, when it is sworn that there is a mere equitable cause of action and that the defendant is about to abscond and leave the kingdom. (t)

Another most important distinction in practice between the two descriptions of Courts is, that *at law* disputed facts, which constitute the *point in issue* in a cause formally and compactly joined upon distinct *pleadings*, are in general *tried by a jury* convened before a judge, (or a sheriff when the claim is under 20*l.*.) though there are certainly innumerable disputes upon irregularities and practice, and some collateral summonses, motions, and rules that are disposed of by affidavit, upon the weight of which the Court or the master thereof decides; whilst *in equity* the judge always decides upon long and intricate statements in the bill, answer, or affidavits, or interrogatories, unless he think that the truth as disclosed by those documents, sometimes very contradictory, is so uncertain that it is more fit that it should be investigated and decided upon by a jury, in which case he directs an issue to be tried in a Court of law and the result to be communicated to him, and upon which he decides.

---

(s) See Chitty's Col. Stat. tit. Court of Equity, p. 233, and *id.* note (a); 1 Newl. Pr. 62; 2 Mad. Ch. Pr. 197.

(t) *Ante*, vol. i. 731, 733.

## CHAPTER III.

OF THE TERMS AND VACATIONS, SITTINGS AT NISI PRIUS, IMPARLANCES, DIES NON, HOLIDAYS, YEAR, HALF YEAR, MONTH, AND WEEK, AND TIME IN GENERAL AS IT AFFECTS PROCEEDINGS IN ACTIONS AT LAW. (a)

1. Of the Terms and Vacation, Essoin and Return Days, and how altered and consequences . . . . .	89	5. Months, how calculated . . . . .	108
2. Of Imparances and their virtual abolition . . . . .	103	6. Day, when or not excluded . . . . .	109
3. Of Dies Non and Holidays, and hours of attendance . . . . .	104	7. Hour of the day, when or not material in practice . . . . .	110
4. Year or half-year, how calculated . . . . .	107	8. Meaning of terms Instant, Forthwith, <i>Peremptory</i> , &c. . . . .	112
		9. Time of Declaring, Pleading, &c. when to be stated in title . . . . .	113

THE first consideration in a chapter respecting *Time* would be whether any *statute of limitations* has already barred all remedy, a subject already fully examined. (b) If the limited time for suing is only *nearly expired*, then it is essential *immediately to commence* a proper *personal action* by appropriate process, stating the intended form of action to be afterwards adhered to, and to cause the same to be *continued* in the manner shewn in a subsequent chapter. The next and very important subject is the distinction between the *Terms* and the *Vacations*, being the times between each term, and which we will now examine.

CHAP. III.

Limitations of actions referred to.

Before the recent enactments the four divisions of the year called the *Terms* were more important than at present, because many proceedings in a cause that may now be transacted in the *Vacation* or between the terms could before only take place *during* one of the terms. All process, whether mesne or final, and whether in personal, real, or mixed actions, must formerly have been *tested* and *returnable in term time*, and when the pleadings were *ore tenus* they were actually stated to the Courts whilst sitting in one of the terms; and although at a very early period the practice of pleading *ore tenus* was abandoned, and the *pleadings* were reduced into writing, still it was considered that unless a declaration were delivered *during a term*, no plea on the part

*Terms and vacations, essoin, general return-days, and how altered and affected by modern statutes and rules.*

Formerly few proceedings in vacation.

(a) And see further as to time, Chitty's Col. Stat. tit. Time.

(b) *Ante*, vol. i. 736 to 786.

CHAP. III.  
OF TERMS AND  
VACATIONS,  
&c.

of a defendant could be required before the *next term*, but he was entitled to an *imparlance*. As the terms, with reference to the entire year, constituted a very small portion of it, viz. only ninety-one days, and Easter (the longest term,) contained only twenty-four days, it followed that no great progress could be made in an action in the terms, and the same was for many purposes suspended during the vacations, although on principle there could be no objection to all proceedings, not actually requiring the interposition of the *four judges in banc*, taking place as well during the vacation as pending the terms.

The following acts it will be found have most materially altered the ancient law in this respect, and authorized most practical proceedings in an action during the *vacations* as well as in the terms. The 1 W. 4, c. 7, s. 1, as to writs of inquiry, and 2 W. 4, c. 39, as to writs of *summons* and *capias* in *personal* actions, enacts that they are to be *dated* or *tested* on the day when *issued*, and to be in force for four calendar months, and not to have any *return day*, though as to proceedings by *distringas* or to *outlawry* they must still be returnable on a day certain in term. The terms also were holden at different times of the year to those *now fixed*, viz. Hilary term was *fixed* to commence on the 23d January and ended on 12th February; Michaelmas term commenced on the 6th November and ended on the 28th November. Easter and Trinity terms were termed *moveable* because they then depended in their commencement on the *moveable* feasts of Easter-Day and Trinity-Sunday, which in successive years fall at different periods.

Alterations by  
11 G. 4 and 1  
W. 4, c. 70, (c)  
and 1 W. 4,  
c. 3.

But great alterations in these respects, as well respecting the *commencement* as the *duration* of the terms, and *essoins* days and *general return days*, and the *tests*, *duration*, and *return* of certain writs, and in other respects, were effected by an act passed in the sessions of 11 G. 4 and 1 W. 4, c. 70, (c) s. 6 & 7, (passed 23d July, 1830,) and by the 1 W. 4, c. 11, s. 1, 2, and 3, (passed 23d December, 1830,) and certain rules thereon, (d)

(c) In order to prevent any confusion that might arise by calling the first act, 1 W. 4, c. 70, when there are subsequent acts of 1 W. 4, c. 3 and ch. 7, I have here described it as of the *sessions* when it was enacted; but in *pleading* and in all other technical proceedings it is to be termed 1 W. 4, c. 70; and in *pleading* it would be fatal to describe that or any act as made in 11 G. 4 and 1 W. 4, for a statute cannot be enacted in two different

reigns, though it may have been enacted in a *sessions* extending into two king's reigns; *R. v. Biers*, 1 Adol. & Ellis, 327.

(d) With respect to the terms and vacations, *essoins* and *return-days*, as formerly regulating all actions, and which still prevail in *mixed* actions and *scire facias* and *replevin*, not repealed by 3 & 4 W. 4, c. 47, as *quare impedit*, see 3 Bla. Com. 275, 276, 278; Sellon's Prac. vol. i.

Thus, as respects the terms, the 11 G. 4 and 1 W. 4, c. 70, s. 6, without any recital, enacts that in A. D. 1831, *and afterwards*, the terms shall begin and end as follows, viz.—

Hilary Term shall *begin* on the 11th and *end* on 31st January.

Easter Term shall *begin* on 15th April and *end* on 8th May.

Trinity Term shall *begin* on 22d May and *end* on 12th June.

Michaelmas Term shall *begin* on 2d November and *end* on 25th November.

And that the *essoins* and general return days of each term shall, until further provision be made by parliament, be as follows, that is to say, *the first essoin or general return day* for every term shall be *the fourth day before the day of the commencement of the term*, both days being included in the computation; the *second* *essoins* day shall be the fifth day of the term; the *third* *essoins* day shall be the fifteenth day of the term; and the *fourth* and last shall be the nineteenth day of each term; the first day of the term being already included in the computation with the same relation to the commencement of each term as they now bear, and shall be distinguished by the day of the term on which they respectively fall, the Monday being in all cases substituted for the Sunday when it shall happen that the day would fall on Sunday, except always that in *Easter* term there shall be but *four* returns instead of five as heretofore, the last being omitted; provided that if the whole or any number of the days intervening between the Thursday before and the Wednesday next after Easter-day shall fall within *Easter* term there shall be no sittings in banc on any of such intervening days, but the term shall in such case be prolonged and continue for such number of days of business as shall be equal to the number of the intervening days before-mentioned, exclusive of Easter-day, and the commencement of the ensuing Trinity term shall in such case be postponed and its continuance prolonged for an equal number of days of business.

Section 7 enacts that when the alteration of the terms therein-before mentioned should take effect, not more than *twenty-four days*, exclusive of Sundays, after any Hilary, Trinity and Michaelmas Term; nor more than *six days*, exclusive of Sundays, after any Easter Term, to be reckoned consecutively immediately after such terms, shall be appropriated to sittings in London and Middlesex for the trial of issues of fact arising in any of the said Courts; *provided* that if any *trial at bar* shall be directed by any of the said Courts it shall be competent to the judges of such Court to appoint such day or days for the

CHAP. III.  
OF TERMS AND  
VACATIONS,  
&c.

Prescribed  
commencement  
of each term,  
and the four  
essoins or gene-  
ral return-days  
in each.

Prescribed  
number of the  
days of sittings  
at Nisi Prius in  
Middlesex and  
London, be-  
tween the  
terms.

Proviso for  
trials at bar.

CHAP. III.  
OF TERMS AND  
VACATIONS,  
&c.

And for trials  
at Nisi Prius on  
any day with  
consent of parties.

Immediate  
judgments on  
indictments in  
vacations.

Justifying  
bail in vaca-  
tion.

Expediting  
proceedings in  
actions of eject-  
ment, and im-  
mediate execu-  
tion therein.

Enactments in  
1 W. 4, c. 3,  
again altering  
return-days and  
duration of  
terms.

trial thereof as they shall think fit, and the time so appointed, if in vacation, shall for the purpose of such trial be deemed and taken to be a part of the preceding term; provided also that a day or days may be specially appointed, at any time not being within such twenty-four days, for the trial of any cause at Nisi Prius with the consent of the parties thereto, their counsel, or attorneys.

The 9th section authorizes judgments on *indictments* for felonies tried upon a record out of the King's Bench, to be given by the single judge *immediately after the trial* at the *sittings* or at the *assizes* in *vacation*, instead of waiting as heretofore, and giving judgment in term time by and before the full Court. (d) And the 12th section enacts, that *bail* may be *justified* before a judge at chambers or elsewhere, in *vacation* as well as term, and whether the defendant be actually in custody or not; whereas before that act, bail could not justify at chambers or in vacation, unless the defendant was in actual custody, or by consent.

The 36th section as to actions of *ejectment*, where the right of entry has accrued to a landlord *in or after Hilary* or *Trinity* Term, enables him to proceed to trial in the vacation after those terms in the manner therein prescribed, the declaration to be entitled specially; and moreover enables the judge, immediately after the trial, to certify his opinion on the back of the record, that a writ of possession should issue immediately, and the same shall issue accordingly.

The 1 W. 4, c. 3, (passed the 23d December, 1830,) "for the better administration of justice so far as relates to the *essoins* and general return days of each term, and to substitute other provisions in lieu thereof, and to declare the law with regard to the duration of the terms in certain cases," by section 1st repeals so much of 11 G. 4 and 1 W. 4, c. 70, s. 6, as relates to the appointment of *essoins* or general return days; and section 2 enacts, "that all writs now usually returnable before any of his Majesty's Courts of King's Bench, Common Pleas or Exchequer respectively, on general return days, that shall be made returnable after Jan. 1, A. D. 1831, may be made returnable on the third day exclusive before the commencement of each term, or on any day, not being Sunday, between that day and the third day exclusive before the last day of the term; and the day for appearance shall, as heretofore, be the third day after such return, exclusive of the day of the return, or in



case such third day shall fall on a Sunday, then on the fourth day after such return, exclusive of such day of return.

CHAP. III.  
OF TERMS AND  
VACATIONS,  
&c.

Section 3rd, after reciting that it is expedient to remove all doubts that may exist as to the duration of the terms in any case that may occur, enacts, "that in case the day of the month on which any term, according to the act aforesaid, is to end, shall fall to be on a Sunday, then the Monday next after such day shall be deemed and taken to be the last day of the term; and that in case any of the days between the Thursday before and the Wednesday next after Easter shall fall within Easter term, then such days shall be deemed and taken to be a part of such term, although there be no sittings in banc on any of such intervening days."

But it will be presently seen, that the Uniformity of Process Act, 2 W. 4, c. 39, prescribing writs of summons and *capias* in *personal* actions, without any return day, and providing that act shall continue in force for four calendar months from the date, has in practice almost extinguished, as regards such *personal* actions, the distinction between the different return days in a term. They however still apply to those actions, the proceedings in which are not affected by 2 W. 4, c. 39, as *dower*, *quare impedit*, *ejectment*, *replevin*, *scire facias*, &c.

The 1 W. 4, c. 7, (passed 11th March, 1831,) for more speedy judgment and execution in actions in the Courts of Law at Westminster, in section 1 enacts, "that all *writs of inquiry* may be made returnable and be returned on a day certain in term or *vacation*, to be named in such writ; and that thereupon in such vacation, after a rule for judgment, costs taxed, and final judgment signed, execution may be forthwith issued, unless the *sheriff* or other officer should certify that judgment ought not to be signed until the ensuing term, or unless one of the judges should think fit to order the judgment to be stayed until a day to be named in his order." And sect. 2 authorizes a judge at *Nisi Prius* to direct *immediate execution after a verdict*; and sect. 3 directs that the writ of execution may (e) be tested on the day it issues, although in the vacation; and section 3 enacts, that every judgment to be signed by virtue of that act, may be entered and recorded as the judgment of the

Alterations by  
1 W. 4, c. 7.  
Writs of in-  
quiry return-  
able in vacation,  
and immediate  
execution there-  
on, and also  
after verdict in  
vacation.

(e) As the act thus merely authorizes the writ to be tested on the day it is issued, it may also, as before, be tested of the preceding term; and should be so if the defendant died before the day of issuing the execution, and after the first day of the preceding term. *Brocher v.*

*Pond*, 2 Dowl. Pr. C. 472; see *quære* see *Peacock v. Day*, 3 Dowl. 291; 9 Legal Observer, 251, 252. *Littledale, J.* held irregular a *scire facias* against bail, tested of the preceding term, and before the day of judgment against principal. And see suggestion, 3 Dowl. 294, note (a).

CHAP. III.  
OF TERMS AND  
VACATIONS,  
&c.

Court, although the Court may not be sitting on the day of signing thereof, and every execution issued by virtue of that act shall and *may* (f) bear *teste* on the day of issuing thereof, and such judgment and execution shall be as valid and effectual as if the same had been signed and recorded and issued according to the course of the common law. Before this act, when a cause stood for trial at a sittings in term, and the cause was made a remanet to the sittings after it, on the terms expressed in a rule of Court drawn up for the particular purpose, that the plaintiff should be entitled to a judgment of the preceding term in case he obtained a verdict, the course was to state on the record of the judgment such rule by consent, whereby the inconsistency in the judgment appearing antecedent to the trial was cured; and since this act a *fiat facias* on a judgment, signed after the defendant's death in vacation, may be tested on the last day of the preceding term, as the act only enacts that it *may* be tested on the day it issued, and not that it *must* or shall be so. (g) But section 4 provides, that in the next term the Court may set aside the judgment and execution, and grant a new trial or inquiry. That act was an extension of 11 G. 4 and 1 W. 4, c. 70, s. 36, which we have seen (h) previously allowed in vacation an execution by *haberi facias*, immediately after the trial of an action of ejectment. But sect. 6 enacts, that no officer shall be *compelled* (i) to attend to *tax costs* on any judgment signed by virtue of that act, at any time between the 30th August and 31st October in any year. Upon this section it has been suggested, that probably during that time a plaintiff might issue execution for the sum recovered by the verdict, (j) and on or after such 31st October tax his costs, and issue a fresh execution for them. (j) The 8th and 9th sections relate to the returns of *writs of inquiry* in the counties palatine and the return of writs removing actions in inferior courts into the Common Pleas at Westminster, and in order to expedite the proceedings, requires them to be returnable on the first Wednesday in every month.

But the principal act tending to destroy the distinction

(f) *Supra* last note.

(g) *Brocher v. Pond*, 2 Dowl. Pr. C. 472; but see qualification, *Peacock v. Day*, *ante*, 93, note (c).

(h) *Ante*, 92.

(i) From this expression it should seem that if the proper officer can be prevailed upon to attend, he might legally tax costs during or between these days,

and that the enactment is merely to afford him a reasonable holiday if he think fit.

(j) Dowl. Statute, 1 W. 4, c. 7, p. 17, in note. Certainly if the plaintiff be content to give up his costs, this may be done, 5 East, 146; 4 Taunt. 280; Tidd, 994; Chitty's Summary Prac. 195; but *quere* as to any subsequent proceedings to obtain costs.

between term time and vacation, and particular return days, as respects most *personal* actions, is the Uniformity of Process Act, 2 W. 4, c. 39, (passed 23d May, 1832,) which, as regards all mesne process in *personal* actions, wholly puts an end to the previous necessity for *certain* mesne process (i. e. writs of *summons* and *capias*, and *detainer*, (k) constituting by far the most usual proceedings in an action at law,) being *tested*, or *returnable in term time*, by requiring, in section 12, that all such writs of summons and *capias* shall be *dated on the day when issued*, whether in term or vacation, and shall not be made returnable on a particular day, but shall be *in force for four calendar months* from the day of the date inclusive thereof. (l) And sect. 15, and the rule of Mich. T. 3 W. 4, 1832, and Hilary Term, 1833, order that a judge may make an order on the sheriff or other officer to return the writ and what has been done thereon, so as to prevent delay in the action after the process has been so executed, before the expiration of the four months. But section 3d requires that writs of *distringas* shall be tested on the day of the issuing thereof, whether in term or vacation, though to be *returnable in term time*, on some day certain, not being less than fifteen days after the teste thereof; and by section 5, in proceedings to *outdewry*, every writ subsequent to the writ of *capias* or *distringas* shall be *tested* on the day of the return of the next preceding writ, and be made returnable on a day certain in term.

Since this act, although the writ of summons or *capias* *must* be correctly dated of the day when actually issued, or it may be set aside, (m) yet all the other innumerable motions for irregularity in respect of mistakes in the date or return day, or on account of a term intervening between such date and return, or the return day being a dies non, have necessarily ceased, so far at least as regards most *personal actions*.

But the even still more important enactment tending to diminish the distinctions between terms and vacations, is contained in the 11th section of 2 W. 4, c. 39, which, after reciting that, according to the then existing practice in certain cases, no proceedings could be effectually had on any writ returnable *within four days* of the end of the term until the beginning of the ensuing term, *whereby an unnecessary delay has been sometimes created*, for remedy thereof enacted, that if any writ

CHAP. III.  
OF TERMS AND  
VACATIONS,  
&c.

Alterations by  
the Uniformity  
of Process Act,  
2 W. 4, c. 39.

2 W. 4, c. 39, s. 11, as to vacations and certain excepted days, enabling a plaintiff to issue his writ and proceed to judgment and execution, even in the same vacation.

(k) But writs of *Distringas*, *Exigent*, and *Proclamation*, must still be returnable in term. See sect. 3, 5; and see schedule of act, 2 W. 4, c. 39.

(l) 2 W. 4, c. 39, sections 10 & 12.

(m) R. M. 3 W. 4, rule 10; *semble*, 1 Burr. 408, and *post*, Chap. V.

CHAP. III.  
OF TERMS AND  
VACATIONS,  
&c.

Requires appearance or bail above, to process, even in vacation.

The exceptions as to certain proceedings, especially between 10th August and 24th October.

Provides that bail and appearance must be perfected during that time.

But no declaration or pleading to take place between those days.

of *summons, capias* or *detainer*, issued by authority of that act, shall be served or executed on any day, whether in term or vacation, all *necessary proceeding to judgment and execution, may, except as hereinafter provided, be had thereon without delay, at the expiration of eight days from the service or execution* thereof, on whatever day the last of such eight days may happen to fall, whether in term or vacation. (n) And then follow *certain exceptions*, viz. that if the last of such eight days shall in any case happen to fall on a Sunday, Christmas day, or any day appointed for a public fast or thanksgiving, in either of such cases the *following day* shall be considered as the last of such eight days; and if the last of such eight days shall happen to fall on any day between the Thursday before and the Wednesday after Easter day, then and in every such case, the Wednesday after Easter day shall be considered as the last of such eight days. *Provided* also, that if such writ shall be served or executed on any day between the 10th day of August and the 24th day of October in any year, special bail *may* (o) be put in by the defendant in bailable process, or appearance entered either by the defendant or the plaintiff on process not bailable, at the expiration of such eight days. (o) *Provided* also, that no *declaration or pleading after declaration* shall be filed or delivered between the said 10th day of August and the 24th day of October. And by G. R. M. 3 W. 4, r. 12, in case the time for pleading to any declaration, or for answering any pleadings, shall not have expired before the 10th August, the party called upon to plead, reply, &c. shall have the same number of days for that purpose after the 24th October, as if the declaration or preceding pleading had been delivered or filed on the 24th October. And it has been decided, that if a defendant obtain enlarged time for pleading previous to the 10th August, but which does not expire on that day, he is not entitled to the remainder of the enlarged time after the 24th of October for the purpose of pleading. (p) And if the time for pleading does not expire until after the 10th August, although it may be enlarged time, still the defendant is to have the same time for pleading as if the declaration had been filed or delivered on the 24th October. (q)

(n) But see *infra*.

(o) If, therefore, a defendant be arrested between the 19th of August and 24th of October, he must put in and justify bail before a judge at chambers, within the same time, and in the same

way, as in any other part of the vacation. *R. v. Sheriff of Middlesex*, 2 Cr. & M. 333; and the same as to a common appearance.

(p) *Trinder v. Smedley*, 3 Dowl. 87.

(q) *Wilson v. Bradstocke*, 2 Dowl. 417

The wording of the proviso respecting the defendant's putting in bail, or entering an appearance between the 10th of August and 24th October is obscure,<sup>(r)</sup> for the word *may* would only seem to give the defendant a *liberty* or power which he unquestionably would have without the proviso; the word *may*, however, applies only to the *plaintiffs* entering an appearance according to the statutes between those days; for as respects *defendants*, it is now settled that they *must enter their appearance, and put in and perfect special bail* at a judge's chambers, between the 10th August and 24th October, precisely as if the act contained no exception whatever, and the exception in the act is construed only to apply to *declarations* and *pleadings* after declaration, which are not to be filed or delivered during the excepted time.<sup>(s)</sup>

The result, therefore, of the enactment is, that the 11th sect. with its exceptions, is confined to mesne process, and provides, that if the last of the eight days after service or execution of mesne process fall on a Sunday, Christmas-day, or public fast or thanksgiving day, the next day is to be considered the last of the eight days; and if the last of *such* eight days shall fall between Thursday before and Wednesday after Easter day, then such Wednesday shall be considered the last of such eight days, and the defendant has so many additional days to appear or put in bail; but that as respects appearance and bail above, they are to take place between the 10th August and 24th October, the same as at any other time of the year; though as regards *declarations*, and other *pleadings*, they are not to be filed or delivered between the 10th August and 24th October.

The rule, Michaelmas term, 3 Wm. 4, r. 12, in furtherance of the exception in 2 Wm. 4, c. 39, stat. 11, respecting any declaration or other pleading between the 10th August and 24th October, orders that "in case the time for pleading to any declaration, or for answering any pleadings, shall not have expired before the 10th August, the party called upon to plead, reply, &c. shall have the same number of days for that purpose after the 24th October, as if the declaration or preceding pleading had been delivered or filed on the latter day.

Rule M. T. 3 W. 4, r. 12, ordering that if time for pleading shall expire between 10th August and 24th October, defendant shall have as much time after the latter day as he had on 10th August.

The principal consequences of these alterations is, that now, The principal

(r) Per Lord Lyndhurst and Bayley, B. in *Rex v. Sheriff of Middlesex*, 2 Crom. & M. 335, and see 1 Archbold, Pr. C. P. [16].

(s) *Rex v. Sheriff of Middlesex*, in *Wolaston v. Wright*, 2 Cromp. & M. 333, 335.

CHAP. III.  
OF TERMS AND  
VACATIONS,  
&c.

result of the  
modern altera-  
tions, and what  
exceptions.

subject to such few exceptions, a plaintiff may *issue his process*, insist on an appearance or bail above, *declare*, give notice to plead, demand plea, and sign judgment for want of a plea, or in case of a plea in due time, proceed to issue, and even trial, and judgment, and execution, *in vacation*, if the requisite number of days essential to intervene between each stage of the cause will allow, *at any time*, (excepting between 10th August and 24th October,) and which is now strictly the only *actual vacation*, (and is confined to *declarations* and *pleadings* thereon,) and as to *putting in bail* in bailable actions, and the *entering an appearance* by the defendant or the plaintiff, the same must be done even during that excepted time.(t)

Sittings in Mid-  
dlesex and  
London after  
term.

We have seen that the 11 G. 4 and 1 W. 4, c. 70, s. 7, prohibits the appropriation of more than *twenty-four* days, exclusive of Sundays, after any Hilary, Trinity, and Michaelmas term, nor more than *six* days, exclusive of Sunday, after any Easter term, to be reckoned consecutively, immediately after such terms, to sittings in London and Middlesex, *for the trial of issues of fact* arising in any of the said Courts, with the exception of trials at bar, or particular days of trial appointed by consent to take place during a vacation, but not pending the twenty-four days, so that only *twenty-four days* can now, in any case be appropriated, in London and Middlesex, for trials after term, usually *twelve* for Middlesex and *twelve* for London.

Time for trans-  
acting business  
during the cir-  
cuits.

As regards the *Circuits*, certain days are usually appointed in anticipation for the circuit town of each county. And the 3 G. 4, c. 10, enacts, that when commissions shall not be opened and read at any place specified on the day named therein, the same may be opened and read on the following day, not being Sunday, or if a Sunday, then on the next succeeding day.(u) If the business on the civil side in one county be not finished before the commission day for the next county, the remaining causes cannot then be tried, but must be made remanets, and it is only at the last county town on the circuit that it is *certain* that all the business will be completed.

Enactment of 3

The last act tending to destroy the distinctions between

(t) See exceptions in 2 W. 4, c. 39, s. 11; 1 Arch. Pr. C. P. [16].

(u) See stat. 3 G. 4, c. 10, Chitty's Col. Stat. 1061.

terms and vacations, was the 3 & 4 W. 4, c. 67, s. 2, (passed 28th August, 1833,) whereby, after reciting that by the existing law and the practice of the Courts, actions may be brought, and issues may proceed to trial and final judgment, in vacation, notwithstanding the cause of action may have arisen subsequent to the then preceding term, *but that jury process and writs of execution are now by law tested in term time only*; therefore enacts that the writ of *venire facias juratores* may be tested on the day on which the same is actually issued, and may be made returnable *forthwith*, and that the writ of *distringas juratores*, or *habeas corpora juratorum*, may be tested in term or vacation, on any day subsequent to the teste of the *venire facias juratores*, and that *all writs of execution* may be tested on the day on which the same are issued, and shall be made returnable immediately after execution thereof; provided that when a trial at bar is had, the writ of *venire facias juratores* shall be made returnable as heretofore.

And the 2 W. 4, c. 39, s. 15, authorizes the Court, or a judge in vacation, to make orders for the sheriff's return of writs of *execution* and *mesne process* in the vacation, subject to an attachment in the next term. And that act, as well as the 3 & 4 W. 4, c. 67, s. 2, extends as well to judgments and proceedings that had *commenced before* the passing of those acts as since; and it is no excuse to a sheriff for not obeying any such order, that he could not open the treasury and file his return without paying an extra vacation fee.(x) But the circumstance of proceedings being now sustainable in the vacations, and even the abolition of the necessity for a rule to enter the issue, has hitherto been considered as not altering the previous practice and time of moving for a judgment in case of a nonsuit, though an alteration in that respect is in contemplation.(y)

As respects all acts that *must be transacted in banc*, the distinctions between term and vacation continues, and if a rule has not been determined upon in the term in which it was obtained, it must, on the motion of counsel, or by a distinct rule, be *enlarged* until the next term, or if not, it must, by a distinct motion, referring, nevertheless, to the prior affidavit and rule, be *revived* before its merits can be discussed.(z)

CHAP. III.  
OF TERMS AND  
VACATIONS,  
&c.

& 4 W. 4, c. 67, s. 2, that all jury process and writs of execution may be tested in vacation, and returnable immediately after the same have been executed.

A judge's order may be for return of all process in vacation.

Of the necessity for enlarging or reviving rules of one term until or in the next.

(x) *Res v. Sheriff of Surrey*, 3 Dowl. 184; *Williams v. Edwards*, id. 183.  
82.

(y) *Butterworth v. Crabtree*, 3 Dowl.

(z) *Smith v. Collier*, 3 Dowl. 100.

CHAP. III.  
OF TERMS AND  
VACATIONS,  
&c.

Terms and vacations how altered or affected by modern rules.

Many of the modern technical rules founded on 11 G. 4 and 1 W. 4, c. 70, s. 11, or the subsequent acts, also materially tend to put an end to the ancient distinctions between the terms and vacations, and the essoin days and the first day of full term. Formerly a declaration in ejectment must have been served *before the first essoin day* of each term to entitle the plaintiff to an appearance and plea of that term, but now the rule T. T. 1 W. 4, 1831, authorizes the service of such declaration before the first day in term; and by rule H. T. 2 W. 4, A.D. 1832, when a rule to return a writ expires in vacation, the sheriff is to file the writ at the expiration of such rule, or as soon after as the office shall be open.

The rule M. T. 3 W. 4, 1832, provides, that in case the time for pleading to any declaration or answering any pleading, shall not have expired before the 10th August in any year, the party called upon to plead, reply, &c. shall have the same number of days for that purpose after the 24th October then next, as if the declaration or preceding pleading had been delivered or filed on the 24th day of October, but in such cases it shall not be necessary to have a second rule to plead, &c. The object of this rule was to secure a *complete* and perfect vacation, holiday and state of repose, between the 10th August and 24th October, without the necessity for any part of that time being occupied by practitioners even in *preparing* for a renewal of active measures to commence immediately after the latter day, excepting as regards the entry of an appearance and putting in and perfecting bail.(a) But the following rule provides, that in case a judge should make an order in vacation for the return of any writ issued by authority of 2 W. 4, c. 39, or any writ of *capias ad satisfaciendum*, *feri facias*, or *elegit* on *any day* in vacation, and such order shall have been duly served but not obeyed, and the same shall be made a rule of Court in the next term, it shall not be necessary to serve such *rule* of Court, or make any fresh demand of performance thereon, but an attachment shall issue forthwith for disobedience of such order, *whether the thing required by such order shall or not have been done in the meantime.*"(b) Where a writ issued in vacation; and a declaration was delivered, and rule to plead given in the same vacation, but the plaintiff did not sign judgment until the ensuing term, it was held that it was not necessary to give a new rule to plead in that term.(c)

(a) *Ante*, 97.

(b) Rule M. T. 3 W. 4, r. 13, 1833.

(c) *Mould v. Murphy*, 1 Cramp. & M.

495; and *Fagg v. Borsley*, 6 Legal Observer, 478; *Lidd's Supp.* 1833, p. 127.



Lastly, The Rule 2 of H. T. 1834 as to *pleading*, puts an end to the necessity for entries of continuances by way of *imparlance*, *curia advisari vult*, *vicecomes non misit breve*, or otherwise, and directs that they *shall* not be made upon any record or roll whatever, or in the pleadings, except the *jurata ponitur in respectu*, which is to be retained; and rule 3 directs, that *all judgments*, whether interlocutory or final, shall be *entered of record* of the day of the month and year, whether in term or vacation, *when signed*, (usually identified as to time by *taxing* costs,) and shall not have relation to any other day, provided that it shall be competent for the Court to order a judgment to be entered *nunc pro tunc*.(c) This rule altered the antecedent legal fiction, that a judgment by bill related to the first day in full term,(d) and that a judgment by original related to the essoin day,(e) and has materially altered the practice in other respects; as, for instance, since that rule an affidavit, on which to obtain leave to enter up judgment on an old warrant of attorney, need not shew that the party was alive in *full term*.(f)

CHAP. III.  
OF TERMS AND  
VACATIONS,  
&c.

Rule 2, H. T.  
4 W. 4, A.D.  
1834.

It will thus be seen, that all or most of the *technical* distinctions between term and vacation, essoin days and general return days, or return days certain, are now annulled, as they affected most *personal* actions; but still whenever the *full Court* in *fact* interfered, as in giving judgment on argued demurrers, special cases, special verdicts, new trials, (except for mere irregularity,) motions for criminal informations, special rules, &c. then the proceeding can only take place during the terms, and not in vacation. And as the Uniformity of Process Act, 2 W. 4, c. 39, extends only to certain *personal* actions, such as *assumpsit*, *covenant*, *debt*, *detinue*, *case*, *trover*, and *trespass*, originally commenced in one of the superior Courts, and not to proceedings in *scire facias* (though in some respects a *personal* action,) nor to actions of *replevin*, which are removed from the County Court, nor to *real* or mixed actions, such as *dower*, *quare impedit* and *ejectment*,(g) it will still be necessary to keep in view the enactments of 11 Geo. 4 and 1 Wm. 4, c. 70, and 1 W. 4, c. 3, s. 1, 2, 3, as to general return days and other particular days in term, excepting in some instances relative to

The general result.

(c) *Bragner v. Langmead*, 7 T. R. 20; *Calvert v. Tomlin*, 5 Bing. 1; *Mara v. Quin*, 6 T. R. 6; *Lawrence v. Hodgson*, 1 Young & Jer. 368.

(d) *Gresnaway v. Fisher*, 7 B. & C. 436; *Haswell v. Thorogood*, *id.* 705.

(e) *Whitaker v. Whitaker*, 8 B. & C.

768; *Turner v. Davis*, 2 Saund. 5th ed. 148.

(f) *Cockman v. Hellyer*, 1 Bing. N.C. 1.

(g) *Doe d. Gillett v. Roe*, 4 Tyr. Rep. 649.

CHAP. III.  
OF TERMS AND  
VACATIONS,  
&c.

the action of ejectment, as in the rule of T. T. 1 W. 4, A. D. 1831, which authorizes the delivery of a declaration in ejectment at any time before the first day in full term, which previously must have been delivered before the essoin day. The consequence is, that a declaration in ejectment in the Exchequer is still to commence and conclude with the usual *quominus* clauses, because neither the statute for the uniformity of process in *personal* actions, nor the general rule of M. T. 3 W. 4, r. 15, prescribing the forms of commencing and concluding declarations in personal actions, extend to the action of ejectment; (h) and for the same reason it is not necessary to entitle a declaration in ejectment of a term, or of any particular day in a term, but it suffices to entitle it of any day, because the rule of H. T. 4 W. 4, r. 1, is confined to *personal* actions, and does not extend to actions of ejectment. (i)

What acts must  
still be trans-  
acted in term  
time.

We have necessarily, in examining the several branches of jurisdiction into which such Court has, for the despatch of business, been subdivided, considered in some degree the difference between the acts of the whole Court to be exercised only in term time, and those of a single judge sitting in the Practice Court or at chambers in term or vacation, and to those pages we must here refer. At *common law*, or at least without express enactment, neither the judges constituting the whole Court, nor any judge thereof, could do certain acts otherwise than during one of the four terms. Thus even bail could not justify *at chambers* during term time, excepting by consent; (j) and in *vacation* bail could not be justified at all without consent, so that if a party were imprisoned he could not be released until the next term before the passing of the 48 G. 3, c. 46, s. 6, and which only applied to *actual prisoners*, and not to parties at large; and consequently if a defendant's bail were going abroad in vacation time, he could not have them first justify in vacation before the 1 W. 4, c. 70, s. 12. So no rule could or can be discussed in vacation unless by consent. But now, *principally* under the statute of 2 W. 4, c. 39, s. 11, *all proceedings* in a cause, excepting those that must of necessity be decided upon *in banc* or in the *Practice Court*, may be taken and had in and during the vacation; and the expedients of sham pleading or other devices "to get over the term," as was the technical expression, have been defeated, excepting in a few instances of actions commenced towards the end of a

(h) *Dee d. Gillett v. Roe*, 4 Tyr. R. 649.

(j) *Hewitins v. Plomer and Hart*, 2 Bla.

(i) *Dos d. Ashman v. Roe*, 1 Bing. N. C. 253,

Rep. 1064; Tidd, 263.

term, and to be tried at the sittings in London and Middlesex, when the time in general properly allowed to a defendant to prepare his plea, and the time consumed before issue can be joined, and a proper notice of trial be given for the sittings in London or Middlesex after term, may delay a trial until in or after next term. But it can rarely occur even in the issuable terms, when the venue is laid in the *country*, that a defendant can by any pleading or device, however ingenious, prevent a trial at the next *immediate* assizes, except by *demurrer* precluding a trial; but upon which, unless it be well founded, judgment against the defendant will as of course be obtained in the next term. The recent acts, however, principally relate to certain proceedings in *personal* actions, and there are still many cases in which writs, as a *certiorari*, must be tested in *term*. (k)

2. Before these recent enactments and rules thereon, as recited in 2 Wm. 4, c. 39, sect. 11, no proceedings could be effectually had on any writ returnable within four days of the end of the term, until the beginning of the next term, (l) for in that case, if the defendant appeared and the plaintiff delivered his declaration, the defendant was not obliged to *plead* until the first four days of the next term, but was entitled, as of course, to an *imparlance*, a term designating a right upon which, in the older works on practice, much learning will be found. (m) So, if a writ were returnable in one term, and the declaration was not delivered before the *essoin* day of the next, the defendant might *imparle* or delay his plea until the third term, provided he perfected appearance or bail in the first term. (n) It will be observed that neither of the modern enactments mention *imparlances*; and therefore it was for some time supposed, and even decided by a judge at chambers, that there were cases in which the right to an *imparlance* may still continue. (o) Though it was at first supposed that as the acts were silent respecting *imparlances*, a defendant might still be entitled to an *imparlance*, where a plaintiff *declared in vacation*, notwithstanding this act; (o) yet it has since been determined

2. *Imparlances* in certain actions impliedly abolished.

(k) See 9 Legal Observer, 299.

(l) *Ante*, 95. The general rule of Mich. term, 1 W. 4, A.D. 1831, however, enabled a plaintiff to declare and insist on a plea of the same term upon any writ returnable any day of the term, provided the declaration was delivered on or before the last day of the term.

(m) Tidd, 465, 466, 467; Rule Trin.

term, 5 & 6 G. 2; Rule Mich. 10 G. 2, reg. 2; Rule Trin. 22 G. 3, in K. B.; Rule Hil. term, 35 G. 3, in C. P.; Rule M. T. 1 W. 4, A. D. 1830, Exchequer.

(n) Tidd, 466, 467.

(o) *Frean v. Chaplin*, 2 Dowl. 525, observed upon in *Wigley v. Tomlins*, 3 Dowl. 7; and see Tidd's Supp. A.D. 1833, p. 127.

CHAP. III.  
OF TERMS AND  
VACATIONS,  
&c.

in banc, after a conference with the judges of the three Courts, that giving a plaintiff an *absolute right to proceed in vacation* impliedly took away all right to an *imparlance*, which, if allowed, would annul such right. (q)

3. Of Sundays and other dies nonjuridici, and of holidays and hours of attendance.

3. At common law Sunday was always considered *dies non juridicus* as to process, though deeds and other acts not in the ordinary way of business may be executed on that day. But process by original, when a general return day fell on a Sunday, might be returnable *nominally* on that day. (r) But that practice is now prevented, and writs that have any return day, as a distringas and proceedings to outlawry, must now be returnable on a *day certain* in term time, not being Sunday. (s) At common law, if an act be stipulated to be or is to be done on a day of a month, which happens to fall on a Sunday, the party has the next following day to perform it; and the legislature and the Courts appear to have considered such allowance of the following day as proper. (t) But by the *mercantile* law and by statute, as regards bills of exchange or promissory notes, if payable on a Sunday, they become due the day before, though, if dishonoured, notice need not be given until the following Monday. (u) And if a letter giving notice of the dishonour be received on Sunday, it need not be opened till the Monday, and it is to be considered as only having been received on the latter day. (x)

The 20 Car. 2, c. 7, prohibiting secular affairs in general on a Sunday, and considered to be in affirmance of the common law, in sect. 6 enacts, (y) "that no person shall on *Sunday* serve or "execute, or cause to be served or executed, any writ, process, warrant, order, judgment, or decree, (except in cases "of treason, felony, or breach of the peace,) but that the service thereof on Sunday *shall be void* to all intents and purposes whatsoever; and the person so serving or executing "the same shall be liable at the suit of the party grieved, and "to answer damages to him for doing thereof, as if he had "done the same without any writ, process, warrant, order, "judgment, or decree at all." (z)

(q) *Nurse v. Geeting*, 3 Dowl. 157, 158; *Wigley v. Tomlins*, 3 Dowl. 7; and see 9 Legal Observer, p. 20 to 22, 226. But imparlances may in some actions for some purposes still continue, Tidd's Supp. 1833, p. 127.

(r) Tidd, 106.

(s) 1 W. 4, c. 3, s. 2; 2 W. 4, c. 39, s. 4, 5.

(t) See 11 G. 4 and 1 W. 4, c. 70, s. 6.

(u) 7 & 8 G. 4, c. 15; *Tassel v. Lewis*, Lord Raym. 743. The same law as to a Jewish festival, *Lindo v. Unsworth*, 2 Campb. 602.

(x) *Bray v. Hadwen*, 5 Maule & Selw. 68; *Wright v. Shawcross*, 2 Bar. & Ald. 501.

(y) Chitty's Summary, Pr. 18, 19, tenth line.

(z) See note on this act, Chitty's Col. Stat. 1039. There may be a reception

If process by original were returnable on a Sunday, it must have been executed before midnight of Saturday; (a) and a service of any process on a Sunday is so absolutely void that it cannot be made good by any waiver of the objection; (b) but if the defendant plead to a declaration, as that step excuses even the total want of process, it would equally waive an irregularity in the service. The statute, it will be observed, does not in express terms extend to pleadings or notices thereof, but nevertheless the service of a notice of declaration, (c) or delivery of pleadings, (d) service of notice of plea that had been filed on a Sunday, (e) or service of a copy of any rule, (f) or service on Sunday of a "countermand of notice of trial," (g) are bad; and the imperfection in the proceeding cannot be aided; (h) nor can judgment for want of a plea be signed on Sunday or any dies non. (i)

And as Sunday is not a proper day for making inquiries, it is not counted as one of the two days in a notice of justification of bail, (j) nor in a rule for judgment after verdict, (k) nor one of the four days during which a ca. sa., (l) or scire facias, (m) to fix bail must lie in the office. And yet Sunday, unless it be the last, is counted as one of the days in a notice to plead, and one of the four days in a rule to plead. (n)

Before the act 3 & 4 W. 4, c. 42, s. 43, which abolished the numerous holidays, and reduced the dies non holidays to Sundays, and Easter Monday and Tuesday, Christmas day, and the three following days, it was held that a dies non, un-

Of other dies non and holidays, and what abolished. (o)

after a negligent escape, though not after one that has been voluntary, 6 Mod. 231; *Atkinson v. Jameson*, 5 T. R. 25, nor after a release without searching, when there happens to be a detainer, or another writ in sheriff's office, *id. ib.* But there may be a retaking on a Sunday under an escape warrant, *Parker v. Moor*, 2 Salk. 626, or on Lord Chancellor's warrant or order of commitment for a contempt, 1 Atk. 55, and by bail above, 6 Mod. 231, though not by bail to the sheriff, *Brooks v. Warren*, 2 Black. R. 1273; nor on an attachment for non-performance of an award, 1 T. R. 265; nor on a justice's warrant for non-payment of a penalty on a conviction. *id. ibid.*; nor can a rule nisi for an attachment for non-payment of money be served on a Sunday, *M'Ilham v. Smith*, 8 T. R. 66.

(a) *Leveridge v. Plaistow*, 2 Hen. Bla. 29.

(b) *Taylor v. Phillips*, 13 East, 155; 8 East, 547.

(c) 1 H. Bla. 628.

(d) 1 H. Bla. 629; 8 T. R. 86.

(e) 8 East, 547.

(f) 8 T. R. 86; Tyr. 218, 481, 499.

(g) Tyr. 757.

(h) 1 H. Bla. 629; 13 East, 155; 8 East, 547.

(i) 9 Bar. & Cres. 243.

(j) Tidd, 260.

(k) Tidd, 903.

(l) 1 B. & Ald. 528; 6 M. & S. 133.

(m) *Semble*, 7 Bing. 109.

(n) 2 Salk. 624; 11 East, 272; so that supposing the four days were intended to allow time for preparing a plea, special pleaders are supposed to be less observant of the sabbath than the rest of mankind.

(o) For an account of the former different holidays, and when they were commanded or allowed to be kept on different days in the year, see Sellon's Prac. and Tidd's Prac. 9th edit. 55 to 58. And as to the remedies for refusing to transact business at any office, or demanding extra fees, Tidd, 55 to 58.

CHAP. III.  
OF TERMS AND  
VACATIONS,  
&c.

less a Sunday, was a day for acts that did not require to be, nor were supposed to be done in Court, as putting in bail; (*p*) and if the last of the four days to plead were a dies non, as the Purification, the defendant must, nevertheless, have pleaded on or before that day, and he had not another day. (*q*)

By the 3 & 4 W. 4, c. 42, s. 48, passed 14th August, 1833, reciting that the observance of *holidays* in the *Courts* of Common Law during term time, and in the *offices* belonging to the same, on the several days on which holidays were then kept, was very inconvenient, and tended to delay the administration of justice, therefore enacted, that none of the several days mentioned in 5 & 6 Ed. 6, c. 3, shall be observed or kept in the said *Courts*, or in the *offices* belonging thereto, except *Sundays*, the day of the Nativity of our Lord, and the three following days, and Monday and Tuesday in Easter week." Good Friday, though formerly a holiday, (*r*) is no longer so; Sundays and Christmas day, the three following days, and Easter Monday and Tuesday, being the only *general* holidays allowed in the above statute. But the general rule of Easter term, 2 W. 4, A. D. 1832, orders, that the days between Thursday next before, and the Wednesday next after Easter day shall not be reckoned or included in any rules or notices, or other proceedings, except notices of trials, and notices of inquiry in any of the Courts of Law at Westminster.

Hours of attendance at Seal Office and other offices.

The enjoined *hours* of attendance at the *Seal Office*, (being the office for sealing writs issued out of K. B. and C. P.) are from eleven in the morning till two in the afternoon, and five to seven in the evening, during each term, and for *ten* days after every issuable term, and one week after every other term, and from eleven in the morning till three in the afternoon at all other times. (*s*) The remedy for not opening the offices at the proper time, or for refusing to perform duty, is an action on the case, or a summary application to the Court. (*t*)

(*p*) 5 T. R. 176; T. 118.

(*q*) 2 Hen. Bla. 616; Tidd, 474.

(*r*) Tidd, 55.

(*s*) R. T. 1656, rag. 7, K. B. R. T. 9 W. 3, C. P.; Tidd, 54; Rule Trin. 54 G. 3, K. B.; 3 M. & S. 163; 5 Taunt. 702. But it will be observed that the 5 & 6 Ed. 6, c. 3, did not name Good Friday, so that the statute 3 & 4 W. 4, c. 12, s. 43, does not expressly prohibit the observance of that day as a holiday. The statute 7 & 8 G. 4, c. 15, declared Good Friday to be a dies non for business, so

that bills of exchange otherwise falling due on that day should become due on the preceding Thursday, though notice of dishonour need not be given until the Saturday. The anecdote of Dunning telling Lord Mansfield, when he declared he would try causes on Good Friday, that he would be the first judge who had transacted business on that day since Pontius Pilate, will be remembered.

(*t*) Tidd, 53; 7 T. R. 336; 7 Taunt. 182; 1 Hen. Bl. 105.

In the *Common Pleas* the hours of attendance at the Office of the Prothonotaries, No. 1, King's Bench Walk. Temple, of the Treasury Keeper at the Treasury, Westminster Hall, at the Warrant-of-Attorney Office, now at No. 1, New Court, are the same as at the Seal Office, viz. from eleven to two, and from five to seven during each term, and ten days after every issuable term, and one week after every other term; and from eleven to three at all other times. (u)

In the *Exchequer*, the rule of M. T. & W. 4, (x) requires the Exchequer Office of Pleas to be kept open for business *during term, and one week after every term*, (Sundays, Christmas-day, Good Friday, Easter Monday, Ascension day, and Midsummer day, and the days appointed for public feasts, thankgivings, or fasts excepted,) (y) from eleven o'clock in the morning till three o'clock in the afternoon, and from six till nine o'clock in the evening, *and at other times*, from eleven o'clock in the morning until four o'clock in the afternoon, the usual holidays excepted, when the said office is to be closed. (z) The distinction of Monday and Tuesday, not being days of business on the plea side, no longer prevails in the Exchequer. (a) *Wednesdays* in term time have been recently declared to be special paper days, excepting when the first and last of either terms. (b)

A "*year and a day*" is a period particularly recognized in the law as regards some proceedings on an action as well as otherwise. Thus, if a judgment in an action be reversed, a party, notwithstanding the lapse of time mentioned in a statute of limitations pending that action, may commence a fresh action within a year and a day after the day of such reversal. (c) The day was probably added by our ancestors to remove any doubt as to the completion of the year by inclusive or exclusive computation of the first or last day. (d) So, after a year and a day had elapsed from the day of signing a judgment, without any intervening writ of execution or other proceeding thereon, no writ of execution could afterwards be issued, and the only remedy was by action of debt on the judgment, until the 13 Edw. 1, c. 45, gave a writ of *scire facias* to revive the judg-

4. Year and a day, year and half year, &c. how construed, &c.

(u) Rule Trin. T. 54 G. 3, and 1 Hen. Bla. 105.

(x) This rule virtually annuls that of Mich. term, 1 W. 4; 1 Tyrw. R. 156; Jervis Rules 3.

(y) The statute 3 & 4 W. 4, c. 42, s. 43, abolishes all holidays excepting Sunday, Christmas-day, and three following days, and Easter Monday and Tuesday, ante, 105.

(z) In *Tate v. Badfield*, 3 Dowl. 219, it was considered that the *afternoon* in the Exchequer for the purpose of signing a judgment does not commence till three o'clock.

(a) Price Pr. 73.

(b) Price Pr. 329.

(c) 4 Bla. Com. 315, 335; *Ruddock's case*, 6 Coke, 25; 1 Lev. 310.

(d) Palmer's Pr. Lords, 175, note.

CHAP. III.  
OF TERMS AND  
VACATIONS,  
&c.

ment; and after judgment on *scire facias*, execution may be issued. (d) The year is to be computed from the day of signing the judgment, exclusive of that day, (e) and the words *infra annum*, in 13 Edw. 1, are to be reckoned by calendar months, and not by terms. (f) But by express agreement, as is usually the case when a warrant of attorney is executed as a collateral security, the necessity for a *scire facias* may be avoided. (g)

So by the general rule of Hil. T. 2 W. 4, 1832, rule 35, "a plaintiff shall be deemed out of Court unless he declare within one year after the process is returnable." But as writs of summons and *capias*, since the 2 W. 4, c. 39, have no return day, the year would probably be calculated to commence from the eighth day *inclusive* from the execution of the process, (h) or according to another author, within a year from the very day when the process was served or executed. (i) So, before the recent enactments, it was considered, that after four terms from the issuing the first writ, or rather *from the return day* of such writ, without any intervening proceeding thereon, or the like time had elapsed from the return day of a *pluries* or other continued process, there must have been an entirely fresh writ, and not mere continued process. (k)

*Six months*, we have seen, will sometimes be construed to mean *half a year*, and not merely six *lunar* months. (l) According to a French author, a quarter or half a year signifies three or six months. (m)

5. Month, how  
calculated.

5. A *month*, when applicable to the practice of the Court, or to *temporal* matters, or used in a statute, in general imports a *lunar* month of four weeks, or twenty-eight days; (n) but in ecclesiastical, maritime, or mercantile affairs, it imports a *calendar* month, even in a formal contract, (o) varying in the number of days according to the calendar. (p) It has been held, that a *calendar* month's notice of action, required by 24

(d) Bac. Ab. Execution, H.; Tidd, 1103.

(e) Barnes, 197; Tidd, 1103.

(f) 1 Stra. 301; 1 Chit. Rep. 669, a.

(g) 2 Bar. & Cres. 242; Tidd, 1104.

(h) 1 Archbold's Pr. by T. Chitty, 186, edit. 1834, p. 218.

(i) 1 Arch. Pr. C. P. [68].

(k) 3 Bar. & Ald. 271; Tidd, 147, 421.

(l) *The Bishop of Peterborough*, Cro. Jac. 167; *ante*, vol. i. 775; vol. ii. 69.

(m) 1 Pardessus, 354.

(n) *Ante*, vol. i. 775; vol. ii. 69, 149; 6 Term Rep. 224; *Creswell v. Harris*, 2 Sim. & Stu. 476.

(o) Willes, 588; 1 Maule & Sel. 111; 6 Maule & Sel. 227; *ante*, vol. i. 775.

(p) These may be kept in recollection by the doggerel verses:

"Thirty days hath September,  
April, June, and November;  
All the rest have thirty-one,  
Except February alone,  
Which claimeth just eight and a score,  
And every leap year one more."

It may appear ridiculous to refer to these, but great utility has been derived from assistance to the memory on the plan of Gray's *Ars Technica Memoria*.



G. 2, c. 44, to be given to a justice of the peace, *begins on the day the notice is served, inclusive* thereof; and that therefore if notice be served on the 28th of April, it expires on the 27th of May; (q) though it would seem on principle and the general rule of construction presently noticed, (especially as the statute in terms requires *at least* a calendar month's notice,) (r) the first day ought to be excluded, so that the party to whom the notice is addressed should, according to the expressed intention of the legislature, have the *full time* by days of twenty-four hours each. And it has been recently held, that the seven days allowed for making the oath and submitting to examination antecedent to an action against the hundred, are to be calculated *exclusive* of the day on which the damage was committed; (s) and in construing the 2 W. & M. sess. 1, c. 5, authorising a landlord to sell a distress "after such distress and notice as aforesaid, and expiration of the said *five days*," the day of making the distress is to be excluded, and after allowing the five following clear days, the sale should not be until the seventh day. (t)

6. Before the recent rule of Hil. T. 2 W. 4, c. 8, for regulating the *practice* in the three superior Courts of law, there was much contradiction and uncertainty when a statute or rule declared affirmatively that some notice or step should be taken, a month or other time, before an action should be commenced, whether the day on which the act took place, or the day of giving such notice or taking such step should be included or excluded in the calculation. In general the rule was, that the computation from an act done, must *include* the day on which it was done; (u) but that *from* the day of the date of the act, *excludes* the day. (x) A distinction has also been taken between cases where the injury or matter complained of was done *to the plaintiff himself* or in his presence, so that he must know it immediately, on the same day; and cases where the plaintiff was absent at the time, and might not hear of it till afterwards. In the first case, if he were required to give a notice, or commence his action within a specified time afterwards, then the

6. Day, when or not excluded, and time, how computed in general.

(q) *Ante*, vol. ii. 69; 3 T. R. 623; S. C. 2 Camp. 294.

(r) 4 Man. & Ry. 300, n. (b); 5 Bing. 339.

(s) *Pellaw v. Inhabitants of Worsford*, 9 Bar. & Cres. 134; 4 Man. & Ry. 130,

S. C.

(t) *Semble*, *Pitt v. Shew and others*, 4 B. & Ald. 208, and *ante*, vol. i. 663.

(u) 3 T. R. 623; 3 East, 407; Hob. 139; 4 Moore, 465.

(x) 2 Camp. 294.

CHAP. III.  
OF TERMS AND  
VACATIONS,  
&c.

The general  
rule Hil. T. 2  
W. 4, excluding  
first day and in-  
cluding the last.

day on which the injury or act was committed, was to be *included*, but in the latter case it was to be *excluded*; that distinction was first taken in equity, and was afterwards adopted in Courts of law. (y) Of late the general rule of construction seems to have been, to *exclude* the first day. (z)

Now as respects the *practice* of the superior Courts of law, it has been fixed by the general rule of all the Courts, Hil. T. 2 W. 4, reg. 8, (a) which ordered, that "in all cases in which any particular number of *days*, not being expressed to be clear days, is prescribed by the *rules* and *practice* of the Courts, the same shall be reckoned *exclusively* of the *first* day, and *inclusively* of the last day, unless the last day shall happen to fall on a Sunday, Christmas-day, Good Friday, (b) or a day appointed for a public fast or thanksgiving, in which case the time shall be reckoned *exclusively* of that day also." (δ)

7. Hour of the  
day.

Process serviceable may be served at any hour, even at midnight; (c) although a distress for rent must be made after sunrise and before sunset, so that the rent, if tendered, may be readily counted. (d) An arrest also may be made at any hour of the night, (e) though not on a Saturday night, at any instant after twelve o'clock. (f) With respect to other proceedings before the recent general rules, there were particular rules for each Court, prescribing ten o'clock at night in K. B., (g) and nine o'clock in C. P. (h) and Exchequer, (i) as the latest hours for serving rules, notices, &c. But now the General Rule, Hil. T. 1832, reg. 50, and which extends to all the Courts, orders that "*service of rules and orders, and notices, (j) made before nine at night, shall be deemed good, but not if made after that hour.*" Upon the above former rule in K. B., it was decided that a service after the fixed hour was wholly unavailing, and that although it was received and read, and returned on the next day, it was not good as a

(y) 15 Ves. 248; 9 B. & Cres. 134, 603; 3 Young & J. 1 and 16; 4 Man. & R. 300, b. As to omission, 3 Young & J. 80.

(z) *Id. ibid.*; 4 Man. & Ry. 300, b; 9 B. & Cres. 134, 603. It is so when time has been given for pleading, *Pepperell v. Barrell*, 4 Tyr. 811.

(a) See the rule, 8 Bing. 307, 308; and *post*, Appendix.

(b) By 3 & 4 W. 4, c. 42, s. 43, all other holidays are now repealed.

(c) 2 Chitty's Rep. 357; 1 Bing. 66; Tidd, 168, 499.

(d) *Leveridge v. Plakston*, 2 Hen. Bl. 29. We have seen what is night as re-

gards the offence of *Burglary*, *ante*, vol. i. 411. The act 9 G. 4, c. 69, s. 34, against night poaching, defines night to be between an hour after sunset and one hour before sunrise.

(e) 9 Coke, 66.

(f) *Supra*, n. (d).

(g) R. M. 41 G. 3, K. B.; 1 East, 132.

(h) R. E. 10 G. 2, C. P., 1 Bing. 66; 2 Taunt. 48.

(i) R. M. 1 W. 4.

(j) This extended to a notice of motion for judgment as in case of a nonsuit, when that notice was necessary, 2 Taunt. 48.

service on the latter. (k) And upon the rule of the Common Pleas, it was held that the delivery of a notice sealed up in a letter before nine o'clock in the evening, in the absence of the attorney to whom it was addressed, was no service but from the time when the letter was actually opened. (l)

In some cases, in order to secure an adequate number of hours, so as to enable the opponent to inquire, as in notices of the justification of bail served on one day, of the intention to justify bail on the morning of the next day but one after the receipt of such notice, it must be sworn that such notice was served *before eleven o'clock* on the day of the service, but which rule does not apply when there are *two clear days* intervening between the time of service and the time of justifying; (m) and where there is a rule or order for further time to justify, it suffices to serve the same before *three o'clock* of the afternoon of the day when it was made. (n)

In case of a *demand of plea, &c.*, which expires immediately after the expiration of *twenty-four hours by fractions*, from the exact time of the demand, it sometimes becomes material to ascertain the *precise instant* of the demand, (o) excepting in the Common Pleas, where the plaintiff cannot sign judgment for want of a plea, until the opening of the office in the afternoon, after the twenty-four hours. (p) So as a plea in bar may be delivered at any time before judgment has been actually signed, it sometimes becomes difficult, on contradictory affidavits, to ascertain the precise instant when the plea was delivered at the office of the plaintiff's attorney, and when the judgment was actually signed at the office. (p)

In other respects the hour of the day is not material, and although it is an ancient maxim that in law there is no fraction of a day, (q) yet that fiction and doctrine no longer prevail, when it becomes essential for the purposes of justice to ascertain the exact hour or minute; (r) and if a tender be made at any instant before a writ issues, although on the same day, it may be pleaded; (s) and if a sheriff actually seize the goods of

Fraction of a  
day.

(k) E. T. A. D. 1829, K. B., 2 Chit. R. 88; Tidd, 261.

(l) 3 Taunt. 234.

(m) Tidd, 26; and see post, Bail.

(n) Chitty's Summary, 94, 95.

(o) Tidd, 477.

(p) It would be advisable to provide against any such uncertainty, by a rule ordering that a plea, after the proper time, should be a nullity, or should not prevent the plaintiff from signing judgment, unless delivered before any clerk had left the office of the plaintiff's attor-

ney, for the purpose of signing judgment.

(q) 15 Ves. 257; Co. Lit. 135, 136; 9 East, 154; 4 T. R. 660; 11 East, 496; 3 Coke, 36 a.

(r) Per Lord Mansfield, 3 Barr. 1484; 9 East, 154; 3 Coke, 36.

(s) The facts were so specially pleaded, and the plea holden good in the King's Bench on demurrer; the plea stated that the writ was not issued until after eleven o'clock on a named day; and that the tender was made at an earlier hour, to wit, at nine o'clock in the morning,

CHAP. III.  
OF TERMS AND  
VACATIONS,  
&c.

a trader, under a writ of fieri facias, at any instant of the same day, but before an act of bankruptcy had been actually committed, the levy will be deemed complete and valid. (t)

8. *Instanter*.

8. The term *Instanter* means, it is said, that the act shall be done within twenty-four hours; (u) but a doubt has been suggested by whom the account of hours is to be kept, and whether the term *instanter*, as applied to the subject-matter, may not more properly be taken to mean "before the rising of the Court," when the act is to be done in Court; or "before the shutting of the office on the same night," when the act is to be done there. (x)

*Forthwith*.

The term "*Forthwith*," sometimes used, seems to import that the requisite act shall be performed as soon as by reasonable exertion, confined to that object, it might be; and which must consequently vary according to the circumstances of each particular case. (y)

*Peremptory*.

The term *peremptory* or *peremptorily* is not used to denote any definite measure of time, but is rather added to some other expression, the more emphatically to signify that the time is positively or *peremptorily* fixed, and not to be deviated from; as occurs in a *peremptory* undertaking to try a cause at the next assizes, &c. The term *peremptory* is also applied to rules not heard in the term when they stood for discussion, but which are enlarged to the next term, and are then set down in a paper called the *Peremptory Paper*, and usually apportioned to be heard on several consecutive days early in the next term.

*Reasonable time*.

*Reasonable time*. It has been sensibly observed, when remarking upon the twentieth General Rule of Hilary term, 4 W. 4, requiring a certain consent to be given *within forty-eight hours*, that the question of *reasonable time* must depend upon the character and importance of instruments required to be admitted, the number of parties interested, and the distance at which they may be situated from the person giving notice and requiring the admission; and it has been objected that in that case forty-eight hours would appear to be in most cases

and it was decided to have been well pleaded; and a case in Impey's Prac. K.B. 310, was cited, and overruled, MS.; and Chitty on Pleading, 5th ed. 1222.

(t) 8 Ves. 80; 4 Cambp. 197; 2 Bar. & Ald. 586.

(u) 1 Taunt. 343; Tidd, 567, 641, 674.

(x) Tidd, 567, 641; and see 6 East, 587.

(y) *Nicholls v. Chambers*, 4 Tyr. 837.

too short a period within which a party should be required to give his assent or dissent. (y)

CHAP. III.  
OF TERMS AND  
VACATIONS,  
&c.

By the rule Hilary term, 4 W. 4, 1834, rule 1, "*Every pleading*, as well as the declaration, shall be *entitled* of the "*day of the month and year* when the same was pleaded," and shall bear no other time or date; and every declaration and other pleading shall also be *entered on the record* (z) made up for trial, and on the judgment roll, under the date of the day of the month and year when the same respectively took place, and without reference to any other time or "date, unless otherwise specially ordered by the Court or a judge." And rule 3 orders "that all judgments, whether interlocutory or final, shall be entered of record of the day of the month and year, when in term or vacation, when signed, and shall not have relation to any other day;" but it is provided that it shall be "competent for the Court or a judge to order a judgment to be entered nunc pro tunc."

9. Time of declaring, pleading, &c. to be stated at the top of pleadings, &c.

But these rules apply only to *personal* actions commenced in the Superior Court, and do not extend to real or mixed actions, or scire facias, or replevin, removed from the County Court; and therefore we have seen that it has been recently decided that a declaration in ejectment need not be entitled of the day it was served or delivered. (a)

(y) Wordsworth's Rules of Court, 26, note (c); as to reasonable time in general, see the observations and authorities collected in Chitty on Bills, 8th edit. 366, 412, 420, 509, 800.

was pointed out and considered before the rules were promulgated; but it was not considered expedient to alter the same.

(z) The singularity in this expression

(a) *Doe d. Ashman v. Roe*, 1 Bing. N. C. 253.

## CHAPTER IV.

PRELIMINARY STEPS BEFORE COMMENCEMENT OF ACTION; AND  
PRINCIPALLY OF THE RETAINER OF AN ATTORNEY—IN-  
STRUCTIONS TO SUE—WHO TO BE PLAINTIFF OR DEFENDANT,  
TENDER OF INDEMNITY TO A RELUCTANT PLAINTIFF—FORM  
OF ACTION—OPINION OF COUNSEL—LETTER TO DEFENDANT  
—CONSIDERATION WHETHER OR NOT TO ARREST THE DE-  
FENDANT—AND SUBJECTS TO BE CONSIDERED BY AN ATTOR-  
NEY FOR A DEFENDANT.

<i>First, Of the Retainer of an Attorney</i> .....	114	bond .....	128
<i>Secondly, Instructions to sue or defend</i> .....	117	Form of letter to accompany same .....	<i>ib.</i>
<i>Thirdly, Circumstances for Attorney's consideration thereupon</i> ....	125	<i>Sixthly, Form of action to be observed</i> .....	130
<i>Fourthly, Who to be plaintiff or defendant</i> .....	<i>ib.</i>	<i>Seventhly, Of taking counsel's opinion</i> .....	131
<i>Fifthly, Of obtaining a person's authority to use his name as plaintiff or lessor of plaintiff</i> .....	127	<i>Eighthly, Of retaining counsel</i> ....	132
Tendering indemnity against costs .....	<i>ib.</i>	<i>Ninthly, Of the plaintiff's attorney's letter before action</i> .....	134
Suggested form of indemnity .....		Suggested form of letter .....	135
		<i>Tenthly, Whether or not to arrest the intended defendant</i> .....	137
		<i>Eleventhly, Subjects to be considered by an attorney for a defendant</i> ..	139

## CHAP. IV.

*First, Of the retainer of an attorney, and the expediency of its being in writing and explicit.*

THE party supposed to have been injured, having consulted an attorney of one of the superior Courts upon the right or expediency of enforcing payment of a debt or compensation for an injury, and it appearing at least *prima facie* that he has a sustainable claim, thereupon *retains*, i. e. *authorises*, such attorney, either generally or with certain limits, to proceed against the supposed wrong-doer. When there is mutual confidence this is rarely reduced into writing, although formerly there were enactments and rules imperatively requiring the attorney's retainer or warrant to prosecute or defend to be actually filed at an early stage of the cause, under a penalty of 10*l.* for the omission. (a) But these in practice have long ceased to be filed, (b) and after verdict the want of them has been aided by statute, and after judgment by default and error brought they are allowed to be filed at any time so as to support the proceedings; (c) and now by rule Hil. T. 4 W. 4, A. D. 1834, rule 4, "no *entry* shall be made on record of any warrants of attorney to sue or defend." And although the 25 G. 3, c. 80,

(a) 4 Ann. c. 16.  
(b) Sel. Prac. 18; Tidd, 92.

(c) 32 Hen. 8, c. 30; 18 Eliz. c. 14;  
1 Wils. 85.

CHAP. IV.  
RETAINER.

(enacted merely for revenue purposes and in order the better to secure the payment of the stamp duty,) required the attorney for plaintiff or the defendant to deliver to a proper officer a stamped memorandum of the warrant to sue or defend, under a penalty of 5*l.*, yet the omission did not affect the validity of the proceedings, and as the 5 G. 4, c. 41, repealed the stamp duties on law proceedings, the 25 G. 3, c. 80, as far as regards even such memorandum, was impliedly repealed. (*d*)

But we have seen that it has been strongly urged by the highest authorities, as well at law as in equity, that it is not only *expedient* but the *duty* of every attorney and solicitor to obtain an explicit *written retainer* signed by the client, (*e*) and it is recommended that it should also be witnessed by one or more of the client's friends, so as to avoid the possibility of insinuation that it was obtained by contrivance: and when there are to be several plaintiffs it should be signed by *all* and not by one party for himself and others, especially if they be trustees or assignees of a bankrupt or insolvent, and it should explicitly state whether or not it is to give a general or a qualified authority. For want of these precautions, where there are several parties (especially when assignees of a bankrupt), one of them may insist, and frequently with effect, that he never authorized an action, and thereby defeat the attorney's claim upon him for costs; (*f*) whilst another client will swear that he merely authorized the writing a letter for a debt or a writ without further proceeding. (*g*) The true reason why some

(*d*) And see Tidd, 96; Price, Pr. Ex. 34; Sellon's Pr. 19.

(*e*) *Ante*, vol. ii. part 3, p. 18 to 21, and Price's Prac. of all the Courts, 9 and 10.

(*f*) In a recent case, where a very respectable solicitor, retained by all the assignees as attorney to prosecute a trial, by the express authority of one of the assignees and with the seeming concurrence of the other assignees prosecuted several actions for debts to the estate and obtained verdicts, but the defendants did not pay; the master of K. B. on the solicitor's bill of costs having been referred to him, decided against the claim on the other assignees for want of proof of an *express* authority to institute the actions.

(*g*) As the bankrupt act, 6 G. 4, c. 10, s. 88, 89, implies the necessity for a meeting of creditors in some cases to authorize a suit, an attorney in such a case must take care to observe the requisites of the act; for though no ground of demurrer in equity, 3 Young & J. 378, yet the want of consent of requisite number of creditors

might be pleaded, 2 Young & J. 475. So the insolvent act, 7 G. 4, c. 57, s. 24, in some cases requires a meeting and consent of a majority of creditors to an action, 3 Bing. 303, 370; 10 Moore, 7. In these and other cases, if an attorney neglect to take such measures as are essential to secure a proper authority to proceed, his own remedy for his bill of costs may be lost or prejudiced. So where several persons, not in partnership, concur in employing an attorney in any undertaking, as to obtain or oppose a bill in parliament, it is advisable for the attorney to obtain such a retainer as shall make his remedy clear against all the employers jointly, or each separately; and providing also that in case any one or more of his employers should not pay his quota, then the others shall separately pay his proportion of the deficiency. And if an attorney be himself a subscriber he should obtain an express engagement to prevent the necessity for resorting to a Court of Equity, as in 1 Bar. & Cres. 74; 1 Chitty on Pleading, 46.

**CHAP. IV.**  
**RETAINER.**

inferior practitioners do not require any written retainer is the very reason why the law ought to *enforce* the actual signature of a formal retainer and production of it at some public office, viz. that if the clients were required to sign the same they would frequently pause and refuse to sign, or at least much limit the authority, for fear of being involved hastily in expensive litigation, whereby the authority of such practitioners would be to them inconveniently controlled. (*h*) It has however been recently decided that the circumstance of a plaintiff in an action not having authorized the same is no answer to a motion for judgment as in case of a nonsuit, but that the plaintiff's remedy is against the attorney who erroneously assumed authority, though the Court under circumstances enlarged the rule, to give the plaintiff time to find the attorney, and at the same time granted a rule to shew cause why such attorney should not pay the defendant's costs instead of himself. (*i*) A general retainer to *sue* does not authorize an attorney to oppose the defendant's discharge under an insolvent act. (*k*) The authority to sue must be disputed in the first instance. (*l*)

In the Ecclesiastical Courts the appointment of a proctor must be under seal and duly attested, an excellent precautionary measure. But in the superior Courts of Law no precise words are essential in a retainer to sue; though if the client resolve to *qualify the authority* then he must take care that proper words for that purpose be introduced; as limiting the retainer to writing a letter, or to writing a letter and merely issuing a writ, or conditioned that he shall have notice and be consulted as to further proceedings, especially before notice of trial shall be given, and if so desired restraining any summons or motion for irregularity unless essential to the result of the cause on the merits. The usual authority is in the form in the note. (*m*) In taxing costs formerly a fee was allowed for the

(*h*) See Lord Tenterden's observations in *Owen v. Ord*, 3 Car. & P. 549, and *Anderson v. Watson*, *id.* 214; *Dupon v. Keeley*, 4 Car. & P. 102; *Gill v. Lougher*, 1 Tyr. Rep. 121.

(*i*) *Mundry v. Newman*, 1 Cr. M. & R. 402, and see other cases, Harrison's Index, tit. Attorney, V.

(*k*) *Drake v. Lewin*, 4 Tyr. 730.

(*l*) *Hammond v. Thorpe*, 4 Tyr. 838.

Form of general retainer of an attorney to sue.

(*m*) I, A. B., of No. —, in — Street, in the parish of —, in the county of —, linendraper, do hereby retain Mr. E. F., of —, as my attorney to [commence and prosecute an action in the Court of —, at Westminster, against C. D. now residing at No. — in — Street, in the parish of —, in the county of —, hatter, and G. H. of, &c., and I. K. of, &c., or one or more of them, as may be advisable, for the recovery of the sum of £— and interest thereon, which I claim to be due from them to me, as appears by the annexed particulars of instructions to you.] Dated this — day of —, A. D. 1835.

Signature, A. B.

Witness to the signature of the }  
said A. B. in my presence, }  
Y. Z. of, &c.



retainer of an attorney to sue, but since the stamp duty on the warrant has been repealed, no retainer fee is allowed. It would be well, however, to require a written retainer to be filed before issuing any writ, and to allow for the same a moderate fee, which would ensure compliance with the recommended practice in all cases of having *written* retainers.

It has been observed, that as the first general rule of Hil. T. 2 W. 4, orders that warrants of attorney to prosecute or defend shall *not be entered on distinct rolls*, but on the top of the Issue Rolls, and the fourth general rule of Hil. T. 4 W. 4, orders that *no entry* shall be made *on record* of any warrants of attorney to sue or defend, and the want of any warrant of attorney is aided by verdict by statutes 32 Hen. 8, c. 30, s. 1, and 18 Eliz. c. 14, s. 1, that in the King's Bench and Exchequer no difficulty can arise in respect of the want of any such warrants, yet that in the Common Pleas the officers of that Court are still entitled to insist upon the warrants being *filed* at the warrant of attorney office, and that if not delivered they might refuse to take the next step in the cause, and the master will still allow the *costs of filing* the warrants. (*l*)

In the case of an *infant* plaintiff, his action may be commenced and prosecuted in his name until immediately before declaration without any retainer or appointment of an attorney; but before declaration a prochein ami or guardian must be appointed to take care of the further conduct of the action. (*m*) The second general rule of Hil. T. 2 W. 4. orders that no special admission of prochein ami or guardian to prosecute or defend for an infant shall be deemed an authority to prosecute or defend in any but the particular action or actions specified.

2. With respect to *Instructions to sue*, much more attention and care to obtain full and accurate information, not only regarding the *right* and the *probable defence* as the *evidence*, should be observed *in the first instance* than is usual, especially when the cause of action or defence has arisen at a distance in the country, when it might occasion prejudicial delay at a subsequent stage to have to wait for information that should have been communicated before the commencement of proceedings, and not unfrequently to begin *de novo*; for it will be found that if the principal attorney in the country and his agent in London be very fully informed at *the earliest stage* of all the facts applicable to

*Secondly, How to obtain proper instructions to sue or defend.*

(*l*) 9 Legal Observer, 22, 23.

(*m*) 2 Inst. 261; *Claridge v. Crawford*,

1 Dowl. & Ry. 13; *Bird v. Pegg*, 5 Bar. & Ald. 418.

CHAP. IV.  
INSTRUCTIONS  
TO SUE, &c.

the case, whether of the intended plaintiff or defendant, much subsequent trouble and many errors will be avoided, and much time saved, which is frequently lost by the necessity for the London agent writing to the country attorney for *further information* at each successive stage, all which might with very little trouble at the *first interview* with the client, and certainly no increase of expense, have been obtained and forwarded in the first instance. Nor is this a mere theoretical suggestion of convenience, for it has been recently decided by very high authority, that it is *the professional duty of an attorney to adopt this line of conduct*, and it is moreover his duty to ascertain that the *evidence will support the plaintiff's case before he commences an action*; (n) and where an attorney commenced an action in the name of an *executor* without having first ascertained the *evidence* even to prove the defendant's handwriting to a promissory note, the Court made the plaintiff pay the costs as in case of a nonsuit, although in general an executor, when plaintiff, is not to be subjected to costs. (n) It will moreover frequently occur that if a *minute inquiry* into the facts and evidence be made in the first instance, before the defendant has even heard of any intended litigation, the truth will be better elicited than if the investigation were delayed until after the defendant had cautioned neighbours and witnesses from making any communications that might be adverse to his interests. And in a recent case, where an attorney brought on to trial an action for verbal slander, without first ascertaining from the *witnesses* the exact slanderous words as uttered, and was obliged, on account of a variance in those words, to withdraw the record, it was considered that such negligence precluded him from suing for his professional charges. (o)

Instructions to  
sue.

As certain rules of Court and the statute for uniformity of process, 2 W. 4, c. 39, sometimes require the *addition of residence and degree* or occupation of the plaintiff and defendant

(n) *Wilkinson v. Edwards*, 1 Bing. N. C. 301; 3 Dowl. 137, S. C. *Griffith v. Pointer*, 2 Nev. & Man. 675; *Pickup v. Wharton*, 4 Tyr. 224. In *Southgate, executor, v. Crowley*, 31 January, 1835, the Court of Common Pleas, *dissentiente Vaughan, J.*, decided that a plaintiff executor must pay costs, he having prosecuted to trial an action for the whole of a *prima facie* claim of 900*l.* for the hire of horses and carts supplied by the testator, after the defendant had assured the plaintiff that the real claim was only 535*l.* and had paid that sum into Court; the majority of the Court, considering that it

was incumbent on the plaintiff's attorney, after receiving such information, to make further inquiries into the facts and evidence and not to proceed unless the same would certainly entitle the plaintiff to a verdict.

(o) Although according to the Scotch law intercourse with witnesses is forbidden to a greater extent than in England, yet unquestionably the legal and prudent course is to request the intended witnesses, before the commencement of an action of slander, to write down the whole of the slanderous conversation in the very words.

as well as the intended *form of action* to be inserted or indorsed even in serviceable process, or in an affidavit of debt, or in an affidavit subsequently to be made in the cause, and also when process is issued for a *debt*, that the amount of the debt be indorsed thereon; it is always advisable for an attorney, in the first instance, immediately upon being retained, to obtain very *full instructions* to sue, and for which a fee of 6s. 8d. (or 3s. 4d. when the debt does not exceed 20l.) is allowed on taxing costs, and which charge usually constitutes one of the earliest items in a bill of costs; (p) but that fee is frequently very inadequate, and should be at least tripled, if the full instructions be obtained as presently suggested. To avoid loss of time that might be occasioned in afterwards making enquiry into facts, it is advisable in the first interview with the client to make very full inquiries into all circumstances connected with the case, and to require such client to answer the same, and to take a minute of the result. The subscribed form may assist as an outline of the proper inquiries, and it may be expedient in the first instance to transmit a copy of the questions and answers, with the directions to issue a writ, to the London agent, because such agent, from time to time referring to them, will be enabled immediately to decide upon the *form of action* to be stated in the writ as well as the amount of the *debt to be indorsed*, when at present, for want of such instructions, it frequently happens that he is obliged to write back into the country for fuller instructions, or to avoid delay, is compelled to guess the form of action to be inserted in the writ, and afterwards, when the full instructions for declaration arrive, it very frequently becomes necessary to abandon such process and incur the expense and delay of a fresh writ. (q)

All such preliminary inquiries and answers are calculated to anticipate and avoid the frequent errors and even nonsuits that arise from the want of earlier examination into the circumstances of each case. These instructions being the basis of the action require much more care than is usually evinced in obtaining them. It is even further recommended that in general, and especially if the client be not a man of business or of known accuracy, *one or more of the principal witnesses*, who will afterwards prove the case on the trial, be examined by an

(p) *Morrison v. Simmens*, 1 Bar. & Adol. 559.

(q) It is even submitted that it would be well to have in every country attorney's office printed forms of questions to the effect suggested in the form post, 120, shewing the questions in one column with blanks

left in the opposite column for the client deliberately to write his answers, and to assist the client in so doing, the answers given in the form post, 120, might be shewn to him as a specimen of the manner in which he is in his particular case to write his answers.

CHAP. IV.  
INSTRUCTIONS  
TO SUE, &c.

experienced attorney, and not merely by an inexperienced clerk; (r) for it frequently occurs that very small circumstances vary the form of action, and that a mere cursory inquiry would mislead. Thus suppose a client should inform an attorney that a neighbour has broken his fence, filled up his ditch, and traversed his field with waggons; if the client were himself in possession, then the form of the writ and subsequent declaration should be "in an action of *trespass*," but if on further inquiry it should appear that the close at the time of the injury was in possession of the client's tenant under a lease or from year to year, then the form should be, "in an action *on the case*," viz., for the injury to the client's *reversionary* interest, by destroying the hedge and ditch, and not a *trespass* or *direct* and *immediate* injury to his *own* possession. The instructions should also be so full as at all events to enable the agent in town to fill up in the *writ* the *names*, *additions* and *residences* of the plaintiff and defendant, and all other requisites, and also serve as instructions for the declaration, replication, &c.

Accuracy in the preliminary instructions is so important, that it may be expedient, as a general rule, in all cases to state in print or writing *all the general questions* that usually arise, and to introduce in *writing* all other *particular questions* that may be applicable to each case. The questions should be stated in one column, and the client should then be required to write his answers to each in another opposite column, or if too voluminous to be conveniently there introduced, then on a different paper, but in the same order as the questions; and afterwards the principal attorney himself, or a very experienced and intelligent clerk, should go over the whole and examine the client, and even the principal witnesses, upon each answer, so as to secure accuracy; and the form might be to the subscribed effect. (s)

(r) According to *Atkinson v. Edwards*, of an attorney to ascertain the evidence in 1 Bing. N. C. 301, it seems the duty the first instance, and see *ante*, 118, n. (n).

(s) FORM OF INSTRUCTIONS TO SUE.

Form of instructions to sue.	Instructions and Questions to the Client.	His Answers.
	1. What are the full Christian or first name, and surname of the proposed plaintiff?	1. John Thomas Atkyns.
	2. His exact present residence, viz. hamlet, street, number of his house, parish, and county?	2. No number, but about the middle on west side of High-street, Maidstone, county Kent.
	3. His addition or degree, viz. rank, trade, occupation or profession?	3. Linendraper, haberdasher and stationer.
	4. His age?	4. Age 34 on — day of — last.

The *defendant's attorney* should in like manner, at the earliest interview with his client, and even before the commencement of

CHAP. VI.  
INSTRUCTIONS  
TO SUE, &c.

A *defendant's*  
instructions to  
his attorney for  
his *defence*.

*Instructions and Questions to the Client.*

*His Answers.*

5. In what character or right is he to sue?\*

5. In his own right, (or "as executor of L. M.")

6. Had he any partner, joint-tenant, tenant in common, parcener, co-executor, or co-assignee, as respects the present claim, and who? If yes, state as above the particulars of names, addition and age as to such other persons? If there was a partner, &c. who is dead, state his name and when he died?

6. As surviving partner of James Atkins, who died on 3d July, 1831, as to £37, and also in his own right as to subsequent items, amounting to £49.

7. Full Christian and surname of proposed defendant, or if the full name cannot be ascertained, state what diligent inquiries of relatives, friends and servants to ascertain the name have been made; and if action be on a *written* instrument signed by defendant, deliver to your attorney an exact copy and a facsimile of signature and attestation.

7. Defendant signs his name J. Morris; I have myself and my journeyman also has made numerous inquiries for the full name without effect, and Morris told the latter that he would not let him know, and I might blunder on as I pleased.

8. The place and county of the residence or supposed residence of the proposed defendant, or if several of them, also the exact addition of rank, trade, occupation or profession, or other best description of each, and on what days and hours, and at what place in what county he is or they are most likely to be met with to arrest or serve with process?

8. Resides at a corner house in Market-place, Tenterden, county Kent, and is a shoemaker; he is usually at home from one to two o'clock in the afternoon at dinner, and all the day on Tuesdays, which is market-day there.

9. State the age of proposed defendant or defendants, or at least whether of age?

9. Of full age on the — day of —, A.D. —.

10. State in what character is the proposed defendant to be sued, that is, whether on his own liability, or as executor, assignee, heir, &c. of another, and of whom?\*

10. On his own liability as purchaser of goods.

11. State fully the ground of complaint or cause of action. If a *debt*, produce, and to avoid loss of original, immediately have copies made and delivered to your attorney of every account, (comparing each item with dates in the margin,) bills of exchange, promissory notes, contract, lease, &c., and state the balance due to you; and the amount of the stamp on each instrument?

11. Debt.—Balance £43, due on a current account for linen drapery and other goods, as appears from the bill or account annexed, partly due to plaintiff as surviving partner, and the rest in plaintiff's own right; and also on defendant's acceptance for £30, a copy whereof is annexed. The stamp is a 3s. 6d. bill stamp.

12. If the cause of action be a *trespass* or other injury, state the particulars. If to land, were you alone the owner, or who else? and in what character, whether as joint-tenant, tenant in common, or parcener? Were you alone in possession, or was the land injured in the posses-

12. The answer to this question may be as in the instructions, p. 123, in note. It is necessary in declaration to state name or abuttal, &c. of land injured. See rule H. T. 1834.

\* Although it has been held in K. B. and Exchequer that on *general* process the plaintiff may *declare* in *auter droit*, 1 Barn. & Adol. 19, yet as the practice is at least doubtful in the Court of Com-

mon Pleas, see *post*, *process*, it may be advisable to insert the particular character in the affidavit to hold to bail, writ and declaration.

CHAP. IV.  
INSTRUCTIONS  
TO SUE, &c.

an action, make all possible inquiries that may assist either in settling or staying the action at the least expense, or in defend-

*Instructions and Questions to the Client.*

sion of your tenant, and of what Christian or surname? Give a rough sketch of the places where the injuries were committed, the name of the field and the surrounding fields, highways and lanes, and shew the northern and southern parts of the former by writing close to the same, north, south, &c., and otherwise shewing the abutments of your close.

13. What is the expected defence or excuse for nonpayment of the debt, or for committing the injury? Is there any and what pretence for such defence or excuse? If it be a set-off, have you so carefully examined the accounts on both sides as to be able deliberately to swear to any and what balance at least being due to you? and to what extent will any witnesses, naming them fully by Christian and surname, prove the same, and state the extent of the evidence of each.

14. Do you wish to have defendant arrested, or only served with process? If to arrest him why? have you any and what reason to suspect that defendant will abscond before payment? If defendant be arrested he will then probably defend the action vexatiously; and if you should not recover so much as the debt sworn to, you may be indicted for perjury, and sued for a malicious arrest, or the Court may deprive you of costs. On the other hand, if you do not arrest him, if defendant should leave the country before you obtain payment, you can have no effectual process against defendant's person.

15. In what county would you wish to try the action, on account of the residence of witnesses or otherwise, and why? If the action be for an injury to land or fixed property, the trial must, unless under special circumstances, be where it lies.

16. Do you wish to have the opinion of counsel on your case, or the probable defence, and would you prefer any particular counsel, and whom?

17. In which of the three superior Courts at Westminster do you wish to proceed, either with reference to the Chief Justice usually presiding in each, or in order to retain a particular counsel practising principally in one Court?

18. Do you wish to secure any particular counsel to conduct your action on or before the trial, by retaining him, and whom?

19. State the Christian and surname, residence, station in life, age and connection, if any, with yourself, of all your witnesses, and if your claim is for parcels of goods ordered, sold or delivered at different times, state on the left side of each item the names of such clerks and servants or porters, who can prove the defendant's verbal or written orders, the identity, value, packing and direction of each parcel, and the delivery at the proper carrier's office, and who will prove defendant's hand-

*His Answers.*

13. Defence as to a part infancy, and the residue, overcharges and payments. Plaintiff's answer is, defendant's letter promising payment after he was of age, (a copy of which letter is annexed,) and that the charges are fair; and plaintiff disputes defendant's pretended payments.

14. I can safely swear to a debt of £35, viz. £30 on bill, and the rest for goods sold, and resolve to have defendant arrested.

15. Action to be tried in Kent.

16. Not necessary, unless you find any difficulty as to the terms of defendant's letter promising to pay, or other ground.

17. I leave the Court to yourself.

18. I leave the retainer of counsel to yourself.

19. I have complied with your request; and annexed is a paper stating the full particulars of the evidence on which I am certain I may rely.

ing it with success, ascertaining as well all the facts as the evidence in proof of them, and how each particular witness can be relied upon. In cases, when proper, he should suggest when and how a judicious *apology*, (*t*) or a *tender*, (*u*) or *request*, (*x*) may be made, or state to the defendant his right not to be taken to prison until twenty-four hours after arrest; and within what time after having been served with a writ, or arrested, the defendant may pay the debt and costs indorsed, so as to

**CHAP. IV.**  
**INSTRUCTIONS**  
**TO JURY, &c.**

*Instructions and Questions to the Client.*

writing to letters, bills of exchange, &c. If any doubt should arise as to the proofs being sufficient to sustain the claim to the amount proposed to be sworn to, then it will be hazardous to arrest, or you should swear to a smaller debt accordingly.

20. State fully any matter occurring to you to be material either as respects your claim, or the defence, or the witnesses, or evidence.

*His Answers.*

20. I have made a concise statement on the annexed paper.

The following form of instructions in an action of trespass may also perhaps further illustrate.

INSTRUCTIONS TO JURY.

In the Court of —.

Between { A. B.  
and  
C. D.

Form of instructions to sue in an action of trespass for injury to land.

The plaintiff is a farmer and freeholder, and resides at —, in the parish of —, county of —, occupying his own freehold farm there, and no other person is or has been interested therein.

The defendant is also a farmer, occupying as tenant a farm, one close of which adjoins that of plaintiff.

The cause of action is, that defendant on the — day of —, A.D. —, with several labourers threw down a bank and quickset hedge at the top, and filled up a ditch respectively about thirty rods in length, and the ditch about four feet deep and six broad, and belonging to plaintiff's close or field, part of his said farm; and on the same day and several successive days defendant's servants entered with waggons and crossed plaintiff's said close, and proceeded to a gate adjoining an highway on the south, and forced open the same, and thence proceeded along such highway, and thereby several of the plaintiff's cattle escaped from his said close into said highway, and plaintiff had great difficulty in retaking and driving them back. The defendant has no pretence for claiming a way there. The plaintiff's close is called "Highlands," and abuts towards the north on a close in defendant's occupation, towards the south on the said highway, and towards the east and west on other closes in possession of the plaintiff; and below is a rough sketch of the several closes and highway, and of the part of the hedge, fence and ditch destroyed by the defendant, and the dotted lines describe the track in which the defendant's waggons traversed.

The expenses to make good the fence and ditch, and other expenses and damages amount to about £4 : 17s.

John Atkins, of —, farmer, and Thomas Fellows, of —, labourer, working on the farm of said John Atkins, know all the local situations and abutments, and can prove the trespasses and are disposed to speak the truth, (or, "but are adverse to the plaintiff, he having warned said John Atkins off his land, and prosecuted said Thomas Fellows for poaching.")

The above statement is correct,

Signed A. B.

John Atkins,  
Thomas Fellows, his mark.—

(t) *Ante*, vol. ii. 506 to 510.

(u) *Ante*, vol. ii. 506, 507, *Finch v.*

*Brooke*, 1 Bing. N.C. 267, 258.

(x) *Ante*, vol. ii. 497, 498.

**CHAP. IV.**  
**INSTRUCTIONS**  
**TO SUE, &c.**

avoid further expense, (y) or may deposit the sum for which he may be arrested, with £10 to the sheriff in lieu of giving a bail bond, (z) or may be ready with two persons who have sufficient property within the county to become bail; or at least persons of such known property as probably not to be objected to by any officer. (a) These and numerous other questions, calculated to elicit necessary or useful information essential for the due conduct of any defence, may be stated in writing in the same form as instructions to sue, and to the effect suggested in the subscribed form. (b)

(y) Rule Mich. T. 3 W. 4, referring to rule Hil. T. 2 W. 4.

(z) 43 G. 3, c. 46.

(a) 23 Hen. 6, c. 9.

(b) *Suggested questions to obtain instructions for defence.*

*Suggested questions in order to obtain proper instructions for a defence.*

1st. Do you expect to be arrested for any and what sum of money, or only to be served with process, and for what cause?

2. Do you admit any part of the plaintiff's claim? Are you prepared immediately to TENDER that sum, and if so, immediately make a tender as directed, ante, vol. ii. 506 to 510, and actually produce and shew the exact amount, *Finch v. Brook*, 1 Bing. N. C. 257, 258, or afford me the means and instructions for so doing?

3. Do you dispute the claim, and if so, are you ready with the amount that will be sworn to, in cash or bank notes, and with £10, so as to keep the same at all times about your person whenever you may happen to be arrested, ready to be instantly deposited with the sheriff, or other authorized officer, in lieu of a bail bond? or are you ready to name two persons as your bail to the sheriff, who have sufficient property within the county where you expect to be arrested, and who will be known to the under-sheriff or officer as sufficient, so as not to be objected to, or occasion delay? If you prefer giving a bail-bond, then immediately obtain the consent in writing of such two persons to become bail, and engage to be at home ready to execute a bail-bond immediately on your arrest, so that you may on your arrest satisfy the officer of your being ready to execute a sufficient bail-bond; or which will be preferable, authorize me to inform the officer in your neighbourhood, who will probably arrest you, that I will engage to deliver to him a sufficient bail-bond, and a proper fee, if he will forbear to put you to inconvenience by actual arrest. If the defendant's attorney have confidence in his client, and is not, as frequently the case, prohibited by his articles of copartnership with another attorney not to give undertakings, he will

in general oblige such client by offering to wait on the plaintiff's attorney, and give his own undertaking to perfect bail above, which avoids much annoyance and extra expense. Although in strictness the officer has only a right to receive a fee of 4d. for the arrest, under 23 Hen. 6, it is usual to pay him one guinea, and a smaller sum, as five shillings, for his assistant, and even more to the principal officer for every second hundred pounds, and it is advisable to pay that sum, sanctioned by usage, or the defendant may experience incivility, if not personal inconvenience, and annoyance and distress may be occasioned to himself and family.

4. State the proper Christian and surname and addition of abode of the plaintiff and defendant, and ages of both, so as to enable defendant's attorney to take advantage of any defect in the affidavit or writ, &c. and prepare in some respects for further proceedings in the cause.

5. State all the particulars of the supposed claim of the plaintiff, by what witnesses you expect he will attempt to prove the same, and the relationship, interest, and character of each witness accurately.

6. Supposing it should be necessary to put in bail to the action, and who must swear to their property, state their names and addition, and particulars of their property, and whether they have ever before been rejected as bail, and whether they have consented to become bail for you, and if not, then immediately apply to them and obtain their consents in writing to become such bail, and deliver to me such consents. And be certain that after having become bail, they will not at any time suddenly take alarm, and imprison and render you. And also well consider whether or not either of such persons could on the trial give material evidence in support of your defence, for if they could, then it would become necessary to change such bail, and obtain others in lieu; and to avoid that trouble and expense the defendant had better procure other bail in the first instance.

7. State all the circumstances, if any, in respect of which you think and can



3. A skilful attorney having, on behalf of an intended *plaintiff*, obtained answers to all appropriate questions, and which answers will constitute his *general instructions* to sue, will thereupon, before he has any communication with the proposed defendant, and certainly before he prepares any affidavit of debt, or issues any process, *well consider* the *right* of the plaintiff, and the *probable defence*; and in all those cases in which a *demand*, *offer of performance* of a condition precedent, *notice of action*, or any other *preliminary* step may by law be required, will carefully ascertain whether every requisite proceeding has already been duly had, and if not, he will immediately take them, and *secure evidence* of their completion. These have been fully considered in a prior chapter, (c) but some of them appear here to require more particular notice.

4. The principal difficulties that occasionally arise are *by* and *against* what *party* or *parties* an action *must* or *may* be *sustained*, and in cases where the parties interested have the *election* or *choice*, then by what circumstances the choice should be influenced. Those considerations involve a comprehensive and complete knowledge of law and equity, and of the differences between legal and equitable *rights*, *injuries*, and

#### CHAP. IV. POINTS TO BE CONSIDERED.

*Thirdly*, Of the plaintiff's attorney's consideration of various points after such instructions, and before the commencement of an action.

*Fourthly*, Who to be the plaintiff or plaintiffs, or the defendant or defendants. (d)

swear that you have either a good defence to the plaintiff's claim in whole or part, either on the merits or justice of the case, or on any and what *legal* or *technical* objections. If either, then state names and residence of all the witnesses on whose testimony you rely to prove such your grounds of defence, so that I may at my earliest convenience examine such persons respecting their expected testimony; state the character of each witness, and whether they are adverse or favourable to your wishes, and the particular facts that will be sworn to by each; and appoint them to come to my office on the — day of —, at the hour of —, or to be at home at their own residences on &c.

8. Supposing your defence to be doubtful, are you prepared to offer any and what compromise or part payment, either to be made immediately, or when; and whether to be accompanied by any third persons, and whose guarantee or undertaking, or any and what other security; and what terms, if any, that you have accurately ascertained, you can for a certainty fulfil? And do you authorize me to offer, with or without prejudice, any and what proposal?

9. If you have reason to apprehend that your affairs are in so deranged a state as to render it probable, or even possible, that you will be obliged to become a bankrupt, or obtain your discharge from the plaintiff's claims under an insolvent act, then it is my duty to apprise you that your pleading a dilatory plea, or putting the plaintiff to any useless expense in defending the action, may endanger your discharge, or at least lengthen your imprisonment under express enactments, and also may so irritate the plaintiff that he will shew no indulgence, and stimulate others against you.

Lastly, You will please to add any communication that you may consider important or useful in the conduct of your defence.

(c) *Ante*, part iii. chap. 2, page 46 to 73.

(d) See leading cases as to the joinder of parties in *equity*, *Harvey v. Cooke*, 4 Russ. 34, 54; *The King of Spain v. Machado*, 4 Russ. 224 to 236—240 to 241; *Makepeace v. Haythorne*, *id.* 244, 562; *Lloyd v. Learing*, 6 Ves. 773; *Chit. Eq. Dig.* 217, 898; *Collyer v. Dudley*, 1 Turner & Russ. 422.

CHAP. IV.  
WHO TO BE  
PLAINTIFF, &c.

*remedies*, and certainly constitute branches of law more particularly within the department of a *barrister* who has been a *special pleader*, or of a very experienced pleader; and distinct treatises have been written on that particular branch, but which by the recent alterations now require some alteration.(e) But it is essential that *every practitioner*, whether barrister, pleader, or attorney, should have a general and practical knowledge of this branch of the law, and of the alterations introduced by 3 & 4 W. 4, c. 42.

The general rule is, that *at law* an action must be brought in the name of the party or parties in whom the *legal* right was vested at the time of the injury against the party or parties who committed the injury, and not by a person who has an *equitable* interest, unless he also be in possession, and the injury has affected that possession. As regards *defendants* in actions on *contracts*, the rule was, that unless all parties liable were joined, the parties sued might plead in *abatement* the *nonjoinder*, even if the omitted party were abroad, and compel the plaintiff to proceed *de novo*, and by special original, until he had outlawed the absent contractor; (f) but this is now remedied by 3 & 4 W. 4, c. 42, s. 8, which in effect takes away a plea in abatement for *nonjoinder*, when the omitted party is out of the kingdom, by compelling a party pleading that plea to aver therein that the omitted person is resident within the jurisdiction of the Court, and to *swear* in his *affidavit* of its truth that the party is so resident, and shew his place of residence with convenient certainty.(g) But still if *too many* persons be sued as co-contractors, or if the plaintiff cannot on the trial *prove a joint liability* in all the defendants, it is in general ground of nonsuit; (h) and therefore in case of doubt it is *the safer course to sue only those persons who clearly were originally co-contractors*.

Another remedial extension of rights of action is, that actions for *torts* respecting real and personal *property* may now, under certain qualifications, be brought by or against *executors*. (i) On the other hand, executors suing in right of their testators are now *personally liable* to pay costs, in case they should fail

(e) See observations, ante, vol. ii. 47 to 58; Chitty on Pleading, 5th edit. vol. i. 1 to 107, as to the parties to an action; and see post as to parties in equity.

(f) But now by 11 G. 4 and 1 W. 4, c. 68, s. 5, an action may be supported against any one of several mail contractors, stagecoach proprietors, and common carriers by land, and no action for loss

or injury to any parcel, package, or person, is to abate for want of joining any co-proprietor or co-partner for hire.

(g) 3 & 4 W. 4, c. 42, s. 8.

(h) But see the exception under the statute of limitations in 9 G. 4, c. 14, s. 1.

(i) 3 & 4 W. 4, c. 42, s. 2, 3.

and the Court or a judge should so direct; (f) but if an executor or administrator proceed with care in making all proper inquiries before he commences his action, it is not usual to punish him with costs. (m)

CHAP. IV.  
WHO TO BE  
PLAINTIFF, &c.

In actions in form *ex delicto*, as case, trover, trespass, replevin, or ejectment, there can be no plea in abatement of the nonjoinder of a party liable to be sued, nor on the other hand is it any ground of nonsuit that all the parties sued are not liable; (n) and hence it was sometimes the practice in those actions to include a party as a co-defendant, merely or principally in order to prevent him from giving evidence for the other defendants; but now by the 3 & 4 W. 4, c. 42, s. 32, an acquitted defendant, or one with respect to whom a *nolle prosequi* has been entered, is entitled to his costs in *all actions*, unless the judge in case of a trial certify that there was reasonable cause for making such person a defendant in the action, although before that enactment that remedy for an acquitted defendant, sued with others, was confined to actions of trespass. So that now, as regards the parties to an action, it is essential well to ascertain the right to join, as well as the expediency and propriety of joining a person, whether as a plaintiff or a defendant, before the commencement of such action; and in case there should be a mistake in this respect, the Court will not allow a name to be subtracted or added, unless in cases where the statute of limitations might otherwise bar the claim. (o) In a recent case, the judge upon the trial refused to permit an amendment in a declaration in ejectment on a joint demise of two persons, who it appeared were *tenants in common*, who cannot properly join in a demise in ejectment; (p) and the joining a defendant, against whom no evidence can be adduced, might prejudice a jury, and upon the plaintiff's closing his case, the judge may direct an immediate acquittal of such defendant, so as to render him competent to give evidence for the other defendants. (q)

Should it appear essential or expedient that the name of a partner or trustee, or husband, or co-assignee, or co-executor, or assignee of an insolvent partner, should be named as a sole plaintiff, or as one of several plaintiffs in a personal action, or in ejectment as a lessor of the plaintiff, then it is always advi-

Of obtaining a person's authority to use his name as a plaintiff or lessor of plaintiff upon an indemnity, &c.

(f) 3 & 4 W 4, c. 42, s. 31.

(m) *Wilkinson v. Edwards*, 1 Bing. N. C. 301; 3 Dowl. 137, S. C. ante, 118.

(n) *Govett v. Radnidge*, 3 East, 62.

(o) See post, Chap. V. as to process

and amendment thereof.

(p) *Doe v. Errington*, 3 Nev. & Man. 646.

(q) *Child v. Chamberlain*, 6 Car. & P. 213.

CHAP. IV.  
WHO TO BE  
PLAINTIFF,  
&c.

sable in the first instance to endeavour to obtain his *express written consent* that his name may be used, and to *offer such indemnity* against liability to costs as he might reasonably require; and if he should refuse, then the *draft* of a sufficient bond, with two or more competent sureties, and conditioned to indemnify him against all damages and costs, should be tendered and left with him for his approbation, or some other adequate indemnity should be offered and accompanied with a proposition, in case the sufficiency of the sureties should be disputed, to refer that question to some competent person. (q)

Form of and  
condition of a  
bond to indem-  
nify against  
costs.

(q) See *ante*, vol. i. 505, and *Spicer v. Todd*, 2 Tyrw. Rep. 172, and cases there collected. In general, the tender of the *draft* of an indemnity bond, on unstamped paper, for *approbation*, in the first instance, suffices, *ante*, vol. i. 505. The obligatory part of the bond should be in an adequate penal sum to cover the utmost possible amount of costs, from the commencement of the suit to the determination of a writ of error in the House of Lords, and be from the parties beneficially interested, and two or more sufficient sureties jointly and severally. The condition may be as follows: "Whereas the above bounden A. B. claims to be entitled to recover from C. D. of, &c. the sum of 500*l.* and upwards, and hath been advised that it is essential in any proceeding for the recovery thereof to use the name of the above named Y. Z. as a plaintiff, either jointly or separately with some other person, and the said A. B. hath requested the said Y. Z. to permit and suffer his name to be used in an action or other proceedings against the said C. D., for the recovery of the said claim, and hath proposed to indemnify him from all consequences, and the above A. B., E. F., and G. H., have consented to execute and deliver the above writing obligatory to the said Y. Z. for that purpose: Now therefore the condition of the above written obligation is such that if the said A. B., E. F. and G. H., or one of them, or the heirs, executors, or administrators of either of them, do and shall from time to time and at all times hereafter indemnify and save harmless the said Y. Z., and his heirs, executors and administrators, his estate, goods and chattels, from and against all damages, costs, expenses and charges, that he or his heirs, executors, administrators or assigns, shall or may incur, or become liable to bear, pay or sustain, for or by reason or on account of his the said Y. Z.'s name being or having been used in any action or proceedings whatsoever against the said C. D., or his executors, administrators or assigns, for the recovery of the said claim, and also, if the said A. B., E. F. and G. H., or one of them, do and shall pay to the said Y. Z. lawful interest for and upon any sum or sums of money that he the said Y. Z., or his executors or administrators may be obliged to pay by reason of the premises, then this obligation is to be void and of no effect; but otherwise to stand and remain in full force.

A. B. (L. S.)  
E. F. (L. S.)  
G. H. (L. S.)

Sir,

Form of letter  
to accompany  
the draft of the  
bond, and to be  
delivered to  
Y. Z.

Please to take notice, that in consideration of your permitting your name to be used in an action or other proceedings against C. D. for the recovery of 500*l.* and upwards, which the said A. B. is beneficially entitled to receive, and which he is advised must be sued for in your name; we the said A. B., E. F. and G. H., are ready and willing to execute a bond conditioned as in the accompanying draft, or such other bond or security as you may reasonably require as an indemnity against any liability you might thereby incur. And for references respecting our competency to become security to you for the purpose aforesaid, we refer you to &c. (here state referees and their residence,) and we request you to approve or make reasonable alterations in the said draft as you may think fit or be advised to introduce, and to return the same to Mr. ———, of, &c., as attorney for the said A. B., or to send to him the draft of such other security as you may reasonably require, on or before the ——— day of ——— instant, and to fix a time and place for our executing the proper security in the presence of yourself or your solicitor. Dated on

To Mr. Y. Z.

A. B.  
E. F.  
G. H.

If this be not done before the suit has been commenced, or at least before any application to the Court has been made to stay the proceedings, the party beneficially interested may incur the costs of a motion by the person whose name has been used without previous leave, or may incur the risk of a release being pleaded at the trial, which, although it may perhaps be afterwards got rid of upon motion, may yet occasion increased expense and delay. (r)

It seems to have been considered, that if a *wife* live separate from her husband, or carry on a separate trade with his consent, he impliedly engages to permit his name to be used in all proper proceedings. (s) But according to a subsequent case, the Courts will not suffer the action to proceed until the husband has been sufficiently indemnified according to the judgment of the master; (t) and therefore the safest course is *first* to tender an indemnity; and in deeds of separation it is advisable to introduce an express power to use the husband's name on all proper occasions. (u) And where an action was brought by two out of four executors, and those who were not joined in the action released to the defendant, who pleaded the release puis darrein continuance, the Court refused to set aside such plea, the plaintiff having failed to establish a case of fraud; and as a general rule a plea of that nature is not to be set aside unless in a case of *gross fraud*. (x) But it is considered that creditors in general have a just right to require assignees or trustees to sue for the recovery of claims due to the estate. (y)

It has also been decided, that a *solvent* partner may, without asking permission to do so, sue out a writ in the name of himself and co-partner, or if the latter has been bankrupt, then in the names of his assignees as well as his own, in order to recover a debt due to the partnership: though the objecting partner might apply to stay proceedings until the partner so suing has given him security against costs, or he might go into equity to prevent him from receiving the proceeds; and therefore a motion to set aside the writ and proceedings in such a case, was dis-

(r) *Spicer v. Todd*, 2 Tyrw. Rep. 172, and cases there cited; and 1 Chitty on Pleading, 5 ed. 696, note (e).

(s) *Chambers v. Donaldson*, 9 East, 471; 4 Bar. & Ald. 419; 1 Chitty on Pleading, 5 ed. 696, note. In the Ecclesiastical Court, we have seen, a wife may sometimes sue alone, *ante*, vol. ii. p. 467. *Norris v. Hemingway*, 1 Hagg. R. 4; 3 Add. R. 151.

(t) *Morgan and wife v. Thomas*, 2 C. & M. 388.

(u) See 4 Bar. & Ald. 419.

(x) *Herbert v. Pigott*, 2 Crompt. & M. 384; but see *Smith v. Newman*, 4 Bar. & Ald. 419; 7 Taunt. 421; 1 Chitty's Plead. 5 ed. 696, note (e).

(y) See Law Journal, October, 1833, p. 488; *Ex parte Rylandson re Elm*, 2 Deacon & Chitty, 392.

CHAP. IV.  
WHO TO BE  
PLAINTIFF,  
&c.

charged with costs. (z) In case of bankruptcy, the 6 G. 4, c. 16, expressly authorises the assignees of a bankrupt partner to use that of the solvent partner, but directs that such solvent partner shall be indemnified, and also have such proportion of the sum recovered as the Chancellor shall think fit. (a)

Sixthly, Of the  
form (b) of  
action to be  
observed.

With respect to the *form of action*, unquestionably it is more especially the duty of a professed *special pleader*, either at the bar or practising under it, to be *particularly well informed* upon that subject. But as it is always important that *every practising attorney* should have and exercise *considerable* knowledge of the subject, so as never entirely to depend on *any* third person, but be able to exert his own care and judgment relating to the pleadings, it is most essential in the *writ* and *declaration* not only to adopt that form of pleading which can in point of law be sustained by the evidence on the trial, but also frequently to exercise a *judicious choice* of one of several forms when a choice is permitted by law, and as many causes will not afford the expense of taking the opinion of counsel or special pleader, it is incumbent on *every attorney* to obtain at least a *general* knowledge of all the usual forms and their applicability, and even when they have been settled by a professed pleader, to examine the same carefully with the facts, and exercise his own judgment on their sufficiency, and if he doubt, to suggest such doubt to the counsel or pleader. These are usually divided into forms *ex contractu* and forms *ex delicto*; the former are assumpsit, debt, covenant, and detinue, which latter may however be sometimes *ex delicto*; and those strictly *ex delicto* are case, trover, replevin, trespass and ejectment. The *choice* of the form of action depends on the *facts*, and whether the ground of complaint or *cause* of action be the non-payment of a *debt* or other breach of *contract*, or for a *tort*; and if the former, then whether the sum became due upon a simple contract or upon a deed or record, for in the former case the form of action might be assumpsit or debt, though in the latter only debt; or in case of a *record*, debt or *scire facias*; and if the claim be for damages in respect of a breach of contract, then the form of action must, if the contract were not under seal, be *assumpsit*, or if under seal, then *covenant*. But where a contract and a public duty concur, as in an action against a carrier, innkeeper, &c. sometimes the plaintiff may treat the non-observance of the duty as the

(z) *Whitehead v. Hughes*, 4 Tyrw. R.

92; 2 C. & M. 318, S. C.

(a) 6 G. 4, c. 16, s. 89.

(b) See these fully considered, 1 Chit. on Pleading, 107 to 243.

cause of action, and declare in *case*. If the action be for *detaining* a deed, &c. then the plaintiff has the election of an action of detinue or trover. If for a mere *trespass* or injury, without any contract express or implied, then the form of remedy must be an action *on the case*, *trover*, *trespass*, *replevin* or *ejectment*, depending on the varying circumstances of each case, and as well on the nature of the thing injured, as on the nature of the *injury* to the same, whether direct or only consequential, and also on the plaintiff's interest therein, and whether he was in *actual possession*, or had only a *future right* of possession. The different forms of action, and their application, in general depend on the *common law*, but sometimes are prescribed by statute, and not always with the propriety that was observed by our ancestors, as exemplified by the enactments in 43 G. 3, c. 141, s. 2, which prescribes that if a *trespass* has been committed under a conviction that has been *quashed*, the *declaration* (and now the writ) shall be in *case* for *maliciously* doing the act complained of.

Formerly (excepting in process to *arrest* the defendant, and in proceedings on a recognizance of bail,) it was not necessary to decide upon the *form of action* until the *declaration was framed*. But since the statute for enforcing the uniformity of process, 2 W. 4, c. 39, requires the form of action to be stated in all process, it is necessary to state the same, though very concisely, even in a *serviceable* writ of summons; so that *now* it is incumbent on every practitioner to determine upon the *form of action* before he issues the first writ or process, and the copy of the before-mentioned instructions should be sent from the country to the London agent in the first instance, thereby enabling the latter to decide upon the form of each, and insert it correctly in the writ. The skill of the practitioner is evinced as much, if not more, in the *judicious choice* of the form of remedy, as in the interior structure of the declaration, &c. Thus, as the interpleader act only applies to the enumerated actions of *assumpsit*, *debt*, *detinue* and *trover*, a plaintiff, by issuing his writ in *covenant* or *trespass*, or *trespass on the case*, may, by a small variation, preclude the defendant from afterwards availing himself of the provisions in that act. (c)

In cases of reasonable doubt, not merely on the *right of action*, but who should be the *proper parties to sue or be sued*,

*Seventhly, Of taking counsel's opinion.*

CHAP. IV.  
COUNSEL'S  
OPINION.

or upon the *form of action*, or of the *pleadings*, it is certainly incumbent on an attorney to take counsel's opinion upon a *very explicit and accurate statement of the facts*, approved of by the client upon his careful examination, and sometimes not drawn up until the *witnesses* also have been examined, and with proper questions, and the reasonable expense of which will now be allowed in taxing costs, even between party and party, and certainly so between an attorney and his client. (d) And such opinion, when positive, will in general, if obtained upon a *carefully well drawn case*, protect the attorney from any action for acting strictly in accordance with that opinion, however erroneous in law it may have been. (e) The case should be so distinctly stated, with *separate questions*, as to require specific and distinct answers upon the principal questions arising from the statement of facts, viz. 1st, the general *right of action*; 2ndly, who should be the *parties*, either as plaintiffs or defendants; 3dly, the *form of action and declaration*; 4thly, the *evidence* to sustain the action or defence; and 5thly, whether any and what *further inquiries* into facts be essential? (f)

*Eighthly, Of retaining counsel.*

We have in the preceding pages adverted to the expediency and duty of an attorney for a plaintiff, in cases of difficulty or importance, of *retaining* one or more of the most able counsel before the defendant has the least intimation of the intended proceedings. (g) Although there are very many counsel of great ability, yet there are very few of commanding and super-eminent talent as Nisi Prius advocates, and hence the result of a cause may frequently depend on securing one of the latter.

(d) *Ante*, vol. ii. 43, note (e).

(e) *Ante*, vol. ii. 21, 22, 32, 33, and as to what opinion, *id.* 43.

(f) After stating the *facts* in natural order of time, and as it is expected they can be proved, the case may conclude somewhat to the following effect. "As the parties interested will entirely be governed by your opinion, and an action, if not successful, would be ruinous, you will be pleased to give decided and explicit answers to the following questions:

1st. Supposing the above statements can be distinctly proved, are the complaining parties clearly entitled to recover at law?—and if not, why?—and if not, is there any and what remedy in equity or otherwise?

2dly. Who should be the plaintiffs and who the defendants?

3dly. What should be the *form of action* expressed in the writ and in the declaration?

4thly. Will the above stated evidence be sufficient to entitle the plaintiff to a verdict at law, and if not, in what respects must the evidence be improved?

5thly. You are requested to suggest any proper inquiries after any and what further evidence that you may deem advisable; and also such precautionary measures, if any, to be adopted, and when, or any other proceeding tending to the advantage or security of the parties interested?

6thly. Whether, upon the whole, the parties interested may proceed in the action recommended by you with confidence of success?

(g) *Ante*, vol. ii. 71, 322.

Suggested form of case for counsel's or pleader's opinion.



The ordinary retaining fee in a single cause is one guinea. A general retainer, securing the counsel for the client in every case in which he may be a party, either separately or jointly with others, is five guineas. At law a retainer, whether special or general, and either on the part of a plaintiff or a defendant, may be given before any process has issued, and if duly given in the cause continues until its conclusion, and does not always require renewal every year; (*h*) but care must be observed that the names of the parties be properly stated, or it will not preclude the opponent from afterwards giving a correct retainer. If however a retainer be A. B. and others against C. D. and others, it will secure the counsel whatever persons may be afterwards named in the cause, provided the name of the party particularized be one. In equity it seems that a special or particular retainer is of no efficacy unless given *after* bill filed, though it is otherwise as to a *general* retainer. (*i*)

With respect to the obligatory effect of a retainer, it seems incumbent on a solicitor to give a *fresh retainer* the instant the former has according to usage become inoperative, for otherwise the *opponent* may by offering *his* retainer, or even tendering a brief, obtain the assistance of the same counsel against his former client; and there is no distinction in this respect between cases where such counsel may have become *confidentially acquainted* with *secret information* which he *possibly might* afterwards use injuriously against his former client. If it were otherwise, and if, as has been insisted by some, it were incumbent on counsel, before he received a retainer or brief from the opponent, to send to his first client to know whether it was his intention to give a second retainer, he might appear indecorously to seek employment, and also have to submit to the risk of an answer that his assistance was no longer required, a situation in which no counsel ought to be placed; and if one retainer were to operate perpetually there would never be a second. Moreover, it is not to be believed that any counsel worth retaining will be so dishonourably inclined as to make undue use of any information he may have confidentially obtained. Perhaps, however, the more honourable conduct is to decline holding a brief on either side when any previous confidential communication might be deemed prejudicial to the prior client. A case on this subject recently occurred at

---

(*h*) But a retainer for the *assises* must be renewed on or before the last day of the term preceding the following assises.  
(*i*) *Ante*, part iii. 72, new ed. note.

CHAP. IV.  
RETAINING  
COUNSEL.

the *Rolls Court*, and is stated in the note. (i) If a retainer (then called a *stifling* retainer) be given and not followed in due time with the delivery of a brief, we have on record a spirited instance in the celebrated *Mr. Dunning*, of his afterwards taking a brief on the other side. (j) The form of a retainer is subscribed. (k)

Ninthly, Of the plaintiff's attorney's letter before action.

We have in a prior page shewn that sometimes *an actual demand* of goods or money may be *indispensable*, (l) and have adverted to the expediency (unless it is expected that the defendant will abscond or avoid the service of process) of the plaintiff's attorney addressing a *civil letter to the defendant*, stating his

(i) *Rolls Court, Saturday, February 2d, 1835.—In re Baylis, Martin, Grout, and Brown, Partners.* Mr. Bickersteth moved in this case for an order of the Court that the plaintiff, Martin, might be permitted full liberty to inspect the works at a manufactory for the finishing of silk, and particularly Norwich crape, conducted at Ponder's End, by the defendants, with whom he is in partnership. He then stated the circumstances of the case. The learned counsel said that this motion had a *second object* in view, which was of considerable importance. In the suit between the partners, Mr. Kindersley had been counsel for the plaintiff. It so happened, however, that after that gentleman had been promoted to the honour of a silk gown, he had not received a retainer. He was then proffered a retainer by the other side, thereby carrying all the information which he had *confidentially* acquired when acting for the plaintiff. There was a good deal of obscurity and

indecision, the learned counsel remarked, in regard to the practice of counsel in such cases. Lord Eldon had remarked that he considered that counsel should not accept a retainer in opposition to a former client without giving the latter notice, and the option of again retaining him. No decision, however, was come to on the point. It was important that his Honour should, in this case, settle it, and in his order restrain Mr. Kindersley from appearing in the suit in opposition to the plaintiff.

His Honour said that, with regard to the question respecting the retaining of counsel, he could not interfere—he had himself been in a case where a like application had been made to Lord Eldon, in which his Lordship declined a decision. The order therefore should be made to secure to him the principal object of the notice of motion, but without costs.

(j) See *Palmer's Prac. House of Lords*, p. 14.

Forms of retainer of counsel.

(k) In the K. B., C. P., or Exch.

Between { William Jones, Plaintiff,  
and  
Thomas King, Defendant.

Retainer on behalf of the above plaintiff [or defendant], Mr. Serjeant Wilde, One Guinea.

J. and W., Temple,  
February 4th, 1835.

In Parliament.

In the matter of an intended petition against the return of ——— Bailey, Esq. for the city of Worcester.

Retainer to Mr. Serjeant M., Five Guineas.  
For the petitioners.

B. S. and C., Essex Street,  
January 30th, 1835.

In the House of Lords the form of a general retainer runs thus:—

"Mr. Attorney-General [or Mr. —,] is retained for A. B. in all appeals which shall be brought by or against him, or in which he shall be appellat or respondent.  
C. D., Agent."

Fee, Five Guineas. [Here add the date.]

And see a form *Palmer's Prac. Lords*, 14, 66.

(l) *Ante*, vol. ii. 56, and see suggested form, *id.* and *post.*

instructions to sue and the utmost previous time he can allow, and that after the expiration of that time he must obey his instructions, and requesting the defendant to name his attorney to whom process may be sent for an undertaking to appear or to put in and perfect bail, and thereby save the defendant any personal annoyance or inconvenience by personal service of the process or arrest. Such letter should allow a reasonable time for the defendant to satisfy the claim if so disposed, or if resolved to resist the claim to consult an attorney or to procure bail. Courtesy in this respect in general avoids acrimony, and disposes a defendant the more to exert himself to discharge the claim, or at least not to interpose vexatious objections to accidental irregularities that possibly may occur. The form of letter may vary according to circumstances, that given in the subscribed note may assist. (1)

Formerly there was not any written rule of Court respecting any allowance or remuneration for writing letters before action, but the masters and prothonotaries of each Court had rules of their own. In all the Courts, if the plaintiff's attorney could produce a letter in answer to one that had been written applying for the debt, it was conclusive that such a letter had been sent, and 3*s.* 6*d.* (not 5*s.*) was invariably allowed for it. So if the party or attorney opposing the taxation admitted that a letter had been written, then the 3*s.* 6*d.* is allowed. In the Exchequer, where no letter in answer could be produced, and where the party or attorney opposing the bill would not admit that a letter had been sent, still if the attorney who supported the bill stated positively that a letter had been sent, then the masters in that Court would allow it. In the King's Bench and Common Pleas it was different. In those Courts if no letter or answer could be produced, and the party or attorney opposing the bill would not admit that a letter had been sent, the masters and prothonotaries disallowed it, unless

(1) Sir,

I am instructed by Messrs. — of —, as their attorney, immediately to commence an action against you for the recovery of their claim of £—, and interest thereon; and as they have repeatedly applied to you for payment without effect, no further delay will be admissible, and unless the said claim, with interest thereon, (which I hereby demand in pursuance of the statute 3 & 4 W. 4, c. 42, without prejudice to the numerous other previous demands of interest,) be paid on or before the — day of —, instant, I must, in pursuance of my instructions, immediately afterwards issue process against you. You will be pleased to inform me by return of post whether you will pay the said debt and interest, with 3*s.* 6*d.* for this letter, before the above appointed time, for if not, further expense will be incurred in preparing the necessary process. As it is not the wish of Messrs. — or myself to put you to avoidable inconvenience, pray inform me the name of your attorney who will undertake to put in and justify bail or enter an appearance to the action we may commence. Dated, &c.

G. H. of No. —, — Street, London,  
Attorney for the said Messrs. —;

Form of letter  
of plaintiff's at-  
torney to the  
intended de-  
fendant.

To Mr. —

CHAP. IV.  
LETTER BEFORE  
ACTION.

the attorney who supported the bill could make an *affidavit* that it was sent, which he had a right to do, and the *3s. 6d.* for the letter and the costs of the affidavit, if it be required, were then allowed.

Now a fee of *3s. 6d.* is allowed in every case for the letter, if sent before action brought, and when the claim exceeds *20l.* But by an express rule commencing in operation on 15th March, 1834, directions were given to taxing officers, in cases where the sum recovered shall not exceed *20l.* without costs, that the plaintiff's costs shall be taxed according to the reduced scale thereunto annexed, and the first item in that scale allows for a letter before action, *if sent, two shillings*; but provides that if the action be tried before a judge of the superior Courts, or judge of assize, if he certify on the postea that the cause was proper to be tried before him, and *not* before a sheriff or judge of an inferior Court, then the costs shall be taxed upon the *usual* scale. (m) In a recent case it was established that an attorney is entitled to his costs for writing a letter demanding a debt from a defendant before writ issued, and that he may proceed in the action, unless the same be paid, even after payment of the debt before a writ was issued. (n) Thus where the plaintiff's attorney wrote to the defendant demanding payment of a debt and *5s.* for his letter, and the defendant wrote in answer that he would remit the amount in a fortnight, and the attorney on the 14th April replied that if the debt were paid on the 21st April no further expense would be incurred; but at the same time demanded *13s. 4d.* for his costs. The defendant on the same day, before he received the second letter, remitted the debt to the plaintiff, and on the day following it was received by the latter and a receipt given. And the attorney, on the day the money was received by the plaintiff, sued out a writ in order to secure the payment of his costs. Learning afterwards that the plaintiff had been paid, he informed the defendant that unless the sum of *1l. 1s.* was paid to him he would proceed in the action for costs, at the same time informing him that he would not charge for the writ if the money and costs at first demanded were paid. But as the defendant refused to pay those costs the attorney proceeded with the action, and thereupon the defendant obtained a rule nisi to stay proceedings; and upon cause shewn, the Court said

(m) Wordworth's Rules, 153, 154.

(n) *Morrison v. Simmers* 1 Bar. & Adolp. 559, and apparently stated in

1 Dowl. Pr. C. 325, omitting counsel's arguments.

"the defendant, by remitting the amount of the debt to the plaintiff instead of his attorney, was guilty of a breach of good faith. If a writ had been issued before payment of the debt, the attorney might have charged for the costs of the writ and 6s. 8d. for instructions. The proceedings can only be stayed on the terms of paying the 13s. 4d. and the costs of the application." (o) This decision appears to establish that an attorney *cannot be prejudiced by his courtesy* in writing and actually sending a letter, and that the trouble of so doing must, if he insist, be paid by the opponent. In short, where there has been *any default at any time* in readiness to pay a debt, the defendant could not support a plea of tender averring as is essential *tout temp prêt*, and consequently cannot get rid of any costs or expenses reasonably incurred, and on that account the Courts sustain the charge for a letter *bona fide* written and sent before the commencement of an action. (p)

CHAP. IV.  
LETTER BEFORE  
ACTION.

But perhaps the most important consideration, *collateral* to the trial of the *merits*, is whether the plaintiff should proceed to *arrest the defendant*, or prefer mere *serviceable* process. We shall in another chapter consider all the peculiarities and practical consequences of proceeding by bailable process, but a few observations in this place as regards the *propriety or expediency* of adopting that proceeding, may not be improper. In general, unless there be strong grounds to fear that the defendant will, for the mere purpose of vexatious delay, resist the action, or will leave England, so as to avoid execution after judgment, there are many *prudential reasons* in favour of serviceable process. Thus, amongst others, is the probability that a defendant, after he has been treated with lenity, will exert himself to pay the plaintiff, and may probably be able to retain his credit so as to satisfy at least a part of the debt, although he might not be able to pay all; and when, if the *harsher proceeding by arrest* had been adopted, he would have been instigated to give a preference to another creditor; or his

*Tamely*, Whether or not to arrest the intended defendant.

Reasons for not arresting.

(o) *Ante*, 136, n. (n). It was argued in that case, by the counsel for the defendant, that it was not the practice to allow any charge for the letter antecedent to the action, and the practice certainly was formerly so, and consequently only the most respectable attorneys write such preliminary letter. The author was present on the trial of an action on an attorney's bill before the then Chief Justice of Common Pleas, Sir James Mansfield, and on a reference of several bills of costs

being pressed, the plaintiff, an attorney, refused to refer unless his charge of 3s. 6d. for a letter was previously agreed to be allowed, but which the defendant pertinaciously refused, upon which the Chief Justice facetiously declared that rather than the cause should not be referred he would himself pay the 3s. 6d., and which he instantly did, whereupon the parties, ashamed of their ill-judged pertinacity, immediately referred the cause generally.

(p) *Hume v. Peple*, 8 East's R. 168.

CHAP. IV  
WHEN TO  
ARREST.

other creditors, taking alarm from the arrest, and still more from the defendant's inability to find bail, would also press him, and occasion immediate general insolvency, when he might have stood his ground, at least for a time, and paid all, or at least the plaintiff. These are *prudential* considerations that frequently, independently of *moral feeling*, ought to influence in favour of the milder course. Besides, an arrest, unless in cases of *gross fraud*, is frequently a harsh measure, inducing great family distress, sometimes even self-destruction; and the measure too frequently proceeds from an *uncharitable* spirit of disappointment and unwarrantable revenge, by which no well regulated mind, certainly *no gentleman*, and indeed still more *no Christian*, ought to be influenced. Sometimes, also, arrests are made upon too hasty a supposition of the state of accounts; and as an affidavit of debt must be made before any arrest, and the party may, if it turn out to have been untrue, be *indicted for perjury*, or be sued for damages on account of a *malicious arrest*, or at least may *lose the costs* of his action under the provision in the 43 Geo. 3, c. 46, the proceeding by arrest ought never to be adopted without *great consideration and urgent occasion*, and solely as an indispensable measure to prevent the loss of a debt, payment of which it is expected will be enforced by arrest, *but not otherwise*.

Reasons for  
arresting.

On the other hand, when a debtor has obtained credit by *wilfully misrepresenting* his circumstances, or misrepresenting the object of his requiring credit, or he has been guilty of *other gross fraud*; or has become debtor in consequence of a *criminal* indulgence of extravagance; or where it is certain that he is *about to abscond*, and evade payment, instead of endeavouring to the best of his power to pay all, or at least a portion of his debts; or when it is expected that a perverse and obstinate debtor will defend any action merely for the sake of annoyance; then, after a minute and careful examination of the amount, if it be quite clear that a certain debt, not reduced by set-off, can be safely sworn to, and afterwards *proved* by credible witnesses, then an affidavit of such debt and an arrest *may be justifiable*; especially when it is expected that the defendant, rather than continue in prison, or ask his friends to become bail, will pay the debt, or deposit the amount with £10 for *costs*; but even then the arrest should never be influenced by a desire of revenge or punishment, but purely in order to induce the deceptive debtor to give up the goods or property he has acquired, or to induce some of his companions to become sureties for and pay the debt. It can only be on

some ground of this nature that an arrest should be adopted, for certainly as regards *expedition* in a suit, bailable process may be *more dilatory* than serviceable. (q) At all events, every respectable attorney should, unless in such cases of fraud, rather dissuade his client *against an arrest*, than encourage him to indulge a feeling of resentment or revenge so derogatory to the character of a good member of society, and even baneful to his own true happiness.

CHAP. IV.  
WHEN TO  
ARREST.

There are also many preliminary considerations on the behalf of an *expected defendant*. The observations relative to a *written retainer* of a plaintiff's attorney are here equally applicable; (r) and it may be of essential importance that very explicit *instructions to defend* should be obtained in the first instance, and an outline of such instructions has been given in a note. (s) The defendant's attorney should apprise him, and even write down all essential directions, if an arrest be expected; and in case only part of a money demand is admitted to be due, the attorney himself, or an experienced clerk, should make a legal tender, and actually produce and count out the money, and offer to pay it without any condition or qualification. (t) But if the claim is not for a debt, but for damages, then a tender could not be pleaded; (u) and then if the case be within the 3 & 4 W. 4, c. 42, s. 21, or the antecedent practice, allowing money to be paid into Court, a sufficient sum should be paid accordingly; and even when a plea of tender would be admissible, if there should be any doubt about the sufficiency of the tender either in fact or law, or the proof of it, or whether a prior or subsequent demand may not be replied with effect, then the safest course is to *pay money into Court*, and plead *such payment* in the form prescribed by the general rule of Hil. T. 4 W. 4, s. 17. (x) In general, when a considerable sum has been paid into Court, it induces a favourable presumption on the part of the judge and jury afterwards trying the cause, that the defence is *bonâ fide*.

*Eleventhly,*  
Subjects to be  
considered by  
an attorney for  
a defendant.

(q) See further in chapter as to *capias*.

(r) *Ante*, 114.

(s) *Ante*, 121, 124.

(t) See *ante*, vol. i. 506, 507, as to what is or not a legal tender; and as to

the necessity for actual production of the money, *Finch v. Brook*, 1 Bing. N.C. 257, 258.

(u) *Barrell v. Dearle*, 3 Dowl. 13.

(x) See the rule *post*, and 2 Dowl. 13.

## CHAPTER V.

## OF MESNE PROCESS, AND PROCEEDINGS THEREON IN GENERAL.

Sect. I. Of Mesne Process and proceedings thereon in general.....	140	N.B. The Rules printed in a note .....	160
1. Subject of this chapter ....	id.	6. Examination of the several parts of each of the five writs, and memoranda, warnings and indorsements thereby required .....	162
2. Necessity for some process, and why .....	141	See analytical table of subdivisions, p. ....	163
On what principles to be framed, served and executed .....	142	Sect. II. Of each writ in particular, and proceedings thereon .	
Time of service .....	143	1. Of the writ of <i>Summons</i> in particular, and incident proceedings thereon, and appearance thereto by defendant and plaintiff, <i>post</i> , Chap. VI. ....	
Mode of service .....	144	2. Of the writ of <i>Distingas</i> and proceedings thereon, <i>post</i> , Chap. VII. ....	
3. Of the ancient process, and objections to the same....	145	3. Of the writ of <i>Capias</i> and proceedings thereon to perfecting bail above, <i>post</i> , Chap. VIII. ....	
4. The five several processes substituted by 2 W. 4, c. 39, and observations on the same.....	147	4. Of the writ of <i>Detainer</i> , <i>post</i> , Chap. IX. ....	
Statement of the outline of the regulations in that act.....	148	5. Writ of <i>Summons to a Member of Parliament, a Trader, &amp;c.</i> Chap. X. ....	
The act printed in a note .....	150	6. Of proceedings to <i>Outlawry</i> , <i>post</i> , Chap. XI. ....	
Enumeration and consideration of the five forms of writ.....	158	7. Of proceedings to save the <i>Statute of Limitations</i> , <i>post</i> , Chap. XII. ....	
Process must be in English .....	id.		
General operation of the act .....	id.		
The writ now considered the commencement of the action .....	159		
5. Statement of the Rules of Court for enforcing the same .....	id.		

## SECT. I.—OF MESNE PROCESS AND PROCEEDINGS THEREON IN GENERAL.

## CHAP. V.

## 1. Subjects of this chapter.

WE are now to consider that part of the proceedings in personal actions, usually termed *mesne process*, being the writ or proceeding in an action to *summon* or *bring* the defendant into Court, or *compel* him to appear or put in bail, and then to hear and answer the plaintiff's claim. As most of the recent alterations in the practice of the superior Courts have been made with the view of *improving* such *mesne process*, it is of very great importance to have a full and accurate knowledge of the subject, and it is therefore proposed in this chapter very minutely to examine the *principles, enactments, rules and decisions* which affect all or most of the *five descriptions* of



*process*, now enjoined to be observed by the uniformity of process act, 2 W. 4, c. 39; and then in the subsequent chapters *separately* to consider *each* of those *five writs*, and the particular proceedings thereon, in practical detail.

2. Necessity for some process or notice to a defendant.

It is obviously a principle of natural justice, and it is consequently a maxim in our municipal law, that no *one should be condemned unheard*; (a) and hence the necessity for *process* to be in general actually served on a defendant, thereby summoning or warning, or compelling him to appear in Court to hear the complaint against him. (a) And to such extent was this maxim carried in our ancient law, that a plaintiff could not declare or proceed in an action before the defendant had *actually appeared* in Court to answer the plaintiff; and even if he pertinaciously neglected or refused to appear, the only course was to issue *continued* process, or to *distrein* upon his goods, in order thereby, as it was expected, to induce him to appear, or to *outlaw him*, by which he incurred a qualified forfeiture of his lands and goods, and all his civil rights as a subject were suspended. As an additional stimulant the statute 9 & 10 W. 3, c. 25, s. 33, subjected a defendant who had been served with process to the forfeiture of £5, if he neglected to appear, and which may still be recovered summarily, and when the debt is small, might be a useful proceeding. At length the statute 12 G. 1, c. 29, s. 1, (explained and amended by 5 G. 2, c. 27,) upon an affidavit of actual *personal service* of the writ upon the defendant, and that he had not appeared within eight days after the return day of the writ, authorized the plaintiff *in any Court of Record* to enter an appearance for the defendant, called an appearance *sec. statuti*, (i. e. according to the authority of that statute); and thereupon to declare and proceed to judgment and execution, the same as if the defendant had himself appeared. The recent act 2 W. 4, c. 39, s. 3, extended the power of the plaintiff to enter an appearance for the defendant, pursuant to the prior statute, to certain proceedings upon a writ of *distringas*, as will hereafter be explained. But if the defendant were abroad, (b) or avoided the

(a) Per Bayley, J. in *Williams v. Lord Bagot*, 3 B. & C. 772, 786; 5 D. & R. 719, S. C. which students should read, as *showing* the practical application of that maxim as it affects process.

(b) Although the outlawry of a person who is abroad at the time of issuing the *exigent* may be avoided by him, *Bryan v.*

*Wagstaffe*, 5 B. & C. 314, yet it can only be avoided on *terms*, viz. of appearing, or in case of a bailable claim *perfecting bail* to a new action, 31 Ellis, c. 3, s. 3; and post, Chap. XI. on *Outlawry*; so that even outlawry in this respect illegal may still enable a plaintiff to enforce an appearance or bail above.

## CHAP. V.

service of process, and had no goods, (the distreining of which was considered nearly equivalent to actual service, because it was supposed the defendant would hear of that proceeding,) then the only course was, and still is, to proceed to *outlawry*; which we however have seen does not enable the plaintiff to proceed in his *action*, or to obtain *judgment therein*, but only causes a seizure of the lands, goods and property of the defendant, as forfeited to the *King* for the defendant's contumacy and disrespect of his process; but the plaintiff may thereupon, by application to the Court of Exchequer, or by petition, when his claim exceeds £50, obtain satisfaction of his debt by sale of the defendant's property seized under his outlawry, unless previously the defendant appear to the action, and enable the plaintiff to try the merits.

Such being the general principle and rule of law, it has therefore been holden, that a custom or practice in an *inferior Court*, not sanctioned *by statute*, to proceed to final judgment, upon hasty and unreasonable or unjust proceedings, *although the defendant has not appeared* in the suit, is illegal and void.(c) And in the foreign islands or other dominions, a judgment against an absent defendant would be illegal, unless under particular circumstances; as where the defendant has actually been within the jurisdiction, and has then left the same without paying his debts there, especially when there is a public officer there particularly authorized to take care of the interests of absent persons.(d)

On what principles mesne process should be framed and served or executed.

From these authorities and the best consideration, it is obvious that the main ingredients in all just process are, *first*, that it should by its terms explicitly inform the defendant *when* and in *what Court* or *office* he should enter his appearance or

(c) *Williams v. Lord Bagot*, in error, 3 B. & C. 772; 5 D. & R. 719. Such as a custom to declare against a defendant before any entry of appearance by him, or some person for him, is bad in law; and it seems that a custom to issue a summons and attachment at the same time is also bad.

(d) *Buchanan v. Rucker*, 9 East, 192; 1 Stark. Rep. 525; 4 Bing. 686; *Baquet v. Macarthy*, 2 Barn. & Adol. 951. There are however some exceptions, as is that of the custom of London in the Mayor's Court to attach the goods of an absent party, or even a debt due to him in the hands of a third person within the jurisdiction, called the garnishee; and unless bail be put in, and the suit defended

within a year, the debt is thereby recovered against the garnishee, see *Turbill's case*, 1 Saund. Rep. 67. But, it will be observed, that such attachment is in the nature of a distringas on goods, of which it is supposed that the debtor will hear within a year, and thereupon appear in the action. The proceedings also by two scire facias to revive a judgment, or to enforce a recognizance of bail, and neither of which are even attempted to be served, constitute exceptions, but the latter proceeds on the doctrine that the party or bail ought to search. See *Smith v. Crome*, 8 Moore, 8; 3 Tyr. Rep. 388. But see observations of Tindal, C.J. in 7 Bing. 109; 5 Bing. 284.

put in bail; *secondly*, that it should be served upon him *in sufficient time*, to enable him, without inconvenient hurry, so to appear, or, according to modern practice, time to apply to an attorney in his neighbourhood, and direct him to instruct his agent in London to enter his appearance or put in bail in the proper office; and *thirdly*, in cases where the law permits a defendant immediately to pay a debt or adjust a claim without incurring any further expense, and, as it were, "meet his adversary by the way," it is reasonable and proper that *information of the nature and extent of the claim* which may be thus settled in the first instance, should be afforded by the first process. But as most defendants, when served with process, pretty well recollect that they owe the plaintiff a debt, or have committed a particular injury, and if they have forgotten the amount or nature of the claim, may readily apply and ascertain the same, and which the plaintiff would be ready, if not anxious, to receive, it seems to be scarcely necessary to require any great particularity in the writ as to the nature of the debt or claim; and as respects other demands, it will suffice for the defendant to ascertain the same from the *declaration* when delivered, or the auxiliary particulars of demand, which may be obtained even before appearance or bail above. There was therefore much good sense in the former practice of the Court of Exchequer in regard to particulars of demand, which that Court refused to compel the plaintiff to deliver, unless the defendant would swear that he had not received any account of the nature or particulars of the plaintiff's claim, and could not safely proceed to trial without such delivery. (e) On the like principle it may be questionable whether so much particularity in the writ itself and its indorsements, as has been required by the modern enactments, is in justice essential? At least it is to be regretted that the infinite variety of requisites, accompanied with the right of the defendant to take advantage of any omission or mistake, however trifling, and which is not allowed to be amended, operate too much in delay and obstruction of justice.

As regards the *time* of serving the process, or the time to be afterwards allowed for appearance or putting in bail above, it will be found that according to ancient and long established practice, before the recent alterations, there was a general principle, that a person residing at a *considerable distance* from the metropolis should be allowed *more time* for perform-

Time of service.

---

(e) Dax's Prac.; Chit. Summary, Prac. 114.

## CHAP. V.

ing the act than a person within or very near to the metropolis, and it was considered important to fix the distance so as to depend on, whether the arrest was in London or Middlesex, when *four days* after the return day were allowed for putting in bail, or was in Surrey or any more distant county, when *six days* were allowed; (*f*) but now there is no distinction as regards process between an arrest on process in London or Yorkshire or Cornwall, and in each case without distinction the defendant must appear or put in bail above in *eight days* after the day of the service or arrest, *inclusive* of that day. Perhaps, now that the facilities of intercourse between the metropolis and the remotest parts of the country have become so established, there may be less reason than heretofore for continuing the distinction between distances, which certainly occasionally were the subjects of disputed discussion.

*Mode of service,  
and why to be  
personal.*

With respect to the *mode* of service, there is an obvious analogy between mesne process in an action, and process in other cases; and some principles may be extracted from the decisions respecting the service of a summons to answer an information before a justice of the peace, and of the proof thereof, before the justice can proceed to convict, viz. that in general, and unless otherwise directed, there must be *personal service*, (*g*) or evidence that the summons actually came to the party's possession *a reasonable time* before that appointed for the hearing, so as to enable him without omission omnibus aliis negotiis to appear, or the justice should not proceed, but issue a fresh summons. (*h*) For many purposes the leaving a written notice, as a notice to quit, in the actual possession of the wife or servant of a party at his residence, affords a reasonable inference that he actually received the same; (*i*) and in an action of ejectment the service of the declaration, (then in effect the first process,) upon the wife of the tenant in possession at his residence, suffices; but in all other cases of process the law, perhaps wisely, requires *actual notice of process to the defendant himself*; because such very important interests may be prejudiced by litigation, that it should not be left to mere presumption or inference that a party to be affected by it has

(*f*) Rule M. 8 Anne, reg. 1, K. B.; Tidd, 248.

(*g*) Per Parker, C. J. in *Res v. Simpson*, 10 Mod. 345; *Res v. Dyer*, 1 Salk. 181; *Res v. Chandler*, *id.* 268; *Res v. Com-*

*mins*, 8 D. & R. 344; *Res v. Hall*, 6 D. & R. 84.

(*h*) *Id. ibid.*; *ante*, vol. ii. 177.

(*i*) *Dee d. Neville v. Dunbar*, 1 Moo. & M. 10; *ante*, vol. i. 483.

knowledge of the proceeding, but it should be positively and affirmatively established before any further proceeding in a suit be permitted. The seizure of the defendant's goods upon a *distringas* and the sale of them, unless he appear, has however been, and still is, considered a reasonable proceeding, and an effectual mode of inducing the party to pay due respect to the process, rather than have his goods detained, and still less sold.

The most ancient proceeding to summon or bring a defendant into Court, was an *original writ*, adapted to the nature of the plaintiff's cause of action, and issued out of the Court of Chancery, and returnable either in the Court of King's Bench or Common Pleas, (but in no case in the Court of Exchequer, <sup>(l)</sup>) which originally was merely a Court of Revenue). <sup>(m)</sup> The Court of King's Bench or Common Pleas, into which the original writ was so returnable, thereupon issued a *capias* or summons, depending on the form of the original writ. The numerous forms of such original writs, adapted to the usual circumstances of contracts and wrongs, then comparatively few, will be found in the ancient collection called *Registrum Brevium*. Each of the superior Courts also, by a particular process of its own, held cognizance over causes of action by and against the officers and attornies of that particular Court; and the Court of Exchequer had actual and constitutional jurisdiction over debts and causes of action when due to an *actual debtor* of the king, who by the detention of the debt, or in consequence of the injury, was in fact, or supposed to be *less able* (*quo minus*) to pay the debt due to the king. The Court of King's Bench also, as an incident of its criminal jurisdiction, had not only cognizance over civil claims when due from or to an officer of their Court, and issued a peculiar process for the recovery thereof, but also over all civil matters when the defendant was in the *actual custody* of the marshal for a *trespass* committed in the county where the Court sat. The Common Pleas also had an incidental jurisdiction of the

3. The ancient process, and those existing immediately before the uniformity of process act, 2 W. 4, c. 39, <sup>(k)</sup> and some inconveniences resulting from the same.

(k) See the clear account of the former writs in Mr. Tidd's Addenda to the 9th ed. of his Practice Supplement of A.D. 1832, page 1 & 2. Students should also read the Appendix to Sellon's Practice, for a succinct account of the usurped jurisdiction of the superior Courts, and Gilbert's Prac. C. P.

(l) See 1 Price's Rep. 309; 1 Tyrw. Rep. 289, in note; as to no *original writ* having been returnable in the Court of Exchequer, Tidd, 88, *ante*, vol. ii. 391.

(m) And consequently there could be no outlawry in that Court until the 2 W. 4, c. 39, s. 5, Tidd's Supp. 100.

## CHAP. V.

same nature. For a time each Court correctly confined itself to its appropriate though limited jurisdiction; but as we are historically informed, each of the three superior Courts soon lost sight of the true limits of its jurisdiction, and unworthily descended to fictitious and subtle contrivances to acquire co-extensive jurisdiction over all debts and claims of a civil nature, and the ancient distinct jurisdiction of the three Courts was entirely forgotten; and the legislature have by several acts of the present reign, and by his majesty's warrant throwing open the Court of Common Pleas, not only sanctioned those illegal accessions of jurisdiction, but have even introduced regulations calculated to render the three Courts co-extensive in jurisdiction over most *private personal civil actions*.(\*) The numerous writs in force before, and abolished by the uniformity of process act, 2 W. 4, c. 39, were the offsprings of such degrading contrivances; viz. in the *King's Bench*, the bill of Middlesex, and latitat with or without an *ac etiam*, with the *alias capias*, *pluries capias*, and *testatum capias*, into another county; attachments of privileges at the suit of an officer or attorney of the Court; bills against members of parliament, &c. &c. In the *Common Pleas*, the *capias ad respondendum*, and *capias quare clausum fregit*; attachment of privilege, &c. &c. In the *Exchequer*, the writ of *quo minus*, for a mere pretended debtor to the king, (but who in fact was not so); the *subpœna ad respondendum*, *venire*, *distringas*, &c.; with in each Court almost innumerable other varying proceedings. The ancient original writs fell into disuse excepting when it was essential to proceed to *outlawry*, and which was the only form of process (excepting in the solitary instance of an action on a recognizance of bail) where the *body* of the writ disclosed the subject-matter of the debt or claim, though by the singular and uncouth contrivance of an *ac etiam* clause at the foot of bailable process, the defendant was informed in bailable actions of the *form* of action intended to be declared upon, though not of the *precise nature* of the *debt* or *claim*.

The several processes, excepting when founded on an original writ, were moreover not absolutely considered the commencement of the action, but might at the option of a plaintiff be so treated or used merely to bring the defendant into Court, and then to answer *some* complaint thereafter to be made; and hence they might be issued, and the defendant even arrested *before the cause of action was complete*, or even had its incep-

---

(\*) *Ante*, vol. ii. 304 to 312.

tion,(o) though the Court would sometimes exercise a just control in that case over the vexatious costs thus prematurely incurred.(p) But since the uniformity of process act, 2 W. 4, c. 39, process is *in all cases* and to all intents considered the commencement of the action, and no cause of action or set-off *subsequently* accrued due can be given in evidence.(q) Moreover, when the defendant or several defendants had appeared, he or they might be declared against either separately or jointly, at the option of the plaintiff, and in any form of action. The writ also, excepting when by original, contained no statement of the residence or other description of the defendant, and hence it sometimes occurred that when there were several persons of the same name, the wrong person was served or arrested; and as the writ, even in an action of debt, contained no statement of the amount of the sum claimed, or the amount of the costs, the defendant did not know what sum would satisfy the plaintiff. As writs might also be returnable on the very day they were issued, and the plaintiff might even declare on the same day,(r) the defendant, for want of the allowance of some time in order to consult his attorney, or obtain money to satisfy the debt, was immediately involved in so rapidly an increasing expense, that it frequently occurred that before the defendant could obtain an order to stay proceedings on just terms, the costs even exceeded the debt; whilst from the infinite variety in the process and proceeding founded on the same, and issued from or transacted in different public offices by different officers, whose practice in some small respect differed, and who required different fees, and such writs and proceedings had different teste and return days, in which great accuracy was required, the plaintiff's attorney was frequently in error, of which the defendant, through his attorney, took vexatious advantage; and if, after great delay, he remained able to pay the debt, he was not in general liable to pay interest, or more than taxed costs, being sometimes less than those incurred by the plaintiff.

It must be admitted that these and some other inconveniences have certainly been in a great measure removed by the uniformity of process act, 2 W. 4, c. 39, and some other enactments and rules thereon; but it has been urged that other

4. The five several writs substituted by 2 W. 4, c. 39, and some objections suggested to the same.

(o) *Best v. Wilding*, 7 T. R. 4; *Swan-cots v. Westgarth*, 4 East, 75; *Davis v. Owen*, 1 Bos. & Pul. 343; *Pinero v. Wright*, 2 Bos. & Pul. 235. But the cause of action must have arisen in the term when the writ was returnable, *Smith*

*v. Muller*, 3 Term R. 624.

(p) *Kerr v. Dick*, 2 Chitty's Rep. 11.

(q) *Thompson v. Dicus*, 3 Tyrw. Rep. 873, and post, 159.

(r) *Oxlade v. Davidson*, 4 Term Rep. 610.

CHAP. V.  
THE 2 W. 4,  
c. 39,  
IN GENERAL.

inconveniences have been introduced by requiring *too many technical and really unimportant points to be attended to in framing and serving process*, and in giving to them the same importance as if the *merits* were affected, and by *not permitting amendments*, but compelling the plaintiff to begin *de novo*, although perhaps the defendant cannot afterwards be arrested or served with the fresh process in a new action.

Statement of  
outline of regu-  
lations in 2  
W. 4, c. 39.

The uniformity of process act, 2 W. 4, c. 39, s. 1, after reciting that *the process* for the commencement of *personal actions* in the superior Courts of law at Westminster, *then was*, by reason of its great variety and multiplicity, *very inconvenient* in practice, *virtually* abolished the same by substituting *five other writs*, one of which must be adopted, (s) and by enacting, in the 21st section, that *those writs* shall be *the only writs for the commencement of personal actions* in the superior Courts therein named, in *the cases to which such writs are applicable*, after the 1st November, 1832. Of these writs, or modes of proceeding, it is to be observed, that only four are *primary* or to be issued in the first instance, and the other new writ is *secondary* or issued after a former writ, and in order the better to enforce an appearance or bail above. Thus, the ordinary *writ of summons* may be issued against every description of persons, and in every case when the defendant cannot legally be, or is not intended to be arrested. The *writs of capias* and of *detainer* are only to be issued when a single defendant, or at least one of several defendants is to be arrested, or being already in the prison of one of the Courts, is to be there detained. And the writ of *summons* against a *member of parliament*, though one of the primary writs, is only issued when such privileged person is a trader, and it is proposed to issue a fiat in bankruptcy against him if he do not appear in due time. The writ of *distringas* is always preceded by a writ of summons, and is issued only in default of the defendant's appearance to such first writ, and is therefore termed *secondary* process. The proceedings to *outlawry* by writs of exigent and proclamation, must also always be preceded by a writ of summons or capias, and are therefore also termed secondary. So all alias and pluries writs, whether of summons, *distringas* or *capias*, being in continuation of the first, are secondary. (t)

(s) The clear enumeration by Mr. Tidd of the multifarious processes antecedent to the uniformity of process act, 2 W. 4, c. 39, certainly justifies this re-

ital. See Mr. Tidd's Observations on the Uniformity of Process Act, A. D. 1832, page 1, 2.

(t) Tidd, 63; Price, Gen. Pr. 11.



It seems to have been the intention of the legislature, by this act, not only to *reduce the number* and variety of the writs then in force, but also to *require more explicit information* to be given by such new process and memoranda, warnings and indorsements, and probably thereby to enable a *defendant himself*, by the information given by the process, to *act in all re-*

CHAP. V.  
THE 2 W. 4,  
c. 39,  
IN GENERAL.

Object of the legislature to afford more certain and explicit information to defendants; but certain inconveniences introduced. (u)  
Objections suggested to enactment, 2 W. 4, c. 39, and rules thereon.

(u) It is true that each requisite *might* with great care be strictly and accurately observed without the exercise of any extraordinary intelligence on the part of the legal practitioner; but experience has evinced that it is frequently otherwise, and as the delay and expense occasioned by these really unimportant irregularities principally injures the *client*, who is not to blame, he and the public will naturally complain that effect should be allowed to such *trifling objections*, delaying, if not actually defeating, the remedy, and it must be painful to counsel to be compelled, by what is considered professional duty, to obey his disgraceful instruction to move to set aside process for a just debt, merely because in the copy of process a single letter has been omitted as *l* in *Middlesex*, in the name of the county, to the sheriff of which the writ itself was directed, although not in a part of the writ which affects to offer any information to the defendant, or merely because the form of action has been described "action on the case upon promises," instead of "action on promises,"\* especially as a defendant, immediately he has been served with any process not stating any form of action, may immediately and before his appearance, obtain explicit particulars of the plaintiff's demand by summons and order of a judge.† It is submitted that there is an imperative call for legislative amelioration of the newly invented practice, which, by the uniformity of process act, has subjected the administration of justice to many objections. If the object of the legislature really was by every writ with its memoranda, warnings, and indorsements, to give to every defendant such explicit information of the cause of action as a bill in Chancery, setting forth the detail of the complaint, and such practical directions *what* he has to perform and *how*, that he might himself take *all* requisite measures without consulting an attorney, then the enactments, even with the rules thereon, fall very short of affording all such requisite information. Thus there is no intimation to the defendant by a bailable capias of his right to insist on being taken for the first twenty-four hours after his arrest to a third person's house in the county, and within three miles, not being a gaol or lock-up house, and that the officer refusing forfeits 50*l.*;‡ nor is there any direction on serviceable process at what particular office of the proper Court, or how the defendant shall enter his appearance; and when a defendant appears in person there is no requisition that the appearance shall state his residence, or where the plaintiff may serve him with a declaration or other proceeding, and in many other respects full information, essential to enable a defendant to act for himself, is *withheld*, or at least not afforded by the 2 W. 4, c. 39, or the rules thereon; nor is there in a writ of summons any notification to the defendant that if he should avoid the process and not appear, a distringas will issue against his goods.§

If on the other hand it is to be supposed that the defendant, when served or arrested, will consult an attorney what he is to do, or rather employ him to transact all measures for him as is the constant practice, then there is no occasion for such great particularity in the writ and indorsements, because that attorney must or ought to be able readily to afford all requisite information upon the most cursory examination of the most general writ, merely requiring the defendant to enter his appearance, or put in bail in the proper Court; at least there seems to be no necessity for visiting a plaintiff with so many serious consequences for his attorney's deviating from the prescribed forms, and unless a party, in support of his application to set aside the proceeding on account of a deviation from a prescribed form, will swear and satisfy the Court that he has *really been misled and prejudiced*, there is no reason why the proceeding should be set aside, and if it be essential for the sake of uniformity that the prescribed form should be *strictly* observed, that object might be attained by empowering the Court or a judge to subject the practitioner to some discretionary pecuniary penalty, and in case of repetition he might be suspended either temporarily or absolutely from assuming to practise, and it seems a harsh rule that a *suitor* shall have his proceedings set aside, and not even permitted to amend on payment of costs.

\* *King v. Sheffington*, 1 Dowl. 686;  
1 Crom. & M. 683; S. C. 1 Arch. K. B. 4  
edit. 515; *Davies v. Parker*, 2 Dowl.  
589.

† Chitty's Rep. 724, 5, K. B. Rule

Trin. T. 2 G. 4, C. P.; 8 Moore, 211.  
‡ 32 G. 2, c. 28, s. 1 & 12; 1 Crompton  
& M. 365.

§ Price's Gen. Prac. 18, note \*.

CHAP. V.  
THE 2 W. 4,  
c. 39,  
IN GENERAL.

*spects for himself, independently of any attorney.* No objection could reasonably be urged to the requiring such explicit

2 WILL. 4, c. 39.

*An Act for the Uniformity of Process in Personal Actions in His Majesty's Courts of Law at Westminster.* [23d May, 1832.]

Serviceable process for the commencement of personal actions.

WHEREAS the process for the commencement of personal actions in his Majesty's superior Courts of Law at Westminster is, by reason of its great variety and multiplicity, very inconvenient in practice; for the remedy thereof be it enacted, that the process in all such actions commenced in either of the said Courts in cases where it is not intended to hold the defendant to special bail, or to proceed against a member of parliament according to the provisions contained in the statute passed in the sixth year of the reign of his late Majesty King George the Fourth, intituled *An Act to amend the Laws relating to Bankrupts*, shall, whether the action be brought by or against any person entitled to the privilege of peerage or of parliament, or of the Court wherein such action shall be brought, or of any other Court, or to any other privilege, or by or against any other person, be according to the form contained in the schedule to this act annexed marked No. 1, and which process may issue from either of the said Courts, and shall be called a writ of summons; and in every such writ and copy thereof, the place and county of the residence or supposed residence of the party defendant, or wherein the defendant shall be or shall be supposed to be, shall be mentioned; and such writ shall be issued by the officer of the said Courts respectively by whom process serviceable in the county therein mentioned hath been heretofore issued from such Court;\* and every such writ may be served in the manner heretofore used in the county therein mentioned, or within two hundred yards of the border thereof, and not elsewhere, and the person serving the same shall and is hereby required to indorse on the writ the day of the month and week of the service thereof.

Mode of appearance to serviceable process.

II. And be it further enacted, that the mode of appearance to every such writ, or under the authority of this act, shall be by delivering a memorandum in writing according to the form contained in the said schedule, and marked No. 2, such memorandum to be delivered to such officer or person as the Court out of which the process issued shall direct, and to be dated on the day of the delivery thereof.

Appearance may be enforced by writ of distringas in case a defendant cannot be served with the writ of summons.

III. And be it further enacted, that in case it shall be made appear by affidavit, to the satisfaction of the Court out of which the process issued, or in vacation, of any judge of either of the said Courts, that any defendant has not been personally served with any such writ of summons as herein before mentioned, and has not, according to the exigency thereof, appeared to the action, and cannot be compelled so to do without some more efficacious process, then and in any such case it shall be lawful for such Court or judge to order a writ of distringas to be issued, directed to the sheriff of the county wherein the dwelling-house or place of abode of such defendant shall be situate, or to the sheriff of any other county, or to any other officer to be named by such Court or judge, in order to compel the appearance of such defendant; which writ of distringas shall be in the form, and with the notice subscribed thereto, mentioned in the schedule to this act, marked No. 3; which writ of distringas and notice, or a copy thereof, shall be served on such defendant, if he can be met with, or if not, shall be left at the place where such distringas shall be executed; and a true copy of every such writ and notice shall be delivered together therewith to the sheriff or other officer to whom such writ shall be directed; and every such writ shall be made returnable on some day in term, not being less than fifteen days after the teste thereof, and shall bear teste on the day of the issuing thereof, whether in term or in vacation; and if such writ of distringas shall be returned non est inventus and nulla bona, and the party suing out such writ shall not intend to proceed to outlawry or waiver, according to the authority hereinafter given, and any defendant against whom such writ of distringas issued shall not appear at or within eight days inclusive after the return thereof, and it shall be made appear by affidavit to the satisfaction of the Court out of which such writ of distringas issued, or in vacation, of any judge of either of the said Courts, that due and proper means were taken and used to serve and execute such writ of distringas, it shall be lawful for such Court or judge to authorize the party suing out such writ to enter an appearance for such defendant, and to proceed thereon to judgment and execution.

Bailable process for the com-

IV. And be it further enacted, that in all such actions wherein it shall be intended to arrest and hold any person to special bail who may not be in the custody of the

\* Altered as to the officer to sign all writs from King's Bench by 3 & 4 W. 4, c. 67, s. 1.

information in process if the statute had limited the consequences of accidental deviation. But unfortunately these new

CHAP. V.  
THE 2 W. 4,  
c. 39,  
IN GENERAL.

Marshal of the Marshalsea of the Court of King's Bench or of the Warden of the Fleet Prison, the process shall be by the writ of *capias* according to the form contained in the said schedule and marked No. 4; and so many copies of such process, together with every memorandum or notice subscribed thereto, and all indorsements thereon, as there may be persons intended to be arrested thereon or served therewith, shall be delivered therewith to the sheriff or other officer or person to whom the same may be directed, or who may have the execution and return thereof, and who shall upon or forthwith after the execution of such process cause one such copy to be delivered to every person upon whom such process shall be executed by him, whether by service or arrest, and shall indorse on such writ the true day of the execution thereof, whether by service or arrest; and if any defendant be taken or charged in custody upon any such process, and imprisoned for want of sureties for his appearance thereto, the plaintiff in such process may before the end of the next term after the detainer or arrest of such defendant declare against such defendant, and proceed thereon in the manner and according to the directions contained in a certain act of parliament made in the fourth and fifth years of the reign of King William and Queen Mary, intituled *An Act for delivering Declarations against Prisoners*: Provided always, that it shall be lawful for the plaintiff or his attorney to order the sheriff or other officer or person to whom such writ shall be directed, to arrest one or more only of the defendants therein named, and to serve a copy thereof on one or more of the others, which order shall be duly obeyed by such sheriff or other officer or person; and such service shall be of the same force and effect as the service of the writ of summons hereinbefore mentioned, and no other.

commencement of personal actions.

4 & 5 W. & M. c. 21.

V. And be it further enacted, that upon the return of non est inventus as to any defendant against whom such writ of *capias* shall have been issued, and also upon the return of non est inventus and nulla bona as to any defendant against whom such writ of *distringas* as hereinbefore mentioned shall have issued, whether such writ of *capias* or *distringas* shall have issued against such defendant only, or against such defendant and any other person or persons, it shall be lawful, until otherwise provided for, to proceed to *outlaw* or *waive* such defendant by writs of *exigi facias* and *proclamation* and otherwise, in such and the same manner as may now be lawfully done upon the return of non est inventus to a pluries writ of *capias* ad respondendum issued after an original writ: Provided always, that every such writ of exigent proclamation, and other writ subsequent to the writ of *capias* or *distringas*, shall be made returnable on a day certain in term; and every such first writ of exigent and proclamation shall bear teste on the day of the return of the writ of *capias* or *distringas*, whether such writ be returned in term or in vacation; and every subsequent writ of exigent and proclamation shall bear teste on the day of the return of the next preceding writ; and no such writ of *capias* or *distringas* shall be sufficient for the purpose of outlawry or waiver if the same be returned within less than fifteen days after the delivery thereof to the sheriff or other officer to whom the same shall be directed.

Proceedings to outlawry.

VI. And be it further enacted, that after judgment given in any action commenced by writ of summons or *capias* under the authority of this act, proceedings to outlawry or waiver may be had and taken, and judgment of outlawry or waiver given in such manner and in such cases as may now be lawfully done after judgment in an action commenced by original writ: Provided always, that every outlawry or waiver had under the authority of this act shall and may be vacated or set aside by writ of error or motion, in like manner as outlawry or waiver founded on an original may now be vacated or set aside.

Proceedings to outlawry may be had after judgment given under the authority of this act.

VII. And be it further enacted, that for the purpose of proceeding to outlawry and waiver upon such writs of *capias* or *distringas* returnable in the Court of Exchequer, it shall and may be lawful for the Lord Chief Baron of the said Court, and he is hereby required, to appoint from time to time a fit person, holding some other office in the said Court, to execute the duties of a filacer, exigenter, and clerk of the outlawries in the same Court.

Filacer to be appointed in the Court of Exchequer.

VIII. And be it further enacted, that when it shall be intended to detain in any such action any person being in the custody of the Marshal of the Marshalsea of the Court of King's Bench, or of the Warden of the Fleet Prison, the process of detainer shall be according to the form of the writ of *detainer* contained in the said schedule and marked No. 5; and a copy of such process, and of all indorsements thereon, shall be delivered together with such process to the said Marshal or Warden to whom the same shall be directed, and who shall forthwith serve such copy upon the defendant personally, or leave the same at his room, lodging, or other place of abode; and such process may issue from either of the said Courts, and the declaration thereupon shall

Mode of detaining a prisoner in the custody of the Marshal or of the Warden of the Fleet.

CHAP. V.  
THE 2 W. 4,  
c. 39,  
IN GENERAL.

regulations have occasioned so great an increase of trifling motions and summons to set aside proceedings for really unim-

Mode of proceeding against a member of parliament to enforce the stat. 6 G. 4, c. 16, s. 10.

Duration of writs.

Proviso as to statute of limitations.

Proceedings on writs served or executed at certain times.

Proviso for Sunday, &c.

Date and teste of writs.

Indorsement of the name of the attorney or party suing.

Service of writs of summons on corporations and on inhabit-

and may allege the prisoner to be in the custody of the said Marshal or Warden, as the fact may be, and the proceedings shall be as against prisoners in the custody of the sheriff, unless otherwise ordered by some rule to be made by the judges of the said Courts.

IX. And be it further enacted, that in all such actions wherein it shall be intended to proceed against a *member of parliament* according to the provisions of the said statute made in the sixth year of the reign of his late Majesty King George the Fourth, the process shall be according to the form contained in the said schedule marked No. 6, and which process and a copy thereof shall be in lieu of the summons, or original bill and summons and copy thereof, mentioned in the said statute.

X. And be it further enacted, that no writ issued by authority of this act shall be in force for more than four calendar months from the day of the date thereof, including the day of such date, but every writ of summons and *capias* may be continued by alias and pluries, as the case may require, if any defendant therein named may not have been arrested thereon or served therewith: Provided always, that no first writ shall be available to prevent the operation of any statute whereby the time for the commencement of the action may be limited, unless the defendant shall be arrested thereon or served therewith, or proceedings to or toward outlawry shall be had thereupon, or unless such writ and every writ, (if any) issued in continuation of a preceding writ, shall be returned non est inventus and entered of record within one calendar month next after the expiration thereof, including the day of such expiration, and unless every writ issued in continuation of a preceding writ shall be issued within one calendar month after the expiration of the preceding writ, and shall contain a memorandum indorsed thereon or subscribed thereto, specifying the day of the date of the first writ; and return to be made in bailable process by the sheriff or other officer to whom the writ shall be directed, or his successor in office, and in process not bailable by the plaintiff or his attorney suing out the same, as the case may be.

XI. And whereas, according to the present practice, in certain cases no proceedings can be effectually had on any writ returnable within four days of the end of any term until the beginning of the ensuing term, whereby an unnecessary delay is sometimes created; for remedy thereof be it enacted, that if any writ of summons, *capias* or detainer, issued by authority of this act, shall be served or executed on any day, whether in term or vacation, all necessary proceedings to judgment and execution may, except as hereinafter provided, be had thereon without delay, at the expiration of eight days from the service or execution thereof, on whatever day the last of such eight days may happen to fall, whether in term or vacation: Provided always, that if the last of such eight days shall in any case happen to fall on a Sunday, Christmas Day, or any day appointed for a public fast or thanksgiving, in either of such cases the following day shall be considered as the last of such eight days; and if the last of such eight days shall happen to fall on any day between the Thursday before and the Wednesday after Easter Day, then and in every such case the Wednesday after Easter Day shall be considered as the last of such eight days: Provided also, that if such writ shall be served or executed on any day between the 10th day of August and the 24th day of October in any year, special bail may be put in by the defendant in bailable process, or appearance entered either by the defendant or the plaintiff on process not bailable, at the expiration of such eight days: Provided also, that no declaration, or pleading after declaration, shall be filed or delivered between the said 10th day of August and 24th day of October.

XII. And be it further enacted, that every writ issued by authority of this act shall bear date on the day on which the same shall be issued, and shall be tested in the name of the Lord Chief Justice or Lord Chief Baron of the Court from which the same shall issue, or in case of a vacancy of such office, then in the name of a senior puisne judge of the said Court, and shall be indorsed with the name and place of abode of the attorney actually suing out the same, and in case such attorney shall not be an attorney of the Court in which the same is sued out, then also with the name and place of abode of the attorney of such Court in whose name such writ shall be taken out: but in case no attorney shall be employed for that purpose, then with a memorandum expressing that the same has been sued out by the plaintiff in person, mentioning the city, town or parish, and also the name of the hamlet, street, and number of the house of such plaintiff's residence, if any such there be.

XIII. And be it further enacted, that every such writ of summons issued against a corporation aggregate may be served on the mayor or other head officer, or on the town clerk, clerk, treasurer, or secretary of such corporation; and every such writ issued against the inhabitants of a hundred or other like district may be served on the

portant irregularities, so unworthy of a superior *Court of Justice*, that it is to be feared that more inconvenience than benefit

CHAP. V.  
THE 2 W. 4,  
c. 39,  
IN GENERAL.

high constable thereof, or any one of the high constables thereof; and every such writ issued against the inhabitants of any county of any city or town, or the inhabitants of any franchise, liberty, city, town, or place not being part of a hundred or other like district, on some peace officer thereof.

ants of hundreds and towns.

XIV. And be it further enacted, that it shall and may be lawful to and for the judges of the said Courts, and they are required from time to time to make all such general rules and orders for the effectual execution of this act, and of the intention and object hereof, and for fixing the costs to be allowed for and in respect of the matters herein contained, and the performance thereof, as in their judgment shall be deemed necessary or proper, and for that purpose to meet as soon as conveniently may be after the passing hereof.

General rules to be made by the judges.

XV. And be it further enacted, that it shall be lawful in term time for the Court out of which any writ issued by authority of this act, or any writ of *capias* ad satisfaciendum, *feri facias*, or *elegit* shall have issued, to make rules, and also for any judge of either of the said Courts in vacation to make orders for the return of any such writ; and every such order shall be of the same force and effect as a rule of Court made for the like purpose: Provided always, that no attachment shall issue for disobedience thereof until the same shall have been made a rule of Court.

Rules and orders may be made for the return of writs.

XVI. And be it further enacted, that all such proceedings as are mentioned in any writ, notice or warning issued under this act, shall and may be had and taken in default of a defendant's appearance or putting in special bail, as the case may be.

Proceedings in default of appearance or special bail.

XVII. And be it further enacted, that every attorney whose name shall be indorsed on any writ issued by authority of this act, shall, on demand in writing made by or on behalf of any defendant, declare forthwith whether such writ has been issued by him, or with his authority or privity; and if he shall answer in the affirmative, then he shall also, in case the Court or any judge of the same or of any other Court shall so order and direct, declare in writing, within a time to be allowed by such Court or judge, the profession, occupation or quality, and place of abode of the plaintiff, on pain of being guilty of a contempt of the Court from which such writ shall have appeared to have been issued; and if such attorney shall declare that the writ was not issued by him, or with his authority or privity, the said Court or any judge of either of the said Courts shall and may, if it shall appear reasonable so to do, make an order for the immediate discharge of any defendant or defendants who may have been arrested on any such writ, on entering a common appearance.

Attorney to declare whether writ sued by his authority; and to declare name and place of abode of his client, if ordered.

XVIII. And be it further enacted, that it shall and may be lawful to and for the judges of each of the said Courts from time to time to make such rules and orders for the government and conduct of the ministers and officers of their respective Courts, in and relating to the distribution and performance of the duties and business to be done and performed in the execution of this act, as such judges may think fit and reasonable; provided always, that no additional charge be thereby imposed on the suitors.

If writ not issued by authority of the attorney, the defendant may be discharged.

XIX. Provided always and be it further enacted, that nothing in this act contained shall subject any person to arrest, outlawry or waiver, who by reason of any privilege, usage or otherwise, may now by law be exempt therefrom, or shall extend to any cause removed into either of the said Courts by writ of *pone*, *certiorari*, *recordari facias loquelam*, *habeas corpus*, or otherwise.

Rules to be made by the Courts for the government of their ministers and officers.

XX. And whereas there are in divers parts of England certain districts and places parcel of some one county, but wholly situate within and surrounded by some other county, which is productive of inconvenience and delay in the service and execution of the process of the said Courts; for remedy thereof be it enacted, that every such district and place shall and may for the purpose of the service and execution of every writ and process, whether meane or judicial, issued out of either of the said Courts, be deemed and taken to be part as well of the county wherein such district or place is so situate as aforesaid as of the county whereof the same is parcel; and every such writ and process may be directed accordingly, and executed in either of such counties.

Proviso for persons privileged from arrest, &c. Places, parcel of one county and situate in another, to be deemed part of each.

XXI. And be it further enacted, that from the time when this act shall commence and take effect, the writs hereinbefore authorized shall be the only writs for the commencement of personal actions in any of the Courts aforesaid, in cases to which such writs are applicable; and the costs to be allowed and charged for such writs shall be the same as for writs of *latitat*: Provided always, that nothing in this act contained shall abridge, alter or affect the franchises and jurisdictions of either of the counties palatine of Lancaster or Durham, or of any officer or minister thereof.

Writs hereinbefore authorized to be the only writs for commencement of personal actions.

XXII. And be it further enacted, that this act shall commence and take effect on the first day of Michaelmas term next after the passing thereof.

Commencement of act.

XXIII. And be it further enacted, that this act may be amended, altered or repealed during the present session of parliament.

Act may be altered this session.

CHAP. V.  
THE 2 W. 4,  
c. 39,  
IN GENERAL.

has arisen from the requisition of so much particularity. And it would certainly be desirable if process were rendered more

**SCHEDULE to which this act refers.**

**No. 1. Writ of Summons.**

WILLIAM the Fourth, &c.

To C. D. of, &c. in the county of —, Greeting :

We command you [or as before or often we have commanded you] that within eight days after the service of this writ on you, inclusive of the day of such service, you do cause an appearance to be entered for you in our Court of —, in an action on promises [or as the case may be] at the suit of A. B. And take notice, that in default of your so doing, the said A. B. may cause an appearance to be entered for you, and proceed therein to judgment and execution.

Witness — at Westminster the — day of —.

*Memorandum to be subscribed on the Writ.*

N.B.—This writ to be served within four calendar months from the date thereof, including the day of such date, and not afterwards.

*Indorsement to be made on the Writ before Service thereof.*

This writ was issued by E. F. of —, attorney for the said A. B.

Or,

This writ was issued in person by A. B. who resides at — [mention the city, town, or parish, and also the name of the hamlet, street, and number of the house of the plaintiff's residence, if any such.]

*Indorsement to be made on the Writ after Service thereof.*

This writ was served by me X. Y. on — on — the — day of —, 18—.

X. Y.

**No. 2. Forms of entering an Appearance.**

A., plaintiff against C. D. { The defendant C. D. appears in person.

or,  
against C. D. and another, { E. F. attorney for C. D. appears for him.

or,  
against C. D. and others. { G. H. attorney for the plaintiff, appears for the defendant  
C. D. according to the statute.

Entered the — day of —, 18—.

**No. 3. Writ of Distraingas.**

WILLIAM the Fourth, &c.

To the sheriff of — Greeting :

We command you, that you omit not by reason of any liberty in your bailiwick, but that you enter the same, and distrain upon the goods and chattels of C. D. for the sum of forty shillings, in order to compel his appearance in our Court of — to answer A. B. in a plea of trespass on the case [or debt, or as the case may be]; and how you shall execute this our writ you make known to us in our said Court on the — day of — now next ensuing.

Witness — at Westminster the — day of — in the — year of our reign.

*Notice to be subscribed to the foregoing Writ.*

In the Court of —.

Between { A. B. plaintiff,  
and  
C. D. defendant.

Mr. C. D.

Take notice, that I have this day distrained upon your goods and chattels in the sum of forty shillings, in consequence of your not having appeared in the said Court to answer the said A. B. according to the exigency of a writ of summons bearing teste on the — day of —; and that in default of your appearance to the present writ within eight days inclusive after the return hereof, the said A. B. will cause an appearance to be entered for you, and proceed thereon to judgment and execution, or [if the defendant be subject to outlawry] will cause proceedings to be taken to outlaw you.

simple than under the present regulation, or at least some limit were imposed to those vexatious proceedings. (u)

CHAP. V.  
THE 2 W. 4,  
c. 39,  
IN GENERAL.

No. 4. *Writ of Capias.*

WILLIAM the Fourth, &c.

To the Sheriff of —,

or,

To the Constable of Dover Castle,

or,

To the Mayor and Bailiffs of Berwick-upon-Tweed,

or,

[as the case may be,]

Greeting :

We command you, [or as before or often, we have commanded you,] that you omit not by reason of any liberty in your bailiwick, but that you enter the same, and take C. D. of — if he shall be found in your bailiwick, and him safely keep until he shall have given you bail or made deposit with you according to the law in an action on promises [or of debt, &c.] at the suit of A. B., or until the said C. D. shall by other lawful means be discharged from your custody. And we further command you, that on execution hereof you do deliver a copy hereof to the said C. D. And we hereby require the said C. D. to take notice, that within eight days after execution hereof on him, inclusive of the day of such execution, he should cause special bail to be put in for him in our Court of — to the said action, and that in default of his so doing, such proceedings may be had and taken as are mentioned in the warning hereunder written or indorsed hereon. And we do further command you the said sheriff, that immediately after the execution hereof you do return this writ to our said Court, together with the manner in which you shall have executed the same, and the day of the execution hereof; or that if the same shall remain unexecuted, then that you do so return the same at the expiration of four calendar months from the date hereof, or sooner if you shall be thereunto required by order of the said Court or by any judge thereof.

Witness — at Westminster the — day of —.

*Memoranda to be subscribed to the Writ.*

N.B.—This writ is to be executed within four calendar months from the date thereof, including the day of such date, and not afterwards.

*A Warning to the Defendant.*

1. If a defendant, being in custody, shall be detained on this writ, or if a defendant, being arrested thereon, shall go to prison for want of bail, the plaintiff may declare against any such defendant before the end of the term next after such detainer or arrest, and proceed thereon to judgment and execution.

2. If a defendant, being arrested on this writ, shall have made a deposit of money according to the statute 7 & 8 G. 4, c. 71, and shall omit to enter a common appearance to the action, the plaintiff will be at liberty to enter a common appearance for the defendant, and proceed thereon to judgment and execution.

3. If a defendant, having given bail on the arrest, shall omit to put in special bail as required, the plaintiff may proceed against the sheriff or on the bail-bond.

4. If a defendant, having been served only with this writ, and not arrested thereon, shall not enter a common appearance within eight days after such service, the plaintiff may enter a common appearance for such defendant, and proceed thereon to judgment and execution.

*Indorsements to be made on the Writ of Capias.*

Bail for £ — by affidavit.

or,

Bail for £ — by order of [naming the judge making the order], dated this — day of —.

This writ was issued by E. F. of — attorney for the plaintiff [or plaintiffs] within named.

Or,

This writ was issued in person by the plaintiff within named, who resides at —, [mention the city, town or parish, and also the name of the hamlet, street, and number of the house of the plaintiff's residence, if any such there be.]

(u) See further objections, ante, 149, n. (n).

CHAP. V.  
THE 2 W. 4,  
c. 39,  
IN GENERAL.

As the terms of the enactments in 2 W. 4, c. 39, and of the forms prescribed in the schedule, (v) and of the rules of Court made thereon in pursuance of sect. 14, (w) are subjects of such frequent reference, it is expedient to insert them in the subscribed notes. (w)

The practical  
operation of  
2 W. 4, c. 39.

The statutes 2 W. 4, c. 39, intituled "An Act for *Uniformity of Process in Personal Actions* in his Majesty's Courts of Law at Westminster," passed 23d May, 1832, and which commenced in operation on the first day of the subsequent Michaelmas term, has *totally changed* as well the substance as the forms of antecedent *mesne process* in *most personal actions*, as well as many proceedings thereon, by expressly enacting that the writs thereinbefore authorized (and presently described) "shall be *the only writs for the commencement of*

#### No. 5. Writ of Detainer.

WILLIAM the Fourth, &c.

To the Marshal of the Marshalsea of our Court before us [or, To the Warden of our Prison of the Fleet.]

We command you, that you detain C. D. if he shall be found in your custody at the delivery hereof to you, and him safely keep, in an action on promises [or of debt, &c. *as the case may be*], at the suit of A. B., until he shall be lawfully discharged from your custody. And we do further command you, that on receipt hereof you do warn the said C. D. by serving a copy hereof on him, that within eight days after service of such copy, inclusive of the day of such service, he do cause special bail to be put in for him in our Court of — to the said action; and that in default of his so doing the said A. B. may declare against him before the end of the term next after his detainer, and proceed thereon to judgment and execution. And we do further command you the said [marshal or warden, *as the case may be*,] that immediately after the service hereof you do return this our writ, or a copy hereof, to our said Court, together with the day of the service hereof.

Witness — at Westminster the — day of —.

N.B.—This writ is to be indorsed in the same manner as the writ of *capias*, but not to contain the warning on that writ.

#### No. 6. Writ of Summons to be served on a Member of Parliament in order to enforce the Provisions of the Statute 6 G. 4, c. 16, s. 10.

WILLIAM the Fourth, &c.

To C. D. of, &c. — Esquire, having privilege of parliament, Greeting :

We command you, that within one calendar month next after personal service hereof on you, you do cause an appearance to be entered for you in our Court of — in an action [on promises, debt, &c. *as the case may be*,] at the suit of A. B.; and you are hereby informed that an affidavit of debt for the sum of — hath been filed in the proper office, according to the provisions of a certain act of parliament made and passed in the sixth year of the reign of his late Majesty King George the Fourth, intituled "An Act to amend the Laws relating to Bankrupts," and that unless you pay, secure or compound for the debt sought to be recovered in this action, or enter into such bond as by the said act is provided, and cause an appearance to be entered for you within one calendar month next after such service hereof, you will be deemed to have committed an act of bankruptcy from the time of the service hereof.

Witness — at Westminster the — day of —.

N.B.—This writ is to be served within four calendar months from the date thereof, including the day of such date, and not afterwards.

Direction.—This summons is to be indorsed with the name of the plaintiff or his attorney in like manner as the writ of *capias*.



CHAP. V.  
THE 2 W. 4,  
c. 39,  
IN GENERAL.

*personal actions in any of the three superior Courts of Law at Westminster, in cases to which such writs are applicable.*"(x) Consequently it must be kept in view, *first*, that the act is confined to *personal actions commenced* in one of the superior Courts, and does not extend to process in *real or mixed actions*, as *dower, quare impedit, or ejectment*;(y) *secondly*, that it does not affect actions *removed from inferior Courts*, such as *replevin*, usually commenced in and removed from the County Court by recordari facias loquelam into one of the superior Courts,(z) or removed by habeas corpus, &c.;(a) and *thirdly*, that it does not affect proceedings in *scire facias*, (though in some respects a personal action,) because, amongst other reasons, the forms prescribed by the act are not, in the language of the 21st section of the act, *applicable to scire facias*.(b) It will, therefore, still be necessary, as regards *those* proceedings, to refer to the previous forms, and observe the distinctions between *terms and vacations* and general return days.(c) But for *most practical* purposes the forms and proceedings directed by the above act to be adopted, with the *rules* thereon, must be *imperatively observed*, at the risk of a summons or motion to set the same aside for irregularity, and the necessity to begin de novo. And although some useful works on practice intimate that this would only be so when the deviation is *material*,(d) and there are certainly some recent cases favouring that view,(e) yet we have seen that in some of the principal decisions on the act, the Courts have declared that they will treat *all* deviations as fatal, whether *material* or not; for otherwise they would incessantly have to hear acute and refined distinctions between what irregularities are or not material,(f) and even in construing the word *material*, it will be found that a *technical*, not a natural view, is taken; for who but a lawyer would consider that the omission of a letter, as Middlesex instead of Middlesex, or sheriff instead of she-

(x) 2 W. 4, c. 39, s. 21; but see rule M. T. 3 W. 4.

(y) Tidd's Supp. 1833, p. 62, as to *ejectment*, so held in *Doe d. Ashman v. Roe*, 1 Bing. N. C. 253; *Doe d. Fry v. Roe*, 3 Moore & S. 870; *Doe d. Haines v. Roe*, 2 Moore & S. 619.

(z) Tidd's Supp. 1833, p. 62.

(a) And see sect. 19.

(b) Tidd's Supp. A.D. 1833, p. 63; Atherton, 4, 6; Wordsworth on Rules of Court, 8. n. (8), so ably composed as to render it desirable the author would extend his labours.

(c) See in general 3 Bla. Com. Chap.

XVIII.; and see Tidd's Supp. 1833, where see a perspicuous summary of the several processes antecedent to 2 W. 4, c. 39; and see Com. Dig. tit. Process. So that practitioners have by the uniformity of process act, 2 W. 4, c. 39, to attain an accumulation, not an exchange, of technical knowledge.

(d) *Pocock v. Mason*, M. T. 1834; 1 Bing. New Cases, 245; S. P. 9 Legal Observer, 109; Arch. Pr. by T. Chitty, 4th ed. 112, 113, 518; 1 Arch. Pr. C. P. 23.

(e) See further post.

(f) *Ante*, 71; and rule M. T. 3 W. 4.

CHAP. V.  
THE 2 W. 4,  
c. 39,  
IN GENERAL.

riffs of London, in the copy of a *capias* delivered to a defendant who had been arrested upon the *capias* itself, should be deemed *material*, all other memoranda, warnings, indorsements and information to the defendant in such copy being perfectly correct. (g) In short, the few instances in which it will be presently seen the Courts have considered the deviations so trifling and immaterial as not to constitute a valid legal objection, have arisen from the natural dislike, and even disgust, which the judges must ever feel in giving effect to objections utterly wide of the merits, but can never be relied upon as forming a rule or exceptions on which any practitioner can safely rely in excuse for ignorance or blunder.

Enumeration and consideration of the *five* different forms of process, one of which must now be adopted under 2 W. 4, c. 39.

Such uniformity of process act, 2 W. 4, c. 39, s. 1, prescribes that one of the *five different forms of process* shall in such *personal* actions be adopted, and not the writs previously in use, viz., 1st, A writ of *summons*, to be *personally served* in ordinary cases upon one or more private individuals, whether privileged or not, and corporations, or the inhabitants of a hundred or other district, and which may also be served upon a single defendant, when he is in prison at the suit of a third person; 2dly, A writ of *distringas*, properly with the view of seizing the defendant's goods to the value of 40s., in case of inability to serve the writ of *summons personally*, though sometimes as the preliminary of proceedings to outlawry; 3dly, A writ of *capias*, to *arrest* a party who is at large, or already in custody of a *sheriff*; 4thly, A writ of *detainer* against a person already in the prison of one of the Courts; and 5thly, A writ of *summons*, to be served on a *member of parliament*, in order to enforce the provisions of the Bankrupt Act, 6 G. 4, c. 16, s. 10. The same statute also, in sections 5, 6 and 10, contains enactments regulating the new proceedings to *outlawry*, and to save the *statute of limitations*.

All process must still be in English, &c.

Before the uniformity of process act, all the numerous processes returnable in the different Courts of law at Westminster, were regulated by the 12 G. 1, c. 27; 5 G. 2, c. 27; and 21 G. 2, c. 3; and 7 & 8 G. 4, c. 71, which required that the writ, process, declaration, and all other proceedings, should be *in the English tongue, and written in words at length*, in a common legible hand and character, and which direction is still *virtually in force*, although all the antecedent forms of writs

(g) *Hodgkinson v. Hodgkinson*, 3 Nev. & Man. 564; 2 Dowl. 535; *Nicol v. Boyd*, 10 Bing. 339.

have been abolished by the 2 W. 4, c. 39, and others substituted.

CHAP. V.  
THE 2 W. 4,  
c. 39,  
IN GENERAL.

Before the uniformity of process act, process not by original might issue before the cause of action was complete, it being considered as issued merely to bring the defendant into Court, and this as well in bailable as serviceable process; (h) but now the suing out the writ of summons, and all the other writs thereby prescribed, are to be considered as the commencement of the action for all purposes, and cannot be issued before the cause of action is complete, (i) or the plaintiff would be non-suited or have a verdict against him; and therefore in a late case it was held, since the passing of the act, that a writ of summons is to be considered as the commencement of the action, and the declaration must correspond with the form of action specified in the writ; and if the declaration is in a different form of action, it is irregular, and the Court will set it aside, leaving the plaintiff to declare on the writ, if he can do so, according to his cause of action. (j) On the other hand a defendant cannot avail himself of a ground of defence, which clearly was not perfected until after the writ was issued. (k) Formerly, on the trial of an action, it frequently became material to prove the time when the action was commenced, and if the first writ was not in Court nor any witness there to prove the time, injustice arose; but those inconveniences are now removed by the 2 W. 4, c. 39, s. 12, requiring the exact day of issuing mesne process to be always inserted therein, and by the rule of Hilary term, 4 W. 4, requiring the issue and record, and writ of trial to the sheriff, also to state the teste of the first writ in those proceedings.

The writs under 2 W. 4, c. 39, are now considered the commencement of an action.

It will be observed that the 14th section of 2 W. 4, c. 39, in express terms requires the judges from time to time to make such general rules and orders for the *effectual execution of that act*, and of the intention and object thereof, and for fixing the *costs* to be allowed for and in respect of the matters contained in the act and performance thereof, as in their judgment should be deemed necessary or proper. (l) And accordingly in Michaelmas term, 3 W. 4, 2d November, 1852, all

THE RULES OF COURT made in pursuance of 14th section of 2 W. 4, c. 39.

(h) *Best v. Wilding*, 7 Term Rep. 4; 4 East, 75; 1 Bos. & P. 343; 2 B. & P. 235; 3 Chitty's R. 11.

(i) *Atton v. Underhill*, 1 Cramp. & M. 492, 768; 3 Tyr. 427.

(j) *Thompson v. Dicus*, 1 Cramp. & M. 768; 3 Tyr. 873.

(k) *Worswick v. Beswick*, 10 Bar. & Cres. 676.

(l) *Ante*, 153, in note.

CHAP. V.  
THE RULES  
THEREON.

the judges, excepting Lord Denman, C. J., (who had not then taken his seat,) promulgated *several General Rules, (m)* and on

(m) *Reg. Gen. Michaelmas Term, 3 William IV.—2nd November, 1832.*

REG. I.

The General  
Rules of Mich.  
T. 3 W. 4,  
A.D. 1832, re-  
lating to mesne  
process.

1. It is ordered, That every writ of *summons*, *capias*, and *detainer*, shall contain the names of all the defendants [if more than one] in the action, and shall not contain the name or names of any defendant or defendants in *more actions than one*.\*

2. It is further ordered, That the following fees shall be taken :—

	£.	s.	d.
For signing all writs for compelling an appearance, whether of summons, distringas, <i>capias</i> , or <i>detainer</i> , and whether the same shall be the first writ, or an <i>alias</i> or <i>pluries</i> writ, and whether the same shall issue into the same county as the preceding writ, or into a different county..	0	2	6
For sealing the same .....	0	0	7
For entering an appearance for every defendant.....	0	1	0
Unless an appearance shall be entered for more than one defendant by the same attorney, and in that case for every additional defendant ....	0	0	4

3. It is further ordered, That the person serving a writ of *summons* shall, within three days at least after such service, *indorse on such writ* the day of the week and month of such service, otherwise the plaintiff shall not be at liberty to enter an appearance for the defendant according to the statute, and every affidavit upon which such an appearance shall be entered shall mention the day on which such indorsement was made.

4. It is further ordered, That the sheriff or other officer, or person to whom any writ of *capias* shall be directed, or who shall have the execution and return thereof, shall within six days at the least after execution thereof, whether by *service* or *arrest*, *indorse on such writ* the true day of the execution thereof, and in default thereof shall be liable in a summary way to make such compensation of any damage which may result from his neglect as the Court or a judge shall direct.

5. It is further ordered, That the second rule of Hilary Term, 1832, shall be applicable to all writs of *summons*, *distringas*, *capias*, and *detainer*, issued under the authority of the said act, and to the copy of every such writ.†

6. It is further ordered, That any *alias* or *pluries* writ of *summons* may, if the plaintiff shall think it desirable, be issued into another county, and any *alias* or *pluries* writ of *capias* may be directed to the sheriff of any other county, the plaintiff in such case, upon the *alias* or *pluries* writ of *summons* describing the defendant as *late of the place of which he was described in the first writ of summons*, and upon the *alias* or *pluries* writ of *capias*, referring to the preceding writ or writs as directed to the sheriff to whom they were in fact directed.

7. It is further ordered, That the *alias* or *pluries* writ of *summons* into another county shall be in the following form :—

William the Fourth, &c.

To C. D., of —, in the county of —, late of —, in the county of —, [original county.] We command you as before [or often] we have commanded you, &c. [as in the writ of *summons* No. 1 in the schedule of the said act.]

\* In consequence of the words in *italic* this rule has been construed not to preclude the plaintiff on serviceable process against several to declare only against one, provided there be no further proceedings against the others, *Evans v. Whitehead*, 2 M. & R. 367; *Boules v. Bilton*, 2 Cr. & J. 474; Arch. by T. Chitty, 220, 222.

† This refers to the following rule. "And it is further ordered, That upon every *bailable* writ and warrant, and upon the *copy* of any process served for the payment of any debt, the amount of the debt shall be stated, and the amount of what the plaintiff's attorney claims for the costs of such writ or process, *arrest*, or copy and service and attendance to receive debt and costs, and that upon payment thereof within four days, to the plaintiff or his attorney, further proceedings will be stayed. But the defendant shall be at liberty, notwithstanding such payment, to have the costs taxed; and if more than one-sixth shall be disallowed, the plaintiff's attorney shall pay the costs of taxation."

The indorsement shall be written or printed in the following form :—

"The plaintiff claims — for debt, and — for costs. And if the amount thereof be paid to the plaintiff or his attorney within four days from the *service* hereof, further proceedings will be stayed."

The second rule of Hil. T. 1832, above referred to, viz. as to indorsement of claim for debt and costs.

the following Hilary term another general rule, relating to the returning of process, was assented to by all the fifteen judges, and which will be stated near the conclusion of this chapter. (n) The principal and most extensive rule under this statute was the tenth rule of Michaelmas term, 3 W. 4, (o) which declares, "that if the plaintiff or his attorney shall *omit to insert* in or *indorse* on any writ or copy thereof, any of the matters required by the said act to be by him inserted therein or indorsed thereon, such writ shall not on that account be held *void*, but *may* be set aside as *irregular* upon application to be made to the Court out of which the same shall issue, or to any judge." The full operation of this rule will be hereafter

And that the alias and pluries writ of capias shall be in the following form :—

William the Fourth, &c.

To the sheriff of —.

We command you as heretofore we have commanded the sheriff of —, that you omit not, &c. [as in the writ of capias No. 4 in the schedule of the said act.]

8. It is further ordered, That in every writ of distringas issued under the authority of the said act, a non omittas clause *may* be introduced by the plaintiff, without the payment of any additional fee on that account.

9. It is further ordered, That when the attorney actually suing out any writ, shall sue out the same as agent for an attorney in the country, the name and place of abode of such attorney in the country shall also be indorsed upon the said writ.

10. It is further ordered, That if the plaintiff or his attorney shall *omit to insert in or indorse on any writ or copy thereof, any of the matters required by the said act to be by him inserted therein or indorsed thereon*, such writ or copy thereof shall not on that account be held void, but *may be set aside as irregular upon application to be made to the Court out of which the same shall issue, or to any judge.*

11. It is further ordered, That upon all writs of capias, where the defendant shall not be in actual custody, the plaintiff, at the expiration of eight days after the execution of the writ, inclusive of the day of such execution, shall be at liberty to declare *de bene esse* in case special bail shall not have been perfected, and if there be several defendants, and one or more of them shall have been served only and not arrested, and the defendant or defendants so served shall not have entered a common appearance, the plaintiff shall be at liberty to enter a common appearance for him or them, and declare against him or them in chief, and *de bene esse* against the defendant or defendants, who shall have been arrested and shall not have perfected special bail.

12. It is further ordered, That in case the time for pleading to any declaration, or for answering any pleading, shall not have expired before the tenth day of August in any year, the party called upon to plead, reply, &c. shall have the same number of days for that purpose, after the twenty-fourth day of October, as if the declaration or preceding pleading had been delivered or filed on the twenty-fourth day of October, but in such cases it shall not be necessary to have a second rule to plead, reply, &c.

13. It is further ordered, That in case a judge shall have made an order in vacation for the return of any writ issued by authority of the said act, or any writ of capias ad satisfaciendum, fieri facias, or elegit, on any day in vacation, and such order shall have been duly served, but obedience shall not have been paid thereto, and the same shall have been made a rule of Court in the term then next following, it shall not be necessary to serve such rule of Court or make any fresh demand of performance thereon, but an attachment shall issue forthwith for disobedience of such order, whether the thing required by such order shall or shall not have been done in the meantime.

14. It is further ordered, That if any attorney shall, as required by the said act, declare that any writ of summons, or writ of capias, upon which his name is indorsed, was not issued by him or with his authority or privity, all proceedings upon the same shall be stayed until further order.

(n) Rule of Hilary term, 3 W. 4, (o) See the rule 10, *supra*, 161, in note. A.D. 1833, *post*.

CHAP. V.  
REQUISITES OF  
WRITS.

fully considered; but it may be proper here to observe that the *judges* have not by this rule *increased* the facility of trifling motions to set aside proceedings for irregularity; but have rather limited and narrowed the consequences of nonobservance of the enactments, by declaring that the process shall not on that account be deemed *void*, as perhaps might otherwise have been the construction.

The *general* operation of 2 W. 4, c. 39, and rules thereon, over all or most of the writs, proposed to be considered in this chapter.

The uniformity of process act, 2 W. 4, c. 39, and the rules thereon, (p) it will be observed, contain enactments and regulations, many of which are in *pari materia* and of a *general nature, equally affecting all or many of the five forms of writs*. It is therefore considered to be most expedient in this chapter to take a general and comparative view of all the *principal requisites* which more or less affect *all* the writs and proceedings thereon, examining in the natural order as they occur all the parts of each *writ*, with the *memoranda* and *indorsements*, and decisions thereon, and the consequences of deviation from the prescribed forms; and then after having thus disposed of the *principal* and most *general rules* in distinct paragraphs, we will *separately* consider the writs of *summons*, *distringas*, *copias* and *detainer*, process to *outlawry*, and *process and entries* to prevent a *statute of limitations* from becoming a bar.

6. Examination of the parts and general requisites of all the five writs under the uniformity act, 2 W. 4, c. 39.

6. We are now to consider the *parts* and *general requisites* of all the writs to be issued in pursuance of the uniformity of process act, 2 W. 4, c. 39, and of the rules thereon; and it is proposed to examine them in the order in which they occur in each writ, and then the indorsement thereon, and under the following heads. Forms of all the writs, as prescribed in the schedule, (q) may in general be obtained from any law stationer, ready printed with blank spaces, in which the name and residence of the defendant, the name of the plaintiff, the form of action, teste, or date, and other varying facts, are to be inserted in the attorney's office. The principal writ is usually on parchment, and as many copies as there are defendants are to be made and are usually on printed paper. The use of these *printed forms* tends to secure accuracy, at least in the printed parts. But when the names and residences of

(p) See the rules, *ante*, 160, 161, in note.

(q) Commencing *ante*, 154, and ending *ante*, 156.

very numerous plaintiffs or defendants would occupy more room than is found in the common printed forms, then it is usual to frame the whole of the writ and copies in manuscript.

CHAP. V.  
REQUISITES OF  
WRITS.

ANALYTICAL TABLE OF THE PARTS OF THE SEVERAL WRITS AND PROCEEDINGS THEREON, CONSIDERED IN THIS CHAPTER.

- |  |   |
|--|---|
| <p><i>First</i>, Name of the king.<br/> <i>Second</i>, Direction to the defendant.<br/> <i>Third</i>, Statement of christian and surname of defendant or defendants.<br/>         Consequences of mistakes.<br/>         The like in continued process.<br/> <i>Fourth</i>, Statement of defendant's residence.<br/>         Consequences of mistakes.<br/>         The like in continued process.<br/> <i>Fifth</i>, Defendant's addition of degree.<br/> <i>Sixth</i>, Character in which the defendant is sued, or plaintiff sues.<br/> <i>Seventh</i>, Names of all the defendants to be inserted, and no more.<br/> <i>Eighth</i>, Direction to sheriff or other officer by whom distringas, capias, or detainer to be executed.<br/>         Forms of directions to sheriffs, &amp;c.<br/> <i>Ninth</i>, Non-omittas clause in distringas or capias.<br/> <i>Tenth</i>, Statement of what defendant or sheriff is required to do.<br/> <i>Eleventh</i>, Time in which defendant to appear, &amp;c. and of return-days.<br/> <i>Twelfth</i>, Returnable in what Court.<br/> <i>Thirteenth</i>, Description of form of action.<br/> <i>Fourteenth</i>, Name of plaintiff and character in which he sues.<br/>         Subsequent repetition of his christian and surname.<br/>         Character in which plaintiff sues.<br/> <i>Fifteenth</i>, Notice to defendant of consequences of his non-compliance or not putting in bail above.<br/> <i>Sixteenth</i>, Teste in name of Chief Justice or Chief Baron.<br/> <i>Seventeenth</i>, Teste or date of day of issuing writ.<br/>         Is the commencement of action.<br/> <i>Eighteenth</i>, Memoranda, notice, and warnings at bottom of writ.<br/> <i>Nineteenth</i>, Indorsements on writs.<br/>         1. Sum sworn to on bailable process.<br/>         Directions to how to arrest a particular defendant.<br/>         2. Name and place of abode of plaintiff's attorney and agent.<br/>         3. Of name and place of residence of plaintiff when suing in person.<br/>         4. Of amount of debt and costs claimed.<br/>         5. Of defendant's abode, addition, or description on bailable process,</p> | <p>whether or not necessary.<br/>         6. Of day of serving writ or arresting defendant.<br/> <i>Twentieth</i>, Of concurrent writs into different counties.<br/> <i>Twenty-first</i>, Of alias and pluries writs of summons and capias.<br/> <i>Twenty-second</i>, Of supposed necessity for second affidavit of debt, &amp;c.<br/> <i>Twenty-third</i>, Of the præcipe for every writ.<br/> <i>Twenty-fourth</i>, By what officer writ to be signed.<br/> <i>Twenty-fifth</i>, By what officer writ to be sealed.<br/> <i>Twenty-sixth</i>, Practical proceedings on issuing any writ.<br/> <i>Twenty-seventh</i>, Consequences of non-observance of requisites in mesne process, and copies thereof.<br/> <i>Twenty-eighth</i>, Of amending and re-sealing before execution.<br/> <i>Twenty-ninth</i>, Amendments of writs and copies, when refused.<br/>         No distinction between writ and copy.<br/> <i>Thirtieth</i>, Of motions and summons for irregularities.<br/> <i>Thirty-first</i>, Of preparing to serve or execute writ.<br/> <i>Thirty-second</i>, Of the execution of writs in general.<br/>         1. Delivery to attorney or sheriff, or officer.<br/>         2. Attorney's undertaking to appear.<br/>         3. Duration of writs.<br/>         4. Place where to be executed.<br/>         5. Preparing to serve or execute.<br/>         6. Mode of service or execution, and delivery of copy of writ.<br/> <i>Thirty-third</i>, Indorsement on writs of, time when executed.<br/> <i>Thirty-fourth</i>, Affidavits of the execution of process.<br/> <i>Thirty-fifth</i>, Returns to process.<br/>         1. Who to return same.<br/>         2. How to enforce returns.<br/>         3. Forms of returns.<br/> <i>Thirty-sixth</i>, Summary of circumstances to be attended to by a defendant after execution of process in general.<br/> <i>Thirty-seventh</i>, His ascertaining the attorney's authority to sue.</p> |
|--|---|

CHAP. V.  
REQUISITES OF  
WRITS.

THE PARTS OF WRITS AND MEMORANDA CONSIDERED.

*First, Name of  
the king.*

*First, William the Fourth, by the Grace of God, of the United Kingdom of Great Britain and Ireland King, Defender of the Faith.* (r) *To C. D. &c. [or to the sheriff, &c.]* The uniformity of process act, 2 W. 4, c. 39, by *all the forms* prescribed in the schedule, (r) requires *every writ to commence* with the name and style of the *king* for the time being, a form very anciently adopted, because the king was always considered the fountain, or less figuratively, the dispenser of justice, (s) and who by every process issuing from or returnable in his Courts *commands* justice to be rendered, and this formula is peculiarly well calculated to induce respect and observance. Before this act it was held that where a writ of *capias ad satisfaciendum* by mistake commenced in the name of the then recently *deceased* king, instead of his *then successor*, but the sheriff had obeyed it by taking the defendant, the mistake did not constitute a material variance or any defence in an action against the sheriff for the escape; provided, as the fact was, that the writ was at its conclusion tested in the name of the then Chief Justice. (t) We shall presently see the importance of the latter being accurately inserted at the *conclusion* of the writ, as expressly required by 2 W. 4, c. 39, s. 12.

*Secondly, Direction to the defendant or defendants, &c.*

*Secondly, To C. D. of —, in the County of —, greeting,* (u) or “*To the Sheriff of —, greeting.*” A writ of *summons* must be directed or addressed to the *defendant*, without the intervention of any public officer, and command him, within eight days after the service of the writ, inclusive of the day of such service, to cause his appearance to be entered in the named Court, and informs him of some of the consequences of his neglect, viz. that the plaintiff *may* cause an appearance to be entered for him and proceed thereon to judgment and execution. The other writs are addressed to the *sheriff* or *other proper officer*, and *command* him, according to the distinct object of each writ, either to *distrain* upon the *goods* of the defendant for forty shillings, or *to take* and keep him, or if he be already in custody to *detain* him; and hence these several processes are, according to their *principal* purport and

(r) See the several forms, *ante*, 154, 155, 156, in the note.

(s) 1 Bla. Com. 266; 3 Bla. Com. 273; and see forms, *id.* *Appendix*.

(t) *Elvin v. Drummond*, 4 Bing. 278; 12 Moore, 523, S. C.

(u) *Ante*, 154, in note.



object, termed writs of *summons*, or of *distringas*, or of *capias*, or *detainer*. A writ of *summons* is to be directed to the defendant by his *christian and surname*, as may be collected from the initials C. D. in the prescribed form in schedule No. 1. It will be observed that all the forms are printed in the singular number, and it follows that when there are *several* parties, whether as plaintiffs or defendants, the form must vary accordingly, but with the like precision as to every additional party; but where the names of *several* defendants have been stated in the writ, the subsequent word, *you*, is to be taken distributively, and it is not necessary to say, "you and each and every of you, &c." (u) The defendant is, by section 1, to be described at all events in a *writ of summons* "of the place of his residence or *supposed residence* or of the place and county where he is *supposed to be*;" and if it be afterwards ascertained that he is to be found in another county and not within two hundred yards of the border of the former, then, before such writ has been served, it may be *altered*, and his description be made of the latter county; but then, after such alteration, the writ must be *re-sealed* before it can be served, or it may be set aside for irregularity; (v) or, as may be advisable, *concurrent* and similar original writs of summons may be issued into the other county or counties. (x)

*Thirdly, The christian and surname of the defendant or defendants.* The forms prescribed in the schedule of 2 W. 4, c. 39, whether addressed to the defendant or to a sheriff or other officer, alike require that the full and exact *christian and surname* of the defendant be stated in *every writ* and also in *every copy thereof*, in full; and it is only in cases provided for by 3 & 4 W. 4, c. 42, s. 12, and the 32d general rule of Hil. Term, 2 W. 4, that any deviation is expressly allowed. That statute, in section 12, enacts "that in all actions upon bills of exchange, promissory notes, and other *written instruments*, any of the parties to which are designated by the *initial letter* or letters, or some *contraction* of the *christian* or *first name* or names, it shall be sufficient in every affidavit to hold to bail, and in the process and declaration, to designate such persons by the *same initial letter* or letters, or contraction of the *christian* or *first name* or names, instead of stating the *christian* or *first name* or names in full; and the 32d general rule of Hil. Term, 2 W. 4, orders "that where the defendant is de-

Thirdly, Statement of christian and surname of defendant or defendants, and consequences of mistake. (y)

(u) *Engleheart v. Eyre and another*, 2 Dowl. 145; post, 183.

(v) *Litsters v. Sanson*, 3 Moore & Scott, 194; 2 Dowl. 745, S. C.

(x) See post, as to concurrent writs.

(y) See the law before 2 W. 4, c. 39, Chitty on Pleading; 5th edit. 279 to 283;

CHAP. V.  
REQUISITES OF  
WRITS.

scribed in the process or affidavit to *hold to bail* (z) by initials or by a *wrong name*, or *without a christian name*, the defendant shall not be discharged out of custody or the bail-bond delivered up to be cancelled on motion for that purpose, if it shall appear to the Court that *due diligence* has been used to obtain knowledge of the proper name, (a) and it is not essential to perfect such due diligence to inquire of the defendant or his friends or at his house, especially if he be a foreigner, because that inquiry might induce his avoidance of process; but it suffices to make the inquiry from *other* different people likely to know the full name. (a) It should seem, therefore, that after applying by letter or otherwise to an intended defendant, or inquiring of his neighbours, or even of other parties likely to give information, as in the case of a bill to the other parties to the same, for the particulars of his full christian and surname, or any other unsuccessful inquiries of several persons likely to be able to give the requisite information, even his surname, with or without any other description, might safely be used, at least in an affidavit to hold to bail and in a *capias*. (b)

(z) It is supposed that from the terms of this rule it only applies to *bailable* process, and not to a writ of *summons*; see 1 Archbold's Pr. K. B. 512, note (c); and perhaps no rule was necessary as regarded *serviceable* process, because the Court would not set it aside on account of a misnomer or *initial*, or omission of *christian*

name, *id.* 513, *sed quare*, for the statute and the prescribed forms require the *full name* in general to be stated, and the rule Mich. T. 1832 declares *any omission* to be an irregularity.

(a) Rule Hil. T. 2 W. 4, c. 32; see what is due diligence, *Hicks v. Marreco*, 3 Tyr. 216; 1 Crompt. & Mee. 84, S. C.

(b) See form of affidavit to oppose a rule for setting aside proceedings, *infra*, in note. This alters the practice stated in Tidd, 9th edit. 148, 301, 448. The *affidavit*, to satisfy the Court that due diligence had been used to obtain the defendant's proper name before issuing process in answer to any rule for setting the same aside, must of course fully state the facts; and according to *Hicks v. Marreco*, 3 Tyr. 216, S. C.; 1 Crompt. & Mee. 84, it seems expedient to state the names and address and answers of the several persons to whom application for information has been made, and especially the reasons why information could not be obtained from the directory, public offices, &c. The following affidavit was made in a late case:—

"A. B., of, &c. maketh oath and saith, that this action hath been commenced and is intended to be prosecuted against the said defendant on a bill of exchange accepted by him by and in the initials of his christian name, thus, [giving an exact copy of the signature,] and that before the making of the affidavit of debt in this action, and also before the issuing of any writ thereon, this deponent, as well by letter as in person, applied to the said defendant and requested him to state his full christian and surname, and this deponent at the same time stated to the said defendant that he made such request on purpose and with the intent to state his name correctly in the affidavit and process about to be made and issued against him; but the said defendant refused to give this deponent any information respecting the same, and said to this deponent 'I will be candid to this extent, I am lineally descended from Adam and was born since the flood, the rest of my name and pedigree you may discover how you can,' [or 'and the said defendant wholly omitted and refused to give this deponent any further or other answer to such application or request.'] And this deponent further saith, that before issuing any process in this action he also made diligent inquiry as to the proper christian and surname of the said defendant, as well of several inmates at the house where the said defendant then resided, as also of several of the neighbours of the said

Form of affidavit to account for plaintiff's suing defendant by initial or wrong name.

It seems proper in general to examine the directory, and according to circumstances to inquire for the full name at the post-office and of the collector of poor-rates and taxes, and at public offices, if the intended defendant be connected with any, before making the affidavit to hold to bail, and in an affidavit to state the result *in answer* to any rule nisi for setting aside the proceeding. (c) But the very terms of this rule of Hil. T. 2 W. 4, appear to imply that unless *due diligence* has been used to obtain knowledge of the proper name, and the defendant in *bailable* process has in the affidavit to hold to bail or process been described by initials or a wrong name, or without a christian name, he might be discharged out of custody or the bail-bond delivered up to be cancelled on motion.

When a person has *signed* or executed a bond or deed by a wrong name, the writ and declaration should be against him by *that* name, and it would not be correct to issue a writ or declare against him by his real name, with an averment that he executed the instrument by the false name; (d) and it is safer to issue the writ, and declare against an obligor by the exact name in which he *subscribed* and executed the bond or deed, although different from that in *the body*. (e)

The above rule of Hil. T. 1832, in its terms, appears to apply only to *bailable* process, and not to extend to a writ of summons or serviceable process. Before the modern enactments, it was decided that a serviceable bill of Middlesex, and

---

defendant, and particularly of, &c. (naming the persons and addition,) and also of the drawer of the said bill, but this deponent could not nor can he now obtain any information whatsoever respecting the full christian or first name of the said defendant, &c." [State any material circumstances according to the facts.]

(c) *Hicks v. Marreco*, 3 Tyr. 216; 1 Crom. & M. 84, S. C.; and see cases as to notice of the dishonour of a bill, Chitty on Bills, 8th edit. 506.

(d) *Gould v. Barnes*, 8 Taunt. 504; *Mayelstone v. Lord Palmerston*, 2 Car. & P. 474; *Bonner v. Wilkinson*, 5 Bar. & Ald. 682.

(e) *Mayelstone v. Lord Palmerston*, 2 Car. & P. 474; 1 Moo. & M. 6, S. C.; Chitty on Pleading, 5th edit. vol. ii. 436 a, note (c), *sed quare*, *id. ibid.* If process has been issued against a person by a wrong name, the proper course is a declaration or other pleading is to continue the same name, and it is not correct to describe it as might have been intended, although the proper name. Thus, where it was alleged that by a writ of latitat the sheriff was commanded to take one E. J., (the real name,) by the name of J. J., (the erroneous name in the writ,) and an

examined copy of the latitat was given in evidence commanding the sheriff to take J. J., and the bail-bond was signed by the principal, thus, "E. J., arrested by the name of J. J.," and the plaintiff offered to prove that this person was their debtor whom they intended to hold to bail, Lord Ellenborough said, "The writ must speak for itself; I cannot hear that instead of A. B. mentioned in the writ, it was meant that the sheriff should arrest X. Y.," and the plaintiff was nonsuited, *Scandover v. Warne*, 2 Campb. 270; *Wilks v. Lock*, 2 Taunt. 399; 1 Dowl. & Ry. 551; *Amery v. Long*, 1 Campb. 14; *Brown v. Jacobs*, 2 Esp. Rep. 726. The proper course in a declaration on a bail-bond, or for an escape, extortion, &c. is to describe the name precisely as in the writ, without more, and then to aver that under colour or virtue of that writ the party, stating his real name, was arrested, &c. *id. ibid.*

CHAP. V.  
REQUISITES OF  
WRITS.

subscribed notice, describing the defendant as Mr. A., without stating his Christian name, was irregular; (f) but in another case, where the defendant's Christian name was *omitted* in serviceable process, the Court of King's Bench refused to set the same aside for irregularity, and left the defendant to plead in abatement, because it might be possible that a party has no Christian or first name. (g) But in another case the *omission* of the Christian name was holden an irregularity. (h) Upon the whole, the safest course in serviceable process is to insert *some even supposed Christian or first name*, as well as the surname, in the process, and leave the defendant to apply by summons under the 3 & 4 W. 4, c. 42, s. 11, to compel the plaintiff to amend his declaration; for the 11th section of that act abolishes all pleas in abatement of *misnomer*; and if a full Christian and surname be inserted in serviceable process, although it be mistaken, no advantage can be taken unless the misnomer be *continued* in the declaration, and then only by summons under the 11th section above noticed; or it may be advisable to issue the writ against the defendant, describing him by an *alias distus* of several names, as John Nokes, *otherwise called James Nokes, otherwise called Joseph Nokes*, which is permitted even in an indictment. (i)

When there are *two persons of the same names*, or nearly so, it may be of essential importance to describe the proper party in the writ and copy, and instruct the party who is to serve the same with more particularity than merely stating the name, and to be careful that *that party* be served, and to be prepared on the trial to prove, even by more than one witness, the identity of the person so served with the person who actually owes the debt or committed the injury; for if by accident a wrong person should be served, and appear and defend throughout the action, then unless the plaintiff can clearly prove collusion between that party and the person who was intended to be sued, and that the latter had full intimation of the writ and interfered with the defence, the plaintiff might be nonsuited. (k)

(f) — — v. *Snow*, Tidd, 9th edit. 148; *Tomlin v. Preston*, 1 Chit. Rep. 398; *Kingston v. Llewellyn*, 4 Moore, 317; 1 Brod. & B. 529, S. C.

(g) *Rolph v. Peckham*, 6 Bar. & Cres. 165.

(h) *Tomlin v. Preston*, 1 Chit. Rep. 397; Tidd, 148; *post*, 170, n. (u).

(i) 1 Chitty on Pleading, 5 edit. 277, 281; 1 Chitty's Criminal Law, &c.

(k) *Wilde v. Keep*, 6 Car. & P. 235. Frequent attempts to nonsuit on this ground, especially when two brothers have been much alike, occur. In a late

case of an action by a surgeon for his professional charges in setting a leg, it singularly happened that the real party's brother had his leg broken about the same time, and was attended by another surgeon who had been paid, and by mistake the latter brother was served with the process, and had it not been for the proof that the real party had in writing instructed his attorney to appear, and that his *left* leg had been broken, and that the plaintiff set a *left* leg, whereas the other brother's right leg was set, the plaintiff would have been nonsuited.

CHAP. V.  
REQUISITES OF  
WRITS.

Name of a Corporation.

In a writ against a *Corporation aggregate*, the *correct corporate name* should be accurately stated, or the same consequence would ensue as in the misnomer of a private individual, viz. a summons to compel the plaintiff to amend his declaration. (k) Thus, the *Corporation* of London should be described as "The mayor, commonalty, and citizens of the city of London." But unless the name of the corporation be so entirely misdescribed as to render it questionable to what corporation it relates, a mistake would not be ground of *nonsuit*, but must have been pleaded in abatement; (l) and since the 3 & 4 W. 4, c. 42, s. 11, the only mode of taking advantage of the mistake would be by affidavit of the correct name and summons, to have the declaration amended accordingly at the cost of the plaintiff. But when there has been a mistake in a political or corporate name, it is considered most prudent to amend, and which will be allowed when the statute of limitations would prejudice, (m) or to issue a fresh writ.

In a writ against *Hundredors*, as on the 7 & 8 G. 4, c. 31, for the felonious demolishing or beginning to demolish a dwelling-house, it has been usual in the writ to describe them as "The *men* inhabiting within the hundred of ——— (n) [or "borough," or "wapentake and division," according to the facts] in the county of ———." But it would perhaps be better to follow the words of that act, and therefore to describe them as "The *inhabitants of the hundred of* ———, in the county of ———," especially as *women* as well as men are liable; (o) and if the writ be issued against only two of the inhabitants by name, it would be irregular, and could not be proceeded upon. (p) The proper name of the district must be carefully observed, for if a mistake should be continued in the declaration, it was holden to be fatal even in arrest of judgment. (q) But probably since the 3 & 4 W. 4, c. 42, s. 11, the defendant ought to apply upon affidavit to have the declaration amended, unless the political name and character of the corporation be so totally dissimilar as to mislead. A writ may be

(k) Com. Dig. Pleader, 2 B. 1; 2 Inst. 666.

(l) *Stafford v. Bolton*, 1 Bos. & Pul. 40; *Croydon Hospital v. Farley*, 6 Taunt. 467; 2 Marsh. 174, S. C.; *Attorney-General v. Rye*, 7 Taunt. 546; 1 Moore, 267, S. C.; and see *Carlisle v. Blamire*, 8 East, 487.

(m) *Horton v. Inhabitants of Stamford*, 1 Cromp. & M. 773.

(n) Tidd's Supp. A. D. 1833, p. 262, note (a).

(o) 2 Saund. 374; Chit. Col. Stat.

569; *Horton v. Inhabitants of Stamford*, 1 Cromp. & M. 773; 2 Dowl. P. C. 96. The service of a writ upon a hundred or other like district, is to be on the high constable thereof, or any one of such high constables, 2 W. 4, c. 39, s. 13.

(p) *Jackson v. Pearson*, 1 Bar. & Cres. 304; 2 Dowl. & Ry. 439.

(q) See *Jackson v. Pearson*, 1 Bar. & Cres. 304; 2 Dowl. & Ry. 439, S. C.; 2 Saund. 376 f; and yet why should it not be considered as only in abatement, as in the case of a corporation, *supra*, n. (l).

CHAP. V.  
REQUISITES OF  
WRITS.

against "*The inhabitants of a county*," or "*of a city*," or "*town*," or the inhabitants of a franchise, liberty, city, town, or place, not being part of a hundred, or other like district, when the law has imposed liability on such a district, but not otherwise,<sup>(r)</sup> and in that case the writ is to be served on any peace officer thereof.<sup>(s)</sup>

Consequences  
of omission and  
mistakes in  
name of a de-  
fendant.

As *all* the forms prescribed by the act require the *full Christian* and *surname* of the *defendant* to be inserted in every writ, and also in the copy to be served, and as the rule Mich. Term 3 W. 4, declares *all omissions* to be irregularities, it would seem that, unless in the excepted cases mentioned in the foregoing rule of Hilary Term, 2 W. 4, r. 32, and in 3 & 4 W. 4, c. 42, s. 12, if a plaintiff, without having used due diligence to ascertain the correct Christian and Surname, should insert merely an *initial* or should leave a blank for or *omit* a Christian or first name, and still more *omit any Surname*, a *bailable* writ might be set aside for irregularity. <sup>(t)</sup> And a similar *blank* for or *omission* of the defendant's Christian name even in *serviceable* process, would still under the act be deemed an irregularity, as it was before that act in *serviceable* process; <sup>(u)</sup> although, before the uniformity of process act, the Court always refused to set aside *serviceable* process on account of a mere *misnomer*, i. e. a *mis- take* in the name, <sup>(x)</sup> and would no doubt do so still. <sup>(y)</sup> The 3 & 4 W. 4, c. 42, s. 11, enacts, "that no plea in abatement for a *misnomer* shall be allowed in any *personal* action; but that in all cases in which a *misnomer* would, but for that act, have been pleadable in abatement in such action, the defendant shall be at liberty to cause the declaration to be amended at the *costs* of the plaintiff, by inserting the right name upon a judge's *summons*, founded on an *affidavit* of the right name; if, however, such a *summons* should be discharged, then the costs of such application are to be paid by the party applying, if the judge shall think fit." <sup>(z)</sup>

(r) 2 T. R. 667; 11 East, 347, 375.

(s) 2 W. 4, c. 39, s. 13.

(t) *Semble*, and see Archbold's K. B. 4 ed. 513, note.

(u) *Tomlin v. Preston*, 1 Chitty's Rep. 397; Tidd, 9 ed. 148; ante, 168, n. (h).

(x) *Serjeant v. Gordon*, 7 Dowl. & Ry. 258; *Rolph v. Peckam*, 6 Bar. & Cres. 164; 9 Dowl. & Ry. 214; *Sumner v. Batson*, 11 Moore, 39.

(y) *Semble*, *id. ibid.* The principle of those decisions no doubt still continues, and the statute 3 & 4 W. 4, c. 42, s. 11,

implies that unless a *misnomer* be carried into and continued by the *declaration*, no objection can be taken by the defendant; but so *defective* a description as a total *omission* seems not to be within that enactment.

(z) *Semble*, that before the *summons* be obtained, the defendant ought to be required to request the plaintiff, or his attorney, to frame or alter his declaration into the proper name, or ought not to be allowed the *costs* of the application.

A defendant is thus enabled in all cases, by summons, to prevent the *continuance* of his misnomer on the record, and even may compel the plaintiff to pay the *costs* of the application, although previously no costs were recoverable on a plea in abatement, unless an issue in fact were joined thereon.

In case of *bailable process*, it was the practice, (a) before the 2 W. 4, c. 39, in case the defendant was described by a wrong Christian or surname, not *idem sonans*, (b) and his affidavit of the misnomer was unanswered by an affidavit shewing that the defendant was known as well by one name as the other, or had allowed himself to be so called, (c) for the Court or a judge, on motion or summons, to discharge the defendant out of custody, or order the bail bond to be cancelled, on the ground that the arrest was illegal. (d) And the sheriff and his officers, and all persons concerned in the arrest, although they took the proper person, were liable, on account of the misnomer, to an action for the illegal imprisonment. (e) But if *idem sonans*, or a variance so trifling as not to mislead, as Reynall for Reynolds, or Tither Leigh for Tythe Leigh, although there was in fact a variance, the Court would not interfere to discharge the defendant. (f) And as respects serviceable process, where the defendant had been served with a copy of a writ of summons, described as Andrew Bryon instead of Andrews Bryan in the writ, the variance was holden not to be a sufficient irregularity to induce the Court to interfere. (g) And it has been suggested, that since the 3 & 4 W. 4, c. 42, s. 11, takes away every plea in abatement of misnomer, and supplies in lieu a summary remedy to compel the plaintiff to correct the name in his declaration, and that as the relief on motion was

Cases of *idem sonans*.

(a) It will be observed that by the 32d rule of Hil. T. 2 W. 4, that practice is adverted to and altered *pro tanto*.

(b) *Webb v. Lawrence*, 1 Crompt. & M. 806, calling defendant Lawrence instead of Lawrence, was considered no misnomer.

(c) As in *Weston v. Maxwell*, 3 Tyr. 278; 2 Crom. & J. 215, S. C.

(d) *Reynolds v. Hankin*, 4 Bar. & Ald. 536; *Smith v. Innes*, 4 Maule & Selw. 360; *Parker v. Bent*, 2 Dowl. & R. 73; *M'Benth v. Chatterley*, *id.* 237; *Wilks v. Lorch*, 2 Taunt. 399. If, however, a defendant put in bail and defended the action, and judgment was in other respects regularly signed against him by the wrong name, it was always considered that he might be taken in execution by the wrong name. *Crawford v.*

*Satchwell*, 2 Stra. 1218.

(e) *Cole v. Hindson*, 6 Term R. 234; *Shadyett v. Clipson*, 8 East, 328. A plea of justification by an officer (to trespass for taking the goods of A. B.) that he took them under a distringas against C. D. (meaning the said A. B.) to compel an appearance, with an averment that A. B. and C. D. are the same persons, cannot be supported, unless A. B. appeared in that action, and did not plead the misnomer in abatement; if he did appear in that action, and omitted to plead in abatement, he was concluded by it. *Cole v. Hindson*, 6 Term R. 234.

(f) — *v. Reynall*, 1 Chit. R. 639; *R. v. Culvert*, 2 Crom. & M. 189; *Shaw v. Tytherleigh*, 6 Price, 2.

(g) *Tyser v. Bryan*, 2 Dowl. 640.

CHAP. V.  
REQUISITES OF  
WRITS.

only in lieu of a plea in abatement now thus abolished, the Court *probably would* not now interfere on *motion* on account of *misnomer*. (*h*) At all events, if it be made the subject of a motion for giving up a bail-bond to be cancelled, that the defendant was arrested by a wrong name, the affidavit should be entitled in the defendant's *right* name, "sued by the name of," the wrong name. (*i*) And in a late case, where the defendant swore that his name was *Winchcombe Henry* Saville Hartley, and he was named in the *capias* William Saville Hartley, Mr. Justice Williams, on 12th January, 1835, refused to discharge him out of custody on account of *misnomer*.

It has been decided, that if a bailable *capias*, or *latitat*, or *dis-tringas*, be issued against a defendant by a wrong name, and his person or goods taken, he might support an action of trespass against the sheriff and his officers, or the plaintiff or his attorney, if the latter actually interfered; (*k*) and therefore it was decided, that if the sheriff or his officer discover that the defendant is described in a *capias* or other process by a wrong name, he is not bound to execute it, because he might thereby subject himself to an action. (*l*) But if the *misnomer* be merely in a *letter* in a surname, not materially altering the *sound*, as Lawrance instead of Lawrence, (which are considered *idem sonans*,) or in such other trifling respects as we have just mentioned, (*m*) then the Court would not interfere. (*n*) And where the defendant was arrested as William *Henry* Maxwell, the Court refused to discharge him on common bail on his affidavit that his real name was William *Hamilton* Maxwell, the plaintiff swearing in answer that the defendant was known to him for five years by the name of William *Henry*, and had told him that was his name, and had signed an agreement with other parties in which he was described as William Henry; thus, W. H. Maxwell. (*o*) It is

(*h*) *Cullum v. Laeson*, 4 Tyr. 266; 2 Crom. & Mees. 406, S. C.; 1 Arch. Pr. C. P. [39]. But see a reported case of a *motion* subsequent to that case, *Finch v. Cocker*, 2 Cromp. & Mees. 412; and 4 Tyr. 285, S. C. In 1 Arch. Pr. C. P. [39], it is thus suggested, "A mistake in the name of the defendant, in the writ and affidavit, however, is not *perhaps* so material now as formerly, for as *misnomer* now cannot be pleaded in abatement, the Court *probably* would not interfere in such a case upon *motion*." But, still in these cases the writ must correspond with the affidavit to hold to bail, and you cannot describe the defendant in one way in the affidavit and in

another in the writ,

(*i*) *Finch v. Cocker*, 4 Tyr. 285.

(*k*) *Cole v. Hindson*, 6 T. R. 234; ante, 171, note (*g*); *Shadyett v. Clipson*, 8 East, 328. And after an action of trespass had been commenced by a defendant on account of such *misnomer*, the Court of K. B. before the 2 W. 4, c. 39, refused permission to amend the process. *Anon. Mich. T.* 41 G. 3, K. B.; Tidd, 9 ed. 161, note (*n*).

(*l*) *Morgan v. Bridges*, 1 Bar. & Ald. 647.

(*m*) *Ante*, 171.

(*n*) *Webb v. Lawrence*, 1 Cromp. & M. 806.

(*o*) *Weston v. Maxwell*, 2 Tyr. 278.



to be hoped that ere long, when the proper intended party or his goods have been taken under process in which his name has been mistaken, he will, by express enactment, be deprived of the power of sustaining an action on any such vexatious ground.

CHAP. V.  
REQUISITES OF  
WRITS.

Before the 2 W. 4, c. 39, in the case of misnomer, if the defendant appeared by the wrong name by which he was sued, the plaintiff was to declare against him by that name; and if he appeared by his right name, the plaintiff might declare against him thereby, stating in the declaration that the defendant had been *served* with process or *arrested* by the wrong name. (p) But if the defendant did not appear, the plaintiff could not appear for him in his right name according to the statute; (q) nor could he appear for him in the name by which he was sued, and afterwards declare against him in his right name. (r) His only course in such case was, and still seems to be, to appear for the defendant in the wrong name by which he was described in the writ, and also to declare against him by the same name, which would only subject him to being compelled, by the judge's order above-mentioned, to amend the declaration by inserting the right name at his costs of the summons and order. (s)

Formerly the Court allowed the amendment of a writ in the name of a defendant, as by allowing the *insertion* of his christian name, omitted by mistake, (u) and this even in proceedings against a prisoner. (x) But since the uniformity of process act, 2 W. 4, c. 39, this will not in general be permitted, unless in cases where the statute of limitations would constitute a bar, (y) or unless the action has proceeded to the eve of trial, or to a considerable length, in which event amendments in the names and number of parties has been permitted, even in cases where the statute of limitations could not apply. (z)

Amendments of  
names or num-  
ber of defend-  
ants when re-  
fused. (t)

(p) *Doe v. Butcher*, 3 T. R. 611; *Dring v. Dickenson*, 11 East, 225.

(q) *Doe v. Butcher*, 3 T. R. 611; *Greenslade v. Rathorne*, 2 N. R. 132; *Dring v. Dickenson*, 11 East, 225.

(r) *Dring v. Dickenson*, 11 East, 225; *Delaney v. Cannon*, 10 East, 328; *Mes-  
taur v. Hertz*, 3 M. & S. 43.

(s) *Ante*, 170, n. (z); 1 Archbold, 4 ed. 514, and see *Smith v. Patten*, 6 Taunt. 115; 1 Marsh. 474, S. C.; *Reeves v. Slater*, 7 B. & C. 486; 1 M. & R. 265, S. C.;

*Oakley v. Giles*, 3 East, 167; *Cole v. Hindson*, 6 T. R. 234, 236; *Crauford v. Satchwell*, 2 Stra. 1218.

(t) See *post* further as to the amend-  
ments of writs.

(u) *Rutherford v. Mein*, 2 Smith, 392.

(x) *Carr v. Shaw*, 7 T. R. 299.

(y) *Hodgkinson v. Hodgkinson*, 3 Nev. & M. 564; *Lakin v. Watson*, 2 Dowl. P. C. 633; *Horton v. Borough of Stamford*, 2 Dowl. P. C. 96.

(z) *Post*, 174, n. (f).

CHAP. V.  
REQUISITES OF  
WRITS.

Names in con-  
tinued process.

Every *continued writ*, as an alias or pluries, summons or capias, should precisely accord with the preceding process in the *names of the parties*, and if a writ of capias be against a defendant by one christian name, and the alias or pluries by a different christian name, it has long been the practice for the Courts to set aside the latter. (a)

Formerly, also, the Courts afforded more facility than at present in *amending* a writ by either inserting *the name of an additional defendant* or *striking out the name of one improperly named*; (b) but of late the Court have refused to allow such an amendment, and compelled the plaintiff to begin *de novo*, (c) unless in cases where if the plaintiff were put to a new action the statute of limitations might constitute a bar, (d) in which case an amendment has been permitted, as substituting "borough" for "hundred" in an action upon the 7 & 8 G. 4, c. 31, (e) or except in cases where the proceedings in the cause have proceeded much beyond mere process, as until the eve of trial, when such an amendment has been permitted; (f) and even so early in the proceedings as after the plaintiff has declared, the Court allowed the name of the official assignee of a bankrupt to be introduced into the declaration, although he had not been named in any writ or prior proceeding. (g)

Fourthly, State-  
ment of defend-  
ant's Residence  
and conse-  
quences of mis-  
take.

*Fourthly, Description of defendant's Residence.* Before the recent enactment no description of *residence* was required in any process excepting in proceedings by original writ to outlawry, when the statute of additions, 1 Hen. 5, c. 5, required original writs and indictments to state the addition of the defendant's *estate or degree* or mystery, and of the towns or hamlets, or places *and counties* of which they were or be, or in which they be or were conversant. (h) When it is considered that in general, as well in executing serviceable asailable process, the plaintiff or his attorney usually takes care in various particulars sufficiently to identify the proper party, it should seem

(a) *Corbet v. Bates*, 3 T. R. 600; and see further, Tidd, 9th ed. 148.

(b) *Carr v. Shaw*, 7 T. R. 399; *For v. Clifton*, 1 Chitty's Pl. 5th ed. 14, n. (c); *Baker v. Neave*, 1 Crom. & M. 112; 1 Dowl. P. C. 618, 8 C.; *Tabram v. Tenent*, 1 B. & Pul. 481; *Binn v. Pratt*, 1 Chit. R. 369.

(c) *Hodghinson v. Hodgkinson*, 3 Nev. & Man. 564; *Lakin v. Watson*, 2 Dowl. P. C. 633.

(d) *Id. ibid.*; *Horton v. Borough of Stamford*, 2 Dowl. 96.

(e) *Horton v. Stamford*, 2 Dowl. 96.

(f) *Fox v. Clifton*, C. P. November, 1829; 1 Chitty's Pleading, 5th ed. 14, note (e). In that case an order was made just before the trial that some of the defendant's names should be struck out.

(g) *Baker v. Neave*, 3 Tyr. 233.

(h) See construction of that act in *Gray v. Sidneff*, 3 Bos. & P. 395.

that it can rarely occur that there will be much occasion for or utility of particularity in the writ in this respect. The 2 W. 4, c. 39, s. 1, however, expressly requires that "in every writ of summons and copy thereof the place and county of the residence or supposed residence of the party defendant, or wherein the defendant shall be or supposed to be, shall be mentioned," and the prescribed words in the form of such writ of summons, in the schd. No. 1, is thus, "*C. D. of, &c. in the county of —.*" But the 4th section merely prescribes that the form of *capias* shall be as in the form No. 4 of the schedule, and which, without in terms naming the county, leaves a blank, as thus, "*C. D. of —, if he shall be found, &c.;*" thus leaving it uncertain what description of residence should be inserted in the latter blank. It will be observed also that in the schedule and in the rule M. T. 3 W. 4, the like uncertainty is continued. In a very recent case the judges of the Court of Common Pleas were equally divided in opinion whether it was necessary to insert in a *capias* the county of the defendant's residence or in which he was supposed to be; the Lord Chief Justice and Mr. Justice Gaselee thought that it was not necessary, but Vaughan, J. and Bosanquet, J. thought that, looking at the effect of the different clauses, it was equally required in both descriptions of writs; (i) and certainly in the report of a prior case the learned Chief Justice also appeared to have been inclined to think that the like description of the defendant's residence as in a summons, was equally requisite in a writ of *capias*. (k) However, Mr. J. Taunton, in two recent cases in the Practice Court, noticed the distinction between the terms of the enactments in the 1st and 4th sections, and the difference between the blank in the prescribed form of summons and that of *capias*, and considered that a less degree of certainty in the description was

(i) *Bosler v. Levy*, C. P. 25th November, 1834; 1 Bing. N. C. 368; 3 Dowl. 150.

(k) *Roberts v. Wedderburne*, 1 Bing. N. C. 5, observed on in *Bosler v. Levy*, 1 Bing. N. C. 362. With respect to any argument to be drawn in any case from a comparison of the different forms of proceedings prescribed in the schedule, it is to be observed that many differences will be found, which it is most probable were accidental, and not intentional. Thus at the foot of a summons the printed direction for the memorandum as to the duration of the writ, differs from that at the foot of a *capias*, in the words *to and on*, the former being "Memorandum to be subscribed on the writ,"

and the latter "Memorandum to be subscribed to the writ," and the indorsement on a summons issued by a plaintiff suing in person is thus: "This writ was issued in person by A.B., (stating the plaintiff's christian and surname,) who resides, &c.," whilst the indorsement on a *capias* runs—"This writ was issued in person by the plaintiff within named, who resides at, &c.," and yet it is probable that there was no reason for such variation, and that they were entirely accidental. It is probable that the legislature gave the forms merely to assist, without any intention that a small deviation, not altering the sense, according to common acceptation, much less technically, should constitute a fatal irregularity.

CHAP. V.  
REQUISITES OF  
WRITS.

required in a *capias* than in a summons, (l) and held that "Captain Langford, of the Honourable East India Company's Ship, the Kelly Castle, and now most likely to be found at the East India-house, in the city of London," was a sufficient description of a defendant in a *capias*; (l) and in a subsequent case, where the *capias* was directed to the Sheriff of Surrey, and the defendant's residence was described as of Holland-street, North Brixton, Mr. Justice Littledale held that the objection that the county of his residence was not stated was aided by the direction to the Sheriff of Surrey. (m) Still, however, until the point has been settled *in banc*, it must be considered uncertain whether or not the county must be named in a *capias*. If the blank in the *capias* was merely intended to require a description of the defendant's residence when actually in the county to the sheriff of which the writ is directed, then it would seem that the insertion of the county would be unnecessary, because the description is followed by the words "if he shall be found in your bailiwick," and the sheriff could only take him in *that* county; but if the filling up of the blank was intended thereby the better to describe the *actual general residence or domicile* of the defendant, without regard to the ~~part~~ of the kingdom he might be in at the time of his arrest, and as a *descriptio personis*, the better to identify the defendant and thereby prevent the arrest of a wrong person of the same name, then, on principle, the name of that county (i. e. where the defendant usually resides or is domiciled) ought to be inserted, without regard to the county into which the writ is to be issued; for the mere statement of a place without stating a county would frequently render the description vague, as there are many places of the same name in different counties, and it seems probable that the legislature equally intended that there should be *as full* a description of the defendant's residence in a *capias* as in a summons. There is, however, certainly a difference in the exact prescribed form of summons and *capias*, and it is to be remarked that in the rules of Mich. T. 3 W. 4, prescribing the forms of alias and pluries writs, there is continued a like difference in the blank for describing the defendant's residence. In a case in the Court of Exchequer Lord Lyndhurst and Bayley, B. considered the object of the statute was to *identify the defendant* so that the right person might be taken, and if so, then

(l) *Welsh v. Langford*, 1 Dowl. 498; *Boiler v. Levi*, *id.* 150; *Webb v. Lawrence*, 2 Dowl. 81.

(m) *Perring v. Turner*, 3 Dowl. 15;

a full description of county as well as place of his general residence seems desirable. (n)

If the defendant's general residence be in the county to the sheriff of which the writ is issued, then he is to be described as of the street and town in which his house or lodgings may be, as thus, "C. D. of — Street, in Chelmsford, in the county of Essex," or "of the parish of Hornchurch, in the county of Essex." If the defendant's residence is in another county, then thus, "C. D. who usually resides at Chelmsford, in the county of Essex, but it is supposed he will now be found in the parish of —, in the county of —." It has been held that "of Kent-street, in the county of Surrey," in a *capias*, is sufficiently particular, and the act does not require in that writ the number of the house or the parish to be inserted; (o) and it was held that "Yorkshire" is a sufficient description of a defendant's residence as far as regarded the county, although he actually resided in the town of Kingston-upon-Hull, which is a county of itself, if from the locality of the defendant's residence it might be supposed that he resided in Yorkshire, and it appearing that the defendant resided at a house within twenty yards of the boundary line of the county of York, in a street which, though it had a different name, was a continuation of that named in the writ. (p) As the prescribed forms of writs of *distringas* and *detainer* do not contain any space for the insertion of the defendant's residence (probably because under the former the goods of the defendant are to be taken in the county *wherever* they may be, and under the latter the defendant is only to be *detained* when already in the custody of the officer to whom the writ is directed,) no description of the residence of the defendant is requisite, though if there should happen to be two or more persons of the same name in the same prison or county, it would be prudent to give some distinguishing description, or at least to send an intelligent person with the officer to point out the goods or person. The statement of the *residence* of the defendant in process (excepting in proceedings by original, when the statute of additions, 1 Hen. 5, c. 5, required such residence to be stated,) is a new provision, for none was required in the body of the now abolished writs of *latitat* and *quo minus*, &c., although to avoid the danger of arresting a wrong person there was a rule re-

(n) *Price v. Huxley*, 2 Cr. & M. 211; *Webb v. Laurence*, 1 Cramp. & M. 806.  
2 Dowl. 81, S. C. (p) *Jelks v. Fry*, 3 Dowl. 37.

(o) Per Lord Lyndhurst, C. B., in

CHAP. V.  
REQUISITES OF  
WRITS.

quiring the *addition* of the defendant, or some other *best* description, to be *indorsed* on bailable process and writs of attachment. (q)

In construing the first section, relative to the description of the *residence* of a defendant in a writ of *summons*, it has been decided not to be necessary to state the number of the defendant's house, or the *parish* where it is situate; and that therefore the description of him in a summons as "of Kent Street, in the county of Surrey," (r) or in a *capias*, "of Morpeth Place, Waterloo Road, in the county of Surrey," (s) suffices; and as in describing the local situation of buildings or land, frequently it may be difficult to give particularity, so it suffices if it appear that the *best* description has been adopted that the facts would enable the plaintiff to give. (s) A variance between the description of the defendant's residence in the *affidavit* of debt from the *capias* is immaterial. (s)

If there be an improper description, or the addition of *supposed residence* be wholly omitted, or be *indorsed* instead of inserted in the body of the writ or copy, or indorsed on the writ but not on the copy, or *vice versa*; (t) or if after the writ has been sealed, one county be substituted for another, without resealing, (u) the Court or judge will set the writ aside for irregularity under the rule Mich. T. 3 W. 4, r. 10; (t) and where the writ of *capias* omitted any statement of the defendant's residence, although the *copy* delivered to the defendant described him as "Thomas Huxley, Whitehall Yard," the Court on motion set aside the writ, although it was insisted that the object of the enactment requiring the residence to be stated was in favour of sheriffs, and to diminish the risk of taking the wrong person, and that as the right person had been taken, the defendant was not prejudiced, and could not complain; but the Court decided that the objection was fatal, observing that it is matter of great public convenience that the forms prescribed by the act should be adhered to, and that it would be impossible in every case to institute an enquiry whether the defendant had sustained any prejudice, (x) for the statute is not merely directory, and the sheriff would not be bound to exe-

(q) Rule, Hilary 2 & 3 G. 4, 5 Bar. & Ald. 560; but *semble*, virtually annulled by 2 W. 4, c. 39.

(r) *Webb v. Laurence*, 2 Dowl. P. C. 81; 6 Legal Observer, 460, S. C.

(s) *Buffle v. Jackson*, 1 Dowl. P. C. 505; *Welsh v. Lawford*, id. 498.

(t) *Roberts v. Wedderburne*, 1 Bing.

New C. 4; *Lindredge v. Roe*, id. 5; *Rice v. Huxley*, 2 Cr. & M. 211; 2 Dowl. 231, S. C.; and rule 10, M. 3 W. 4.

(u) *Siggers v. Samson*, 3 Moore & Scott, 194; 2 Dowl. 745, S. C.

(x) Per Lyndhurst, C. B. and Bayley, B., in *Rice v. Huxley*, 2 Dowl. 230, 232; 2 Cr. & M. 211.

cute a bailable *capias* if thus defective, (y) or at least the Court would prevent any prejudice from the omission to the sheriff. (x) But as the first section in express terms merely requires the insertion of the *supposed* residence of the defendant, or where the defendant is *supposed to be*, if the plaintiff had reasonable ground for naming a particular residence, and did not wilfully insert an improper description, the Court or judge would not interfere on summons or motion to set aside the writ, or try a disputed question of residence, (a) especially if the defendant do not swear that he had no knowledge or intimation of the writ until after a subsequent proceeding thereon; (b) and a variance in the description between the affidavit to hold to bail and the writ affords no objection, as the defendant may have removed since the affidavit was sworn. (c)

It has been observed that where a city, or town and county, is surrounded by another larger county, the safest course is to issue the writ into the latter, because then by section 20 of 2 W. 4, c. 39, the surrounded part of a county will be taken as part of the larger county, and then the process may be served in either. (d)

The necessity for stating "in every writ and copy the place and county of the defendant's residence or supposed residence, or wherein he is or is *supposed to be*," applies not only to the first writ of summons or *capias*, but also to *alias* and *pluries* writs, the forms of which when issued upon a writ of summons or *capias* are prescribed in the schedule of the act. (e) And the rule Mich. T. 3 W. 4, 1832, orders that any *alias* or *pluries* writ of *summons* may, if the plaintiff shall think it desirable, be issued into another county, and any *alias* or *pluries* writ of *capias* may be directed to the sheriff of any other county, the plaintiff in such case, in the *alias* or *pluries* writ of *summons*, describing the defendant as of ———, in the county of ———, (into which the *alias* or *pluries* is issued, and then referring to the description in the first writ thus,) "*late* of the place and county of which he was described in the first writ of *summons*;" and upon the *alias* or *pluries* writ of *capias*, referring to the

Description of residence in continued writ or writs into another county.

(y) *Kenrick v. Nanney*, 2 Legal Observer, 270; 1 Dowl. 58, S. C.

(z) *Clarke v. Palmer*, 4 Mann. & Ry. 141; 9 B. & Cress. 153, S. C.

(a) 1 Arch. K. B. 4th edit. 514.

(b) *Id.*

(c) Per Taunton, J., in *Buffle v. Jackson*, 1 Dowl. 507.

(d) Dowl. Stat. 2 W. 4, c. 39, page 144.

(e) 2 W. 4, c. 39, schedule No. 1 and No. 4; and Rule Mich. T. 3 W. 4, ante, 160, 161; and see observations of Tindal, C. J., in *Roberts v. Wedderburne*, 1 Bing. N. C. 5.

CHAP. V.  
REQUISITES OF  
WRITS.

preceding writ or writs as directed to the sheriff, to whom they were in fact directed; and the *form* of an *alias* or *pluries* writ of summons and *capias* into *another county* are then prescribed, in the former, directing that the defendant shall be described as C. D., or whatever may be his name, "of ———, in the county of ———, late of ———, in the county of ———," (the original county); and in the latter, describing the defendant, as to residence, as "of ———," precisely as in the first *capias*.

Since this statute and rule, it has been decided that if a *pluries capias* be issued with a *blank* for the defendant's residence, (although it appear by affidavit that the residence had been properly inserted in the *capias* or *alias*, and that between the issuing of the *capias* and *pluries* the defendant had quitted his residence, and as it was believed had gone abroad, and that the plaintiff was unable to discover his residence,) the same must be set aside as irregular, on the ground that the statute certainly intended that the residence of the party shall be described both in the writ of *capias* and in those writs which purport to be continuances of it, (f) and thereby also shewing that the last is *continued* process.

Addition of the  
Degree, &c.  
when or not  
necessary.

*Fifth, Addition of Degree.*—Although the uniformity of process act has thus introduced the necessity for some statement of the *defendant's residence*, even in serviceable process, yet it does not adopt the other ancient and perhaps still better description of a defendant by his *estate or degree, or mystery*, as required by the statute of additions, in *original writs* and *indictments*. (g) And although there was a rule of Court requiring the place of abode and *addition* of the defendant, or some other *best* description, to be indorsed on a *bailable writ* or attachment, (h) so as to avoid the danger of arresting a wrong person, although of the same name as the intended defendant, (i) that rule seems to have been impliedly annulled by the 2 W. 4, c. 39, prescribing a form of *capias* without requiring any such indorsement; so that no form is at present prescribed as would be desirable to avert the consequences that might ensue from two or more persons of the same name being, at the same time, in the same county or prison. It is, however, essential

(f) *Roberts v. Wedderburne*, 1 Bing. N. C. 4; and see *Border v. Levi*, 3 Dowl. 150; 9 Legal Observer, 206, S. C.; *ante*, 176.

(g) 1 Hen. 5, c. 5, *ante*, 177; *Chitty's Col. Stat.* 746; *Gray v. Sidney*, 3 Bos. & Pul. 395.

(h) Rule Hil. 2 & 3 G. 4, 5 Bar. & Ald. 560.

(i) The Courts held that that rule was only directory, unless the sheriff was prejudiced, *Clarke v. Palmer*, 9 Bar. & Crea. 153; 4 Mann. & Ry. 141; and see *Rice v. Huxley*, 2 Dowl. P. C. 232.



for every careful practitioner, especially when the name of the defendant is in common use, or there be on any account a possibility of the wrong person being served with process, and still more of the goods of a wrong person being taken under a distringas, or a wrong party arrested, or taken in execution, either in the body of the writ, or by indorsement, or by some other even more distinct and specific description, as of age, height, and complexion, to prevent the possibility of mistake.

If the defendant be a *peer*, or otherwise entitled to a name of *dignity*, although the uniformity of process act is silent, yet he should be *so described* in the writ, as "Duke, or Marquis, or Earl of —," or as the title may be; although with the exception of proceedings against a member of parliament, who is a trader, the same form of writ of summons in other respects is in all cases to be used, whether or not the defendant be privileged; and if such name of dignity be omitted in the declaration, it has been supposed to be pleadable in abatement. (*k*) In a writ against a peer or a member of parliament, in general it is usual, though not necessary, to describe either as having privilege of peerage or of parliament. (*l*) But the sixth form in the schedule to 2 W. 4, c. 39, of a summons against a member of the House of Commons, to be served upon him in order to enforce the provisions of the statute 6 G. 4, c. 16, s. 10, requires the defendant to be described as "C. D., of &c. ———, *Esquire, having privilege of parliament,*" and the omission of the latter words might in that case render the writ irregular, as an omission under the 10th rule of Mich. T. 3 W. 4.

*Sixthly, Description of the Character or Right in which the Plaintiff sues, or the Defendant is sued.*—The uniformity of process act, 2 W. 4, c. 39, as well in its enactments as in the prescribed forms in the schedule, is silent upon the necessity of inserting any description of the *character* or *right* in which the plaintiff sues or the defendant is sued; and it is probable that it was intended by that statute merely to require that the *form of action* should be stated, and the amount of the debt indorsed, which it was perhaps considered would sufficiently inform the *defendant* in all actions, and his *bail* in bailable actions, what was the nature of the claim and supposed liability. Since that act, it was considered by the Courts of K. B. and

*Sixthly, Description of the Character or right in which the defendant is sued or the plaintiff sues.*

(*k*) Tidd's Supp. 1833, page 66, 262, note (a); and it will be observed that 3 & 4 W. 4, c. 42, s. 11, only takes away pleas of *misnomer*.

(*l*) *Cantwell v. Earl Stirling*, 1 Moore & Scott, 297; 8 Bing. 174, S. C.; Tidd's Supp. 1833, p. 66.

CHAP. V.  
REQUISITES OF  
WRITS.

C. P., with reference to prior decisions, that upon a *general* writ, whether *serviceable* (m) or *bailable*, (n) and not stating the character in which the plaintiff sued, or the defendant was sued, the plaintiff was afterwards at liberty to *declare specially* in any particular character or right, as *qui tam*, or as *executor* or administrator, or as an *assignee* of a bankrupt; (o) and also it was held in the Common Pleas, that on such *general process* the plaintiff may declare *against* a defendant *as* an executor or administrator. (p) And where the *affidavit* stated the debt to be due to the intended plaintiff *as* executor, but the process was general, the Court of Exchequer refused to order the bail-bond to be cancelled. (q) It was also held, that although the process had described the plaintiff or defendant generally *as being* executor, administrator, or assignee, without introducing any words denoting that he sued *as such*, the plaintiff might declare generally in his *own right*, or against the defendant on his own liability, treating the description as a mere superfluous addition, just as if the word carpenter had been idly introduced. (r) But that by introducing into the writ any *express statement* that the plaintiff intended to sue in a particular character, as by using the word "*as executor*" or "*as assignee*," &c. then the plaintiff having so expressly limited his proceeding could not declare generally, and that if he did so, then, at least in a bailable action, the defendant would be discharged out of custody and the proceedings be set aside for irregularity. (s)

But it has been supposed that there is a difference in these respects in the practice of the Common Pleas; (t) and it is to be collected from one reported decision, that if a *bailable* writ in C. P. *be general*, and the plaintiff declare thereon *as executor*, the bail will be entitled to have an exoneration entered on the bail-piece, but that the defendant himself cannot avail him-

(m) See cases, Tidd's Supp. 1833, p. 67.

(n) But it will be observed, that in those cases the affidavit to hold to bail correctly stated the character in which the plaintiff sued, the same as in the declaration. See next note.

(o) *Ashworth v. Ryall*, 1 Bar. & Adol. 20; *Ilsey v. Ilsey*, 2 Crompt. & Jer. 300; 2 Tyr. Rep. 214, S. C.

(p) *Watson v. Pilling*, 3 Brod. & B. 446; 6 Moore, 66, S. C.

(q) *Ilsey v. Ilsey*, 2 Tyr. 214; 2 C. & J. 330, S. C.

(r) 1 Dowl. Rep. 97; *Knowles v. Johnson*, 2 Dowl. 653. And see *Henshall v. Roberts*, 5 East, 150.

(s) *Douglas v. Irlam*, 8 T. R. 416; *Rogers v. Jenkins*, 1 Bos. & Pul. 383; 1 Dowl. P. C. 98, 99. But see *Ashworth v. Ryall*, 1 Bar. & Adol. 20.

(t) Archbold's Prac. K. B. by T. Chitty, 4 ed. 117, 515; Arch. Prac. C. P. [19], id. [40]. In the latter it is observed, "Formerly, upon general process, a plaintiff might declare in autre droit as executor, &c. but probably that would now be deemed irregular."

self of such variance. (u) But in that case the affidavit to hold to bail was general, viz. for a debt due to the plaintiff in his own right, and the declaration disclosed that it was for a debt alleged to be due to the plaintiff in his representative character; (x) and we have seen that in another case that Court held that a defendant may be declared against as administrator, though the process described him generally. (y) However, it will be prudent in a writ in the Common Pleas, when the plaintiff sues, or the defendant is sued in a particular character, to describe him accordingly in the writ; and this indeed will be the safest course in all the Courts. (z)

It has been suggested, that in all the writs *against* an executor or administrator, it is advisable so to describe him, in order *thereby* to give him notice that the action is against him in that character, and render him liable for any subsequent misapplication of the assets; (a) but a distinct written notice would be preferable. (a) As by the 2 W. 4, c. 39, and the rule Hil. T. 1832, and Mich. T. 1832, the *form of action* must be described in the body of the writ, and in all actions for a debt, the amount of the claim must be indorsed on the process, it follows that the defendant, as well as his bail, thereby sufficiently know the *extent of liability* they would incur by becoming bail to the sheriff, and they may also search and obtain a copy of the affidavit to hold to bail; therefore so far it is not essential that the body of the writ should also state the exact character and right on which the plaintiff sues or the defendant is to be sued.

*Seventhly, Names of all the Defendants.*—It will be observed that the form of the writ of summons, and other writs mentioned in the act, are only adapted to the case of a *single* plaintiff or defendant; and of course when there are several parties on either side, the form must vary. (c) In such case the word “*you*,” subsequently to be found in the writ, is to be read *distributively* to each of the defendants. (d) It was always

*Seventhly, The names of all the defendants must be inserted in every writ and no more. (b)*

(u) *Manesley v. Stevens*, 9 Bing. 400; 1 Dowl. P. C. 711, S. C. But note in that case the affidavit was general, as for a debt due to the plaintiff himself, and the declaration was for a debt due to plaintiff as executor, a variance which of itself discharged the bail. See *Ilsey v. Ilsey*, 2 Tyr. R. 215; 2 Crompt. & Jer. 331.

(x) *Id. ibid.* See observations of Court in *Ilsey v. Ilsey*, 2 Tyr. 215; 2 Crompt. & Jer. 331.

(y) *Watson v. Pilling*, 3 Brod. & B. 446; 6 Moore, 66, S. C.; ante, 182 (p).

(z) And see 1 Arch. Pr. C. P. [40], where it is observed that it is *extremely*

*doubtful* whether the practice of issuing general process upon an affidavit in *antre droit* would now be allowed in any of the Courts, and refers to 1 Dowl. 97. And see 3 Wils. 61, 2 Bla. R. 722, shewing that only in nonbailable actions can such a variance between process and declaration be unimportant.

(a) *Rees v. Morgan*, 3 Nev. & Man. 205.

(b) See rule, ante, 160, note (n).

(c) Tidd's Sup. A. D. 1833, p. 67.

(d) *Engleheart v. Eyre and another*, 2 Dowl. 145, ante, 165.

CHAP. V.  
REQUISITES OF  
WRITS.

*necessary*, as well in bailable as serviceable process, to include in one writ the names of *all* the persons who ought to be made *co-plaintiffs*, however numerous; and as no amendment would now be allowed, either in adding or subtracting a name, unless in cases where otherwise the remedy would be barred by the statute of limitations, greater care must now be observed in filling up and issuing a writ in this respect than heretofore, or the plaintiff must begin *de novo*. With respect to *several defendants*, it was formerly the practice, in a joint action against *several defendants*, when *exceeding four*, to name at most four in one writ, and to issue another writ or writs against the others, naming only four in each, and it was also usual in serviceable process to include four persons as defendants, and afterwards to declare in *separate* actions against each, so that the defendants could scarcely anticipate, from the terms of the writ, how the plaintiff would afterwards declare or know for what he proceeded, and it was supposed were frequently misled. (c) But the first general rule of Mich. T. 3 W. 4, put an end to both these practices by ordering that *every* writ of summons, *capias* and *detainer*, *shall contain* the names of *all* the *defendants* (if more than one) in the action, and shall *not contain* the name or names of every defendant or defendants *in more actions than one*. (d) However numerous the defendants in a joint action may be, they must all be named in each and *every* writ issued against them, although they greatly exceed four; and when very numerous, if there be not room in the printed blanks for all the names and descriptions of residences, then the whole writ must be written; and if some one or more defendants be in one county, and the others in another county, then there must be at least as many *concurrent* writs precisely alike, as there are counties (varying of course, if writs of *capias*, in the direction to the sheriff of each county); and there must be as many copies of such writ as there are defendants in that county, unless there has been an attorney's written undertaking to appear for them.

Upon the affirmative or first part of this rule, it is clear that a declaration naming *more* defendants than were named in one writ would be irregular. (e) But on the latter part of the rule, it has been held, that in process *not bailable* against several defendants, the plaintiff may regularly declare in a joint action against *some* of them, provided he has done no act shewing any

(c) *Holland v. Johnson*, 4 T. R. 695;  
*Thompson v. Cotter*, 1 Moore & S. 55.

(d) See rule *ante*, 160, note (n).  
(e) 1 Arch. Pr. C. P. [40].

intention to proceed against the other defendant or defendants, and especially so when the plaintiff has entirely dropped his proceeding against such other defendant. (e) And the same doctrine prevails even on *bailable* process, when against several persons for a *tort*. (f) So that until the plaintiff has *declared* on his joint process, no irregularity appears that could be taken advantage of, and therefore a defendant cannot object until after declaration. But where the names of two defendants had been inserted in a writ of summons, and afterwards they were *both* declared against *separately*, the Court set aside the declaration and subsequent proceedings for irregularity, although there were two writs and the defendants had entered separate appearances, which it was insisted waived the irregularity. (g) And where a husband and his wife had been arrested on *joint process*, and the latter had been discharged out of custody upon entering a common appearance, and afterwards the plaintiff declared against the husband alone, the Court held the proceedings irregular. (h) And in a *bailable* action, if the declaration should be against fewer defendants than those named in the writ, the proceeding would, although not within the terms of the rule, be irregular, and the Court would set aside the declaration. (i)

*Eighthly, To the Sheriff of ——— greeting:—*A writ of *summons*, we have seen, is to be addressed to the *defendant* or defendants; but writs of *distringas* and *capias* are by the *prescribed forms* in schedule of 2 W. 4, c. 39, to be directed to the *sheriff or other proper officer* for executing such process; and writs of *detainer* are by the scheduled forms to be directed to the *marshal or warden*, &c., already having the defendant in his custody. Since the abolition of the Welsh Court, the writ may be directed immediately to the sheriff or other proper returning officer of any county in Wales, (k) and it may issue into either of the counties palatine. (l) But they are then to be directed to the chancellor of the county palatine of Lancaster or his deputy there, or to the Bishop of Durham

*Eighthly, Directions to the Sheriff or other officer, to whom writ of distringas, capias or detainer, is to be directed.*

(e) Tidd's Sup. 1833, p. 467; *Evans v. Whitehead*, 2 M. & R. 367; *Bowles v. Bilton*, 2 C. & P. 474; *Knowles v. Johnson*, 2 Dowl. P. C. 653; and R. E. 8 G. 4.

(f) *Wilson v. Edwards*, 3 B. & Cres. 734; 5 D. & R. 622, S. C.; *Evans v. Whitehead*, 2 Man. & Ry. 367; *Pepper v. Whalley*, 1 Bing. N. C. 71; *Knowles v. Johnson*, 2 Dowl. P. C. 653.

(g) *Pepper v. Whalley*, 1 Bing. N. C. 71.

(h) *Cuttarne v. Player*, 3 Dowl. & Ry. 247.

(i) 1 Arch. Pr. C. P. [40], citing 4 East, 589; 1 M. & S. 55.

(k) 11 G. 4 and 1 W. 4, c. 70, s. 13.

(l) *Chapman v. Maddison*, 2 Stra. 1089; *Jackson v. Hunter*, 6 T. R. 73; see the forms of writs into counties palatine, prescribed by rule Michaelmas term, 3 W. 4.

CHAP. V.  
REQUISITES OF  
WRITS.

or his chancellor there, and in a prescribed form, (m) and each is to make his mandate thereon to the sheriff of the county. (n) Before the abolition of the former writs by 2 W. 4, c. 39, a serviceable writ might be served in any county; but that act, section 1, implies that a writ of summons must be served in the county to the sheriff of which it is addressed, or at least within 200 yards of the border thereof, and not elsewhere; and the third and fourth clauses, as to writs of distringas and capias, limit the execution to the *exact boundaries*. If there be a liberty or franchise within a county, it seems that it would be irregular to address the process *directly* to the local officer, but that it *must* be directed to the *sheriff*, who must make his mandate thereon, (n) unless the writ contain a non omittas clause, as is now invariably the case (o) in all writs of distringas and capias. (p) And therefore, where the writ was improperly directed immediately to the bailiff of the borough of Southwark, it was holden absolutely *void*, and the defendant was discharged out of custody. (q)

The writ should be addressed to the sheriff of the proper county *very accurately*, and a mistake even in a letter in the name, *if it would alter the sense or sound, would be fatal*, as was once held the omission of the *l* in Middlesex, or the addition of an *s* after the Sheriff of Middlesex; (r) and although it was held in one case, before the uniformity of process act, that a writ directed to the sheriff (instead of sheriffs) of London, was sufficient, because the Courts take notice that the two sheriffs are but one officer; (s) yet decisions after that act came into operation, expressly deny that doctrine, and seem to establish that such a mistake is a fatal irregularity. (t) The *copy* of a bailable capias, delivered to the defendant, was Sheriff of London, and the writ itself was correctly sheriffs, and the Court

(m) See forms prescribed by general rule, Michaelmas term, 3 W. 4, reg. II.

(n) *Bouring v. Pritchard*, 14 East, 289; *Bradshaw v. Davis*, 1 Chit. Rep. 374.

(o) *Post*, 190.

(p) 2 W. 4, c. 39, schedule No. 3 & 4, and see rule Michaelmas term, 3 W. 4, which directs that no additional fee shall be payable in respect of the plaintiff's introduction of a non omittas clause.

(q) *Bouring v. Pritchard*, 14 East, 289; *Bradshaw v. Davis*, 1 Chit. Rep. 374; *Grant v. Bagge*, 3 East, 128; rule Trinity, 13 G. 2.

(r) Per Lord Denman, C. J., in *Hodgkinson v. Hodgkinson*, 3 Nev. & Man. 564; 2 Dowl. 536; *Tyser v. Bryan*, 2

Dowl. 643; *Barker v. Weedon*, 2 Dowl. 707; 1 Cr. M. & R. 396, S. C.; but see *Sutton v. Burgess*, *post*, 187 (s); and *Colson v. Berens*, 3 Dowl. 253, in which the Court of Exchequer considered that the decision upon the effect of the omission of the *l* in Middlesex was too strict, as such omission could not mislead.

(s) *Clutterbuck v. Wildman*, 10 Law J. 81; 2 Tyr. 276; 2 Crompt. & J. 213; and as to Middlesex see *Barker v. Weedon*, 1 Crompt. M. & R. 396; *Jackson v. Jackson*, *id.* 438; 5 Dowl. 182; Bac. Ab. Sheriff, K.; 2 Ld. Raym. 1135.

(t) *Barker v. Weedon*, 4 Tyr. 860; 2 Dowl. 707; 1 Crompt. M. & R. 396, S. C.; *Nicol v. Boyn*, 10 Bing. 339; 1 Cr. M. & R. 761, S. C.

made absolute a rule for discharging the defendant out of custody, and refused leave to amend. (u) So where the copy of a writ of *capias*, delivered to the defendant, was directed to the Sheriff of *Middlesex*, omitting the *l*, the omission of the *l* was in one case decided to be a fatal irregularity, and in effect no copy at all; and Denman, C. J., observed, that the omission of a letter is immaterial, if it be not productive of a variation either in sense or sound, but if it do, it is material; (x) and in a subsequent case it was decided, that a writ of *capias* directed to the sheriffs of *Middlesex*, in the plural, is irregular. (y) However, in a subsequent case the Court of Exchequer, after reiterating the rule that a mistake in a letter will not constitute an irregularity, unless it alter the sense, appeared to think that such omission of the *l* in *Middlesex* should not according to that rule have been considered a sufficient irregularity to sustain a motion to set aside the proceeding. (x) And Alderson, J., in another case observed, that if the defect consist merely in bad spelling, as if the copy of a writ were in misspelling the word sheriff with only one *f*, perhaps the objection might not be fatal. (a) Where a writ of *detainer* was directed "To the Marshal of our prison of the Marshalsea," instead of "To the Marshal of the Marshalsea of our Court before us," leaving it uncertain whether the prison of the Palace Court or the King's Bench Prison was intended; this was held irregular, and the defendant was discharged. (b) But it will be seen hereafter that there are some recent cases which admit exceptions, when the Court think the *sense* or *meaning* of the writ or copy have not been altered by a mistake. (c)

*Several Forms of Directions to Sheriffs, &c.*—The statute 2 W. 4, c. 39, schedule No. 4, and the *General Rules*, Michaelmas *Forms of directions to sheriffs.*

(u) *Nicol v. Boyn*, 10 Bing. 339; 3 Moore & Scott, 812; 2 Dowl. R. 761, S. C.

(x) *Hodgkinson v. Hodgkinson*, 3 Man. & Nev. 564; 2 Dowl. 536; *Tyser v. Bryan*, 2 Dowl. 640; in *Nicol v. Boyn*, 10 Bing. 338, also Tindal, C. J., held, that the omission of a letter, not altering the sense, might not be material or objectionable. In *Sutton v. Burgess*, Exchequer, 13 January, 1835, Parke, B., it is said expressed his disapprobation of *Hodgkinson v. Hodgkinson*. See note *Barker v. Weedon*, 4 Tyr. 861; and *Colson v. Berens*, 3 Dowl. 253.

(y) *Barker v. Weedon*, 1 Cramp. M. & Ros. 396; *Jackson v. Jackson*, id. 438; 3 Dowl. 182, S. C.

(z) In *Sutton v. Burgess*, Excheq. R. 21 January, Hilary term, 1835, per Parke, B. and Alderson, B. In that case the copy of a *capias*, delivered to the defendant, was "take Marianne Burgess, if h (instead of she) be found, &c.," and the Court discharged with costs a rule for setting aside service of *capias* and delivering up bail-bond, saying the mistake did not alter the sense, MS.; and see *Colson v. Berens*, 3 Dowl. 253; *Barker v. Weedon*, 4 Tyr. 861; 1 Cr. M. & R. 396, S. C.

(a) *Nicol v. Boyn*, 2 Dowl. P. C. 762; 3 Moore & Scott, 812; 10 Bing. 339.

(b) *Storr v. Mount*, 2 Dowl. 417.

(c) *Post*, Twenty-Seven, as the consequences, &c.

CHAP. V.  
REQUISITES OF  
WRITS.

term, 3 W. 4, we have seen, give the forms of *some* directions to the sheriff, &c. in ordinary cases, and to certain other officers, (e) as thus—

“To the Sheriff of ———, Greeting.” (f)

or if to the Cinque Ports,

“To the Constable of Dover Castle, Greeting.”

“To the Mayor and Bailiffs of Berwick-upon-Tweed, Greeting.”

or

“To ——— [as the case may be] Greeting.”

“To the Chancellor of our County Palatine of Lancaster, or to his Deputy there, greeting :” (g) We command, &c.

“To the Reverend Father in God [William] by Divine Providence, Lord Bishop of Durham, or to his Chancellor there, greeting :” (g) We command, &c.

“To the Marshal of the Marshalsea of our Court before us.” (h)

“To the Warden of our Prison of the Fleet.” (i)

Other forms, as may be collected from the books of practice and decided cases, may be thus : (j)

“To the Sheriff of Middlesex.” (k)

“To the Sheriffs of the city of London.”

The following is the direction of the writ in *other* places : (j)

“To the Sheriff of our City of Exeter.”

“To the Sheriff of our city of Litchfield, and the county of the same city.”

“To the Sheriff of our city of Worcester.”

“To the Sheriff of our town and county of Kingston-upon-Hull.”

“To the Sheriff of our town and county of Newcastle-upon-Tyne.”

“To the Sheriff of our town and county of Poole.”

“To the Sheriff of our town and county of Southampton.”

“To the Sheriff of our town and county of Carmarthen.”

(e) *Ante*, 154 to 157, and Reg. Gen. Mich. T. 3 W. 4.

(f) 2 W. 4, c. 39, schedule No. 4. When the writ of *capias* is into Middlesex, it should be directed to the sheriff in the singular, although there are two officers constituting the *sheriff*. In London there are also two persons recognized as sheriffs in the plural, and the writ should be directed accordingly; but *sheriff* may suffice in writ, *Clutterbuck v. Wiseman*, 10 Law J. 81, *sed quare*.

(g) Reg. Gen. 3 W. 4, 1832.

(h) See 2 W. 4, c. 39, schedule No. 5;

*Storr v. Mount*, 2 Dowl. 417; 7 Leg. Ob. 301, S. C.

(i) See 2 W. 4, c. 39, schedule No. 5.

(j) See forms, 2 Sellon's Prac. 671, 672.

(k) A writ into Middlesex should be strictly in the *singular*, although there are two persons constituting only one officer. If described in *pleading* as sheriffs, it would be *demurrable*, and if so in writ, then irregular, *Barker v. Weedon*, 1 Crom. M. & R. 396; 4 Tyr. 860, S. C. *Jackson v. Jackson*, *id.* 381; 3 Dowl. 182, S. C.; Bac. Ab. Sheriff, K.; 2 Ld. Raym. 1135.



"To the Sheriff of our town and county of Haverfordwest."

In the Isle of Ely the writ is directed

"To the Sheriff of Cambridgeshire."

CHAP. V.  
REQUISITES OF  
WRITS.

To a corporate town of exclusive jurisdiction, where there are no sheriffs, the writ must be directed to the corporation by the corporate name, as thus :

"To the Mayor and Bailiffs of Berwick-upon-Tweed."

To the *coroners* of a county, &c. the writ is directed thus :

"To the Coroners of our county of ———," or "of our city of ———."

The process must be directed to the *principal officer*, as to the *sheriff* or *returning officer*, who is to have the execution of the writ, and even when by law it was essential that a writ must be executed by the officer of a liberty or franchise, the process of the superior Courts could not regularly be addressed directly to him, but to the sheriff, who was to make his mandate directed to such officer; and where a writ was directed to the bailiff of the borough of Southwark, it was holden void, and the defendant discharged out of custody. (l) Now as every writ under 2 W. 4, c. 39, is framed as a non omittas, the sheriff or his officer usually executes the writ, though the defendant be within a liberty or franchise.

In *Middlesex*, although two individuals act as sheriff, yet in law they constitute but one sheriff or officer; and the writ must be directed accordingly "To the Sheriff of Middlesex" in the singular, and a direction in the *plural* would render the writ irregular; though at first, under the uniformity of process act, it was considered otherwise. (m)

In *London*, as the two persons constitute two sheriffs, a writ should properly be directed to the sheriffs of London in the plural; and although in one case where the writ was incorrectly in the singular, as "Sheriff of London," it was holden sufficient, as the two sheriffs are but one officer; (n) yet where the writ itself was correctly directed to the sheriffs of London, and the copy served was *sheriff* in the singular, the *variance* was holden fatal; (o) and now if the writ or copy be sheriff instead of sheriffs, the omission of the *plural* seems to be a fatal misdirection. (p)

In the following places there are two sheriffs, viz., the cities

(l) *Bowring v. Pritchard*, 14 East, 289; *Grant v. Bagge*, 3 East, 128; *Bradshaw v. Davis*, 1 Chit. R. 374.

(m) *Barker v. Weedon*, 1 Crom. M. & R. 396; *Jackson v. Jackson*, id. 438; 3 Dowl. 182, S. C., ante, 186, 187.

(n) *Clutterbuck v. Wiseman*, 10 Law J. 81.

(o) *Nicol v. Boyn*, 10 Bing. 339.

(p) *Barker v. Weedon*, 1 Crom. M. & R. 396; 4 Tyr. 860; 2 Dowl. 707.

CHAP. V.  
REQUISITES OF  
WRITS.

of Bristol, Chester, Coventry, Gloucester, Lincoln, London, Norwich, the town of Nottingham, and the city of York. In those *cities* the writ should be directed "To the Sheriffs of our city of ———." In the town of Nottingham the direction is "To the Sheriffs of the town and county of Nottingham," and since the last mentioned decisions it should seem that a direction in the singular number would invalidate the writ.

It should seem that when any district or place, being parcel of one county, is wholly situate within and surrounded by another, a writ of distringas or capias may be directed to the sheriff of *either* county, to serve or execute the same within such district; (*p*) though it has been recommended that the direction be to the returning officer of the largest and surrounding district. (*q*)

It can rarely occur that it will be requisite to issue bailable process to *arrest a sheriff*; but if it should, then, if there be two sheriffs, and only one is to be arrested, the process should be directed to the other sheriff; (*r*) if only one sheriff, then to the *coroner*, for bailable process directed to the sheriff to *arrest himself* would be irregular, (*s*) though it was held otherwise as to *serviceable* process, when that as heretofore was directed to the sheriff. (*t*) If the coroner as well as sheriff are to be defendants, then the Court or Master will appoint *elisors*, to whom the writ is then to be directed. (*u*) When the writ is directed to the coroner, the officer executing it is his officer and not that of the sheriff, consequently the sheriff is not responsible for his misconduct. (*v*)

Ninthly, Non  
omittas clause.

*Ninthly, Non omittas clause.*—It will be observed that the rule Mich. T. 3 W. 4, expressly orders that in every writ of distringas a non omittas clause may be introduced by the plaintiff without the payment of any additional fee on that account. It has been supposed that as the forms of distringas and capias in schedule of 2 W. 4, c. 39, prescribe the *non omittas* clause, if the same should be omitted the writ would be irregular, especially because the rule Mich. T. 3 W. 4, orders that the *omission* of any thing required by the act to be inserted or indorsed shall be deemed an irregularity, and perhaps afford

(*p*) Tidd's Sup. 1833, p. 83 and form there referred to.

(*q*) *Ante*, 179.

(*r*) *Letson v. Bickley*, 5 Maule & S. 144.

(*s*) *Weston v. Coulson*, 1 Bla. R. 506.

(*t*) *Mayor of Kingston v. Bubb*, 1 Dowl. 151.

(*u*) *Mayor of Norwich v. Gill*, 1 Moore & Scott, 91; 8 Bing. 27, S. C.

(*v*) *Sergeant v. Cowan*, 1 Crompt. & M. 491.

ground for the sheriff's refusing to execute it. It is to be observed, however, that it was decided before the 2 W. 4, c. 39, that if a sheriff, under a general writ not containing any non omittas clause, executed the same within an exclusive franchise or liberty, the proceeding was valid between the parties to the suit, although the sheriff might be liable to an action at the suit of the owner of the franchise for the disturbance of his franchise. (x)

The 2 W. 4, c. 39, schedule No. 4, by prescribing the form of capias with a non omittas, obviously intended every writ of capias so to operate; and it has been suggested that if a writ of capias omitting that clause were directed to the sheriff, he might not only refuse to execute it at all, but also the writ would be irregular under rule 10 of Mich. T. 3 W. 4, as omitting part of the prescribed form. (y)

*Tenthly, That within eight days, &c.*—It will be observed that the prescribed form of a writ of summons or of a capias, &c. after naming the defendant, or the sheriff, or other officer, distinctly commands *what shall be done*, viz. a writ of summons commands the defendant "*that within eight days after the service of this writ on you, inclusive of the day of such service, you do cause an appearance to be entered for you in our Court of—(z) in an action, &c.*;" and a writ of capias commands the sheriff or other proper officer, "*that you omit not by reason of any liberty in your bailiwick, but that you enter the same, and take C. D. of——— if he shall be found in your bailiwick, and him safely keep until he shall have given you bail, or made deposit with you according to law, in an action, &c at the suit of A. B. or until the said C. D. shall by other lawful means be discharged from your custody,*" and also commands the sheriff "*on execution hereof (i. e. on the arrest) to deliver a copy of the writ to the defendant;*" and then requires the defendant to take notice, that within eight days after execution of the writ on him, *inclusive of the day of such execution, he cause special bail to be put in for him in our Court of——.*" (a) And a writ of *distringas* commands the sheriff "*to distrain upon the goods and chattels of the defendant for the sum of 40s., in*

*Tenthly, Statement of what the Defendant or the Sheriff is required to do.*

F (z) *Carrott v. Smallpage*, 9 East, 330; *Gilb. Prac. C. P.* 27; *Pigott v. Wilks*, 3 B. & Ald. 502; 4 Bing. 523; 7 Taunt. 311.  
(y) 1 Arch. M. B. 4 edit. 113, *sed quere*; and see *supra*, 190, 191.

(z) See observations on the too general requisition to appear in Court, *ante*, 149, note (u), and *post*, 192.

(a) See the full forms of summons, capias, &c. *ante*, 154 to 157, note.

CHAP. V.  
REQUISITES OF  
WRITS.

order to compel his appearance in Court to answer the plaintiff, and to return to the Court what the sheriff has done on a named day," and is subscribed with a notice to the defendant.

As respects a *Sheriff*, who is an officer of the Court, and who by himself or undersheriff is supposed to be acquainted with legal terms, this direction may be sufficiently explicit; but as regards a *defendant*, who may not be a lawyer, it neither informs him *how* he is to give bail or make a deposit, nor of his right to be taken to a friend's house for the first twenty-four hours, or to what other lawful means of discharge he may be entitled, or how or in what office he is to enter his appearance or put in bail above; and therefore in general a defendant when served or arrested, must apply to an attorney for directions, or rather authorize him to take all necessary measures for him, and therefore less particularity in the writ might have sufficed, because every attorney immediately he has merely ascertained the general description of writ will know as a matter of course what is to be done by the defendant.

*Eleventhly,*  
Return days of  
writs or pro-  
ceedings in lieu.

*Eleventh, Return days of writs.*—It will be observed that by the forms of the writ of summons, capias and detainer, the defendant is required to appear or put in special bail *in eight days, inclusive* of the day of service or arrest in the named Court, and there is no express return day. Before the uniformity of process act, 2 W. 4, c. 39, the greatest niceties prevailed in taking care that all mesne process was made returnable on a proper day, and much of the time of the Court was occupied in discussing irregularities in respect of such return days. It was also a great source of vexation that writs might be made returnable and served on the very day they were issued, so as to fix the defendant with the costs of a declaration thereon, without the possibility of avoiding that expense by the most prompt payment; or if the defendant were not served with the first writ, there were several other alias or testatum writs immediately issued into different counties, greatly increasing the expense. But now every writ is to be in force *for four calendar months* from the day of issuing the same, and a writ of summons or capias or detainer is not to have any return day, and the plaintiff cannot declare until the ninth day after the service of the writ, or the arrest, nor will he be entitled to more than the costs of the retainer, instructions to sue, letter before action, and writ, and copy and service or arrest, if the defendant tender the debt and the costs of those proceedings before the expiration of

four days pursuant to the indorsed notice presently stated. But writs of *distringas* and proceedings to *outlawry* are by sections 3 and 5 to be made *returnable on some day in term*, not being less than fifteen days after the teste thereof; so that no considerable progress can be made on a *distringas* or proceedings to outlawry in the vacations, it being considered essential that the Court in banc should control all further proceedings on a *distringas* or exigent. The sheriffs, however, are required *immediately after the execution* of a writ of *capias* to return the writ to the Court, together with the manner in which he shall have executed the same, and the day of the execution thereof, and also if the same remains unexecuted, then the sheriff must return the same at the expiration of four calendar months from the date, or sooner if the sheriff should be thereunto required by order of the Court or any judge thereof. And in order to enforce the *immediate* return of either of the writs directed to the sheriff or other officer under 2 W. 4, c. 39, the 15th section and the rules of Court, presently mentioned, authorize the Court or a judge in vacation to make orders for the return of any such writ; but no attachment for disobedience is to issue before the next term; and the rule Mich. Term, 3 W. 4, directs that in case of such disobedience an attachment may issue in the next term notwithstanding *subsequent* compliance. (c)

*Twelfthly, Returnable in what Court.*—The forms of the writs prescribed in the schedule of 2 W. 4, c. 39, and of the alias and pluries summons and *capias*, and other writs given in the rule M. T. 3 W. 4, having been intended to be used in either of the three superior Courts, are therein printed in blank for the name or description of the *Court in which* each writ is to be *returnable*. Each is to be filled up according to the intention of the client or his attorney, in which Court he will proceed, as thus, “in our Court of King’s Bench,” or of “Common Pleas,” or of “Exchequer of Pleas;” however, with analogy to the practice before the 2 W. 4, c. 39, if a writ of summons should require the defendant to enter his appearance “in our Court before us,” or “in our Court of the bench at Westminster,” or “in our Court before our justices of the bench at Westminster,” or by any other terms that are considered in law sufficient to describe the proper Court, it might suffice. (d)

*Twelfthly,  
Returnable in  
what Court.*

---

(c) See *post* “thirty five” as to enforcing the sheriff’s return. (d) Tidd, 150, 225.

CHAP. V.  
REQUISITES OF  
WRITS.

It will be observed that the requisition to appear in a named Court, if intended to inform the defendant himself, is *too general*, and should specify the *particular office* of each Court in which the defendant is to enter his appearance, or put in bail above, and even shew *how* he is to appear; the form might be sufficient in ancient times, when the defendant actually appeared *in person* in banc before the judges, but is now only strictly applicable to the most inferior Courts, where there is no office for entering an appearance distinct from the Court itself. It will hereafter be seen, that, as attached to the superior Courts, there is a different office for each Court, in which the defendant is to appear, and but few defendants, without the assistance of an attorney, could correctly learn from the writ how and where they are to appear.

Thirteenthly,  
Statement of  
form of action.  
(e)

*Thirteenthly, "In an action on promises," [or as the case may be,] or "in an action of debt, &c."*(e)—All the forms of writs prescribed by the uniformity of process act, 2 W. 4, c. 39, expressly require that the defendant shall be informed in the *body* of the process of the *form of action* in which he is sued, though not the *particulars* of the *cause* of action, and this as well in serviceable as in bailable process, although before that enactment no allusion in the *writ* to the *form* of action was required, except in proceedings by special original and on recognizances of bail, and in bailable actions when an *ac etiam* was in general required, stating the *form* of action, and then it was held that the variance between an *ac etiam* in assumpsit, and the declaration being in debt, would not be a ground of discharging a defendant on common bail, unless the double sum for bail would be above £40.(f) But now the *form* of action must be properly described in the writ although serviceable, and if the form in the writ should vary from that expressed in the previous affidavit to hold to bail, the defendant would be entitled to be discharged from custody immediately after his arrest;(g) or if the *subsequent* declaration should vary from the form of action expressed in the writ, such variance would be deemed a fatal irregularity, and entitle the

(e) It was urged that the schedule No. 4, by using the words &c. left the plaintiff to describe the form of action according to the *usage of the law*, and that therefore "action on the case," as intended for assumpsit, might suffice; but the Court denied such latitude, and held that the *precise forms* must be observed, *Richards*

*v. Stuart*, 10 Bing. 319; *Gurney v. Hopkinson*, 3 Dowl. 189; if objections taken in due time. See the act, *ante*, 154 to 157.

(f) *Mayfield v. Davison*, 10 Bar. & Cres. 223.

(g) *Barker v. Weedon*, 1 Cr. M. & R. 396; and see *Richards v. Stuart*, 10 Bing. 319, *supra*.

defendant to move to set aside the declaration.<sup>(h)</sup> The prescribed form of the *writ of summons* requires the defendant to cause an appearance to be entered in the named Court, "*in an action on promises* [or as the case may be] at the suit of A. B." The form of the writ of *distringas* uses the expression, "*in a plea of trespass on the case*,"<sup>(i)</sup> [or "*debt*," or as the case may be]; the *capias*, "*in an action on promises*," [or "of debt," &c.]; the writ of *detainer*, "*in an action on promises*," [or "*of debt*," &c. as the case may be]. And the form in a writ of summons to a member of parliament is to be, "*in an action on promises*," [or debt, &c. as the case may be] "*at the suit of A. B.*" The forms in the schedule therefore, in *precise words*, direct the modes of describing the forms of action in only three actions, viz. *Assumpsit*, *Debt*, and *Case*; and by the other words, "*or as the case may be*," leave it open in such other cases only to introduce *any proper* description. It might have been supposed that the forms were given only as *examples*, but in the action of *assumpsit* the form has been holden to be imperative; and although *assumpsit* had always been considered a species of action on the case, and it was *usual* in the introductory part of a declaration in *assumpsit* on promises to describe it as "*an action of trespass on the case upon promises*," and there is not, strictly speaking, any such thing as an *action on promises*;<sup>(k)</sup> yet it has been decided that the directions in this act are to be strictly observed; and therefore, where a writ required the defendant to appear "*to an action of trespass on the case*," the Court of Common Pleas on motion set aside the writ for irregularity, it appearing by an *indorsement* that the action was not intended to be *in case*, but for a debt of £1200, the Court observing that expense would be saved in the long run by adhering to the strict rule, which if departed from would occasion a contest in every case, and every departure might be argued as to the hardship of the particular instance;<sup>(l)</sup> and it has even been *held* that if the description of the form of action was "*trespass on the case upon promises*," instead of "*an action on promises*," this would constitute a fatal irregularity.<sup>(m)</sup> A fortiori the *total omission of any* description of

<sup>(h)</sup> *Post*, 197; and *Scrivener v. Watley*, 9 *Legal Observer*, 299.

<sup>(i)</sup> See 2 *W. & A.*, c. 39, schedule No. 3.

<sup>(k)</sup> *Per Patteson, J.* in *Davis v. Parker*, 2 *Dowl.* 539; and in *Pell v. Jackson*, *id.* 446; and in *Richards v. Stuart*, 10 *Bing.* 319; 3 *Moore & Scott*, 537, *S. C.* The enactment therefore, to say the least, is *untechnical*.

<sup>(l)</sup> *Richards v. Stuart*, 10 *Bing.* 319; 3 *Moore & Scott*, 537, *S. C.*

<sup>(m)</sup> *King v. Skeffington*, 1 *Crompt. & M.* 363; *Gurney v. Hopkinson*, 3 *Dowl.* 189; 1 *Archb. K. B.* 4th edit. 515; *sed quare*, why not reject the words "*trespass on the case*" as *superfluous*; the defect, it will be observed, is not an *omission*, but in using too many words.

CHAP. V.  
REQUISITES OF  
WRITS.

the form of action would be a fatal irregularity according to the rule Mich. T. 3 W. 4, 1832, r. 10, declaring all *omissions* to be irregularities.

But although the act in schedule No. 3, giving the form of distringas, prescribes a "*plea of trespass on the case*," a writ of summons describing the form of action thus, "an action of libel,"(n) or "an action of slander,"(o) has been holden sufficient, because those descriptions convey even greater information than the words "action on the case,"(o) and because the object of the statute was to convey to the defendant information as to the nature of the action to be brought against him, and the phrase "action of slander" conveys information to him even better than the phrase "action on the case" could.(p) However, as respects any *information to a defendant*, this very succinct notification of the intended *form* of action can rarely be of utility, and certainly it cannot supply the use of "particulars of the plaintiff's demand," which he is now entitled to in all the Courts without affidavit if a judge think fit, and this even before appearance or bail put in.(q) If the act had required every writ concisely to state the *substance* of the *cause* of action as in a notice of action, as "in an action for £30, the price of goods sold and delivered," or for "£10 damages for an assault and battery on the — day of — last," then indeed some useful information, if at all requisite, would be afforded. In case of a material *mistatement* or *omission* in a *bailable action* in the writ, or statement in a writ of a form of action not adapted to the nature of the debt sworn to in the affidavit to hold to bail,(r) or appearing by indorsement on the writ not to be the form adapted to the real claim, or so appearing from the subsequent declaration, the Court or a judge would discharge the defendant out of custody, or order the bail-bond to be cancelled.(s)

We have in a preceding page shewn the importance of selecting the most appropriate form of action in cases where the plaintiff has the option of several.(t) In a bailable action care must be observed in describing the form of action in the writ that it accord with the affidavit to hold to bail, for

(n) Per Parke, J. in *Pell v. Jackson*, 2 Dowl. 445.

(o) Per Patteson, J. in *Davies v. Parker*, 2 Dowl. 537; *sed quare*, whether the Court were aware of the precise form having been prescribed in an action on the case; and see *King v. Steffington*, 1 Crompt. & M. 363.

(p) Per Patteson, J. in *Davies v. Parker*,

2 Dowl. 539.

(q) Rule Hil. T. 2 W. 4, r. 47. *Derry v. Lloyd* 1 Chitty's Rep. 724; R. Trin. 3 G. 4, C. P.; 6 Moore, 211.

(r) *Barker v. Weedon*, 1 Crompt. & M. 396, *post*.

(s) *Richards v. Stuart*, 10 Bing. 319; *ante*, 194, note (e).

(t) *Ante*, 150.



otherwise the defendant, after arrest, might be discharged on common bail, or the bail-bond cancelled; (s) and it is of essential importance, even in mere serviceable process, properly to determine on the correct form of action, afterwards to be adhered to in the declaration, before the writ is issued, for the plaintiff cannot *vary* from it in his declaration; and if he should do so in a *bailable* action, (t) the bail would be discharged, or the bail-bond delivered up to be cancelled; and even in a non-bailable action the declaration might be set aside for the irregularity and variance, and perhaps also the writ; (u) as where the writ of summons was in an action of "trespass," and was indorsed, debt £11. 12s. 9d., and the declaration was in *trespass on promises*, in which case Bayley, B. said, "both the writ and declaration might be set aside;" (u) and where the writ of summons was "in an action of *trespass on the case* upon promises," and the notice of declaration in "an action of trespass on the case," the Court set aside the proceedings (x) on the ground that improperly the words "of trespass on the case" were introduced between the words "an action" and the words "upon promises," and on the ground that it is better to compel suitors to adhere to the strict form, for otherwise the Court would always be discussing what deviation was allowable.

But the circumstance of a declaration commencing by alleging that the defendant had been summoned to answer the plaintiff "of a plea of trespass on the case," (instead of "in an action on promises,") and afterwards being framed in *assumpsit*, is not a ground of *demurrer*, but merely an *irregularity*, to be taken advantage of only as such. (y) It has, however, been held that if the affidavit of debt be for goods sold and money lent, the mere circumstance of the declaration containing no count for goods sold, is no ground for entering an *exoneretur* on the bail piece. (z) To avoid mistake, it may be as well here to insert the proper form in every description of action, (a) viz. :

In *assumpsit*, "in an action on promises."

In debt, "in an action of debt."

In covenant, "in an action of covenant."

Proper descriptions of forms of action.

(s) *Barker v. Weedon*, 1 Crompt. & R. 396, *post*.

(t) *Richards v. Stuart*, 10 Bing. 319.

(u) *Edwards v. Dignan*, 2 Dowl. 240; *King v. Skeffington*, 1 Crompt. & M. 363; 2 Dowl. 606, S. C.; *Scriviner v. Watley*, 9 Legal Observer, 299; 1 Arch. Pr. C.P. 40.

(z) *King v. Skeffington*, 1 Crompt. & M. 363.

(y) *Marshall and another v. Thomas*, 2 Dowl. 208.

(s) *Gray v. Harvey*, 2 Dowl. 114; but see *Barker v. Weedon*, 1 Cr. M. & R. 396, *post*.

(a) It will be observed that an action of *replevin*, usually removed from an inferior Court, and *scire facias* and *ejectment*, are not within the 2 W. 4, c. 39, *ante*.

CHAP. V.  
REQUISITES OF  
WRITS.

In *detinue*, "in an action of *detinue*."

In a joint action of debt and *detinue*, "in an action of debt and *detinue*." (b)

In *case* or *trover*, "in a plea of trespass on the case."

In *trespass*, "in an action of trespass."

The non-observance of the directions in the statute, as by misdescribing the form of action "in an action of *trespass on the case* upon promises," is by the rule M. T. 3 W. 4, declared to be only an *irregularity*, to be taken advantage of in due time, and does not render the writ *void*; and if the defendant should omit to apply to set aside the proceeding in due time, or should not succeed in the application, an arrest and bail-bond, on a writ defective in stating the form of action, would continue valid, and could not afterwards be impeached by the bail. (c)

Supposing the description of the *form* of action be technically correct, then it has been considered that it would be premature, merely upon receiving *particulars of demand* stating claims properly the subjects of a *different* form of action, to move to set aside the writ or proceeding for irregularity, because the plaintiff might amend his particulars, but that the defendant must wait until the plaintiff by his *declaration* has varied from the form of action stated in the writ; (d) but that if the affidavit to hold to bail be clearly for a debt, and the form of action described in the *capias* be "in an action on the case," and be indorsed for a debt, the defendant may *immediately*, and before the plaintiff has declared, move to be discharged out of custody for the irregularity, because it is apparent that the plaintiff cannot declare with effect upon such a writ, and there is no reason for detaining the defendant longer in custody. (e)

This enactment, requiring every writ to state the *form* of action, at first occasioned innumerable irregularities, and certainly the requisition may occasion more delay in commencing an action than heretofore, when, at the instance of an angry or hasty client, an attorney would sometimes instantly cause a general writ to be issued, excepting where an *ac etiam* to arrest was essential, and afterwards *declared* in *any* form of action he might think preferable, or left the declaration entirely to the pleader; whereas now it has become essential for every attorney, before he issues *any writ*, fully to ascertain the particulars of the plaintiff's claim, and well to consider

(b) See Price's Gen. Prac. 17.

(c) Gurney v. Hopkinson, 3 Dowl. 189.

(d) Addis v. Jones, 3 Dowl. 164.

(e) Richards v. Stuart, 10 Bing. 319;

ante, 194; Barker v. Weedon, 1 Cr. M. & R. 396; but see Gray v. Harvey, 2 Dowl. 114; ante, 196.

what will be the best form of action; and in doubtful cases even to take advice before he issues the writ. However, as this delay is calculated to secure more accuracy in the *first instance*, the requisition upon the whole will probably be found useful to suitors. (*f*) But as respects any beneficial information to a *defendant*, the very succinct notification of the intended *form* of action cannot be of utility, nor can the same supply the use of "particulars of the plaintiff's demand," which he is now entitled to in all the Courts without affidavit, and even before he enters his appearance or puts in bail, provided a judge think fit to order the same. (*g*)

*Fourteenthly, At the Suit of A. B., &c.*—It will be observed that the prescribed forms of writs of summons and *capias*, in schedule 2 W. 4, c. 39, after concisely describing the form of action, state *at whose suit* the appearance is to be entered or the bail to the sheriff is to be given, or deposit made, and the other forms of process also contain requisitions to the same effect. (*h*) The Christian and Surname of all the plaintiffs in the action must here be stated, but there is not any express rule relating to the names or number of the plaintiffs, as in the case of defendants. If a writ name only one plaintiff, and the declaration two, the declaration would be set aside for irregularity. (*i*) A *misnomer* of a plaintiff, however, could no longer be pleaded in abatement, though it should seem that the 3 & 4 W. 4, c. 42, s. 11, enabling the defendant to compel the plaintiff to amend a misnomer in a declaration, applies as well to mistakes in the name of a *plaintiff* as of a defendant. (*k*) And a *misnomer of a plaintiff*, even when suing as a corporation aggregate, is not a ground of nonsuit, (*l*) unless perhaps it should appear that the defendant was misled by the misdescription. (*m*) But upon process in the name of one plaintiff, if the declaration be delivered in the name of *two*, the proceedings might be set aside for irregularity; (*n*) so if a writ be at the suit of a husband, there cannot regularly be a declara-

*Fourteenthly,*  
Name of the  
plaintiff, or at  
whose suit.

(*f*) See *ante*, 117 to 125, as to the utility of the *first instructions* in an action.

(*g*) Rule H.T. 2 W. 4, r. 47; *Denny v. Lloyd*, 1 Chitty's Rep. 724; Rule T. 2 G. 4, C. P.; 6 Moore, 211.

(*h*) As to names of plaintiff and defendant, see Chitty on Pleading, 5 edit. vol. i. 279 to 284.

(*i*) *Rogers v. Jenkins*, 1 Bos. & P. 383; *Lewin v. Smith*, 4 East, 589; Chit. on Pleading, 5 ed. 282, 283.

(*k*) *Ante*, 170; 1 Arch. Pr. K. B. 3d

ed. 443.

(*l*) *Mayor of Stafford v. Bolton*, 1 Bos. & Pul. 40; *Gardner v. Walker*, 3 Anst. 935; *Jowett and others v. Charnock*, 6 Maule & S. 45; *Boughton v. Frere*, 3 Campb. 29; *Bretherton v. Wood*, 6 Moore, 141; 3 Bro. & B. 54, S. C.; *Longridge v. Brewer*, 7 Moore, 522; 1 Bing. 143, S. C.

(*m*) *Boughton v. Frere*, 3 Camp. 29; 1 Stark. Evid. 2d ed. 411 to 415.

(*n*) *Rogers v. Jenkins*, 1 Bos. & Pul. 383.

CHAP. V.  
REQUISITES OF  
WRITS.

tion at the suit of husband and wife. (o) It has been decided that the prescribed form of a writ of summons, *repeating* the letters A. B. in that part of the writ, impliedly requires the *repetition* of the *Christian* and *Surname* of the plaintiff, who, in default of defendant entering his appearance, will enter an appearance for him, and that the blank in the printed form must be filled up accordingly; and where the name was omitted in that part of the writ, and the word *plaintiff* substituted, Parke, J. held the omission fatal. (p)

Formerly the Courts would in most cases permit an amendment of a writ by striking out or adding the name of a plaintiff; (q) and where the name of an official assignee of a bankrupt was omitted in the declaration by assignees of a bankrupt, the Court, on motion, permitted an amendment by introducing such name, although there was no affidavit, præcipe, or writ to amend by. (r) But no such amendment will now be allowed, unless the remedy would be otherwise barred by the statute of limitations, (s) or unless, perhaps, the proceedings have advanced far in the cause. (t) We have already sufficiently considered the necessity for, or expediency of, a description of the *character* in which parties sue or are sued. (u)

Character in  
which plaintiff  
sues.

Fifteenthly,  
Notice to the  
defendant of  
the conse-  
quences of his  
non-appearance,  
or not putting  
in bail above,  
and other  
warnings in body  
of writ.

*Fifteenthly, Warnings and Notices, &c. in Writ, as "take Notice that, &c."*—The writ of summons, as well as *capias*, and the *distringas* in the body of each, state *what will be the consequences* if the defendant do not enter his appearance, or in a bailable action cause special bail to be put in *within eight days* after the service of the nonbailable writ or arrest on a *capias*, inclusive of the day of service or arrest, viz. the writ of *summons* informs the defendant, "that if he do not appear in the eight days, the person or persons suing, (*repeating his Christian and Surname*, for a blank for the name, or merely inserting the word *plaintiff*, would be irregular,)(x) *may* enter an appearance for him, and proceed therein to judgment and ex-

(o) *Reeks and Wife v. Robins*, Barnes, 337; *Prac. Reg.* 131, 132; 1 *Sel. Prac.* s. 1, b. 3; Tidd, 9 ed. 425.

(p) *Smith v. Crump*, 1 *Dowl.* 519; 5 *Leg. Obs.* 384, S.C.

(q) *Fox v. Clifton*, 1 *Chit. Pl.* 14, n. (e); *Baker, Assignees, &c. v. Neave*, 3 *Tyr.* 233; 1 *Crom. & M.* 112. But see *Binns and Wife v. Pratt and another*, 1 *Chitty's Rep.* 369; Tidd, 161; *Adamson v. —*, *id.* note.

(r) *Id. ibid.*; *Baker v. Neave*, 3 *Tyr.* 233.

(s) *Hodgkinson v. Hodgkinson*, 3 *Nev. & M.* 564; *Lulkin v. Watson*, 2 *Dowl. P. C.* 633.

(t) *Fox v. Clifton*, 1 *Chitty on Pleading*, 5 ed. 14, note (e), an amendment just before trial.

(u) *Ante*, 181 to 183.

(x) *Smith v. Crump*, 1 *Dowl. P. C.* 519; *supra*, note (p); 5 *Legal Ob.* 384, S.C.

ecution ;" and in bailable process states that such consequences will ensue as are pointed out in a warning to the defendant, which the 2 W. 4, c. 39, schedule No. 4, requires to be subscribed at the *foot* of the *capias*. And the 16th section enacts, that all such proceedings as are mentioned in any *writ*, *notice* or *warning* issued under that act, shall and may be had and taken in default of a defendant's appearance or putting in special bail, as the case may be.

It will be observed, that the prescribed form of a writ of *capias* contains in the *body* of the writ the following *notice* to the defendant:—"And we hereby require the said C. D. to take notice that within eight days after execution hereof on him, inclusive of the day of such execution, he should cause special bail to be put in for him in our Court of ——— to the said action, and that in default of his so doing, such proceedings may be had and taken as are mentioned in the warning hereunder written or *endorsed hereon*." This notice in general refers to the *four warnings*, No. 1, 2, 3, and 4, stated in the schedule of the act, No. 4, and are usually printed at the *foot of the writ*; (y) and it has been recently decided, that if so *there* given, and *not* indorsed, then the above words, "*or indorsed hereon*," need not be inserted in the writ, and indeed would be a notice calculated to mislead. (x) The second warning improperly refers to the statute 7 & 8 G. 4, c. 71, s. 2, instead of and even without noticing the 43 G. 3, c. 46, s. 2; for the most important notice to the defendant would have been his right under the last-mentioned act to deposit with the sheriff or undersheriff, or other duly appointed officer, the sum sworn to and 10*l.* for costs, and thereupon to obtain his release; and the 7 & 8 G. 4, c. 71, relates only to a deposit in the *Court*, in lieu of *bail above*. (a) Where there are *several* defendants, it has been held that the printed word "*you*," in the form of a writ of summons, prescribed by the schedule of 2 W. 4, c. 39, is to be read distributively and that it is unnecessary to insert the words "for you and each of you." (b) It has been objected, that the prescribed form of writ of summons is imperfect, in not informing the defendant that if he do not appear, the plaintiff may afterwards issue a *distringas* and take his goods, as another mode of enforcing appearance. (c)

(y) See the form, *ante*, 155, in note.

(x) *Bridgman v. Curgensen*, 3 Dowl. 1.

(a) *Geach v. Coppin*, 3 Dowl. 74.

(b) *Engleheart v. Eyre and another*, 2

Dowl. 145; 6 *Lag. Obs.* 158, S. C.

(c) *Price's Gen. Prac.* 18, note \*.

CHAP. V:  
REQUISITES OF  
WRITS.

*Sixteenthly,*  
*Teste in name of*  
*the Chief Justice*  
*or Chief Baron*  
*of the Court*  
*out of which the*  
*writ is issued.*

*Sixteenthly, "Witness Thomas Lord Denman," [or "Sir Nicolas Conyngham Tindal, Knight," or "James Lord Abinger,"] at Westminster, the — day of — A.D. 1835."*—

The 12th section of 2 W. 4, c. 39, *expressly* and all the forms in the schedule *impliedly* require that all writs issued by authority of that act shall be *tested* and supposed to have been issued by the authority of the chief justice or chief baron of the Court out of which such writ is issued; or, in the case of a vacancy in those offices, then in the name of the senior puisne judge, and the non-observance would be an irregularity; (d) and this, we have seen, is more important than and will supply a defect or mistake in the name of the king. (e) Before that act it was decided that the teste of a writ, if irregular in naming a late chief baron instead of the existing one, might, on a distinct cross-rule for that purpose, be amended, and the rule for setting the same aside be thereupon discharged without costs. (f) But, in a prior case, a rule for setting aside the service of a copy of a quo minus, tested in the name of Sir A. M'Donald, instead of Sir A. Thompson, was made absolute with costs, the copy served varying from the original, which was correct. (g) But since the 2 W. 4, c. 39, and rule M. 3 W. 4, declaring all omissions in writs irregularities, and the resolution of the Courts not to amend unless where otherwise the statute of limitations would bar the remedy, it may be concluded that a different rule as to permitting an amendment would prevail.

*Seventeenthly,*  
*Teste or Date of*  
*day of issuing*  
*the writ.*

*Seventeenthly, The date of the day and year of issuing.*—It is also required by the same 12th section of 2 W. 4, c. 39, that "*every writ issued by authority of that act, (consequently including only writs of summons, distringas, capias, and detainer, and writs of summons against members of parliament when traders, under 6 G. 4, c. 16, but not writs of exigent or proclamation, which were antecedent to the act,) shall bear date on the day on which the same shall be issued, although in the vacation. And if not dated at all, or if dated on a day different to the very day on which it was actually issued, it would be irregular, (h) and the omission would not be cured by any indorsement on the writ. (i) This first regulation was in lieu of that in*

(d) *Seamble*, 2 W. 4, c. 39; rule Mich. term, 3 W. 4, r. 10; *Elwin v. Drummond*, 4 Bing. 278; 12 J. B. Moore, 523, S. C.

(e) *Ante*, 164.

(f) *Wakeling v. Watson and Williams v. Bull*, 1 Tyrw. R. 377.

(g) *Morris v. Herbert*, 1 Price's R.

245; *Anonymous*, 2 Chit. R. 239; 1 Tyrw. R. 377, note (a.)

(h) See rule Michaelmas term, 3 W. 4, r. 10, *ante*, 161, declaring every omission, &c. an irregularity.

(i) *Anon.* 1 Dowl. 654.

5 & 6 W. & M. c. 21, s. 4, and 9 & 10 W. 3, c. 25, s. 42, which required that the *officer* who shall sign any writ or process to arrest a person before judgment, shall at the same time *set down upon* such writ or process the day and year of *his signing* the same, but which enactment seems to be virtually repealed by the substitution of the necessity for inserting the actual date in the *body* of the process. As neither of the statutes referred to prescribed *how* or in what *manner* such time shall be inserted, it has been considered on the former statutes to be immaterial whether the day or year be described in the writ in words or in figures. (k) It was holden that the statutes of William 3d, as to the officer's indorsing the day and year of issuing the writ, were merely directory, and that the omission did not vitiate, provided the teste of the writ was correct; (l) and there was a similar decision upon the rule of M. T. 1 W. 4, which required the like indorsement on process before the 2 W. 4, c. 39. (m) The object of the former statutes and of the last mentioned rule, was to apprise the defendant of the *actual time of issuing* the writ, which was essential at that time, when the date of the writ by no means corresponded with the actual time when it was issued, so that he could *not know* whether it was issued before a tender, &c.; (n) but now as the 2 W. 4, c. 39, s. 12, requires *every writ issued by authority of that act*, (o) viz. writs of summons, distringas, capias, and detainer, and writs of summons against members of parliament, to be dated *on the very day when issued*, the necessity for any *indorsement* of the *time* of issuing is removed, and the former statutes and rule are virtually repealed. (o) And although the direction in the former statutes and rule were considered merely directory, if there were *now* an omission of the date of issuing, or a misstatement, or an *indorsement* of the date instead of an insertion thereof in the body of a writ of summons or capias, it would be decided to be an *irregularity*, especially as the 10th rule of M. T. 3 W. 4,

(k) *Butler v. Cohen*, 4 Maule & Selw. 335; *Grojan v. Lee*, 5 Taunt. 651; *Eggs v. Welsh*, 6 Taunt. 333. Before the 2 W. 4, c. 39, where a wrong and impossible year, as 1807, was stated, instead of 1827, in the English notice at the foot of an attachment of privilege, the mistake was decided not to constitute an irregularity, *Steel v. Campbell*, 1 Taunt. 424; 12 Moore, 522; and an omission of the year was holden no objection, *Humphries*

*v. Collingwood*, 2 Barn. & Ald. 642.

(l) *Coleby v. Norris*, 1 Wils. 91; *Windle v. Ricardo*, 3 J. B. Moore, 249.

(m) See the rule 1 Crompt. & Jer. 274; and *Miller v. Bowden*, *id.* 563.

(n) As an exigent or proclamation is not issued by authority of that act, it is not within this enactment, *Lewis v. Davison*, 3 Dowl. 275.

(o) And see Tidd's Supp. 1833, p. 68, n. (b).

CHAP. V.  
REQUISITES OF  
WRITS.

declares *all* omissions to be irregularities. (p) The *copy* of the writ served on or delivered to the defendant must also contain the date, for indeed otherwise it is not a *copy*, and if the document delivered to the defendant be in blank for the date, it is a fatal irregularity. (q)

Teste of proceedings to outlawry by writ of exigent and proclamation.

But as respects proceedings to *outlawry*, the 12th section does not apply as regards the teste, because an exigent or proclamation is not a writ issued *by the authority* of 2 W. 4, c. 39. (r) The 5th section of that act however enacts, that every first writ of exigent and proclamation shall bear *teste on the day of the return of the writ* of *capias* or *distringas*, whether such writ be returned in term or in vacation; (s) and subsequent writs of exigent and proclamation shall bear teste on the day of the return of the next preceding writ. As a writ of *capias* has no fixed return day named therein, it seems to follow, that the first writ of exigent and proclamation must bear teste on the day on which the sheriff makes his return to the writ of *capias*, (t) or on that marked by the officer. (s)

There is also in the 10th section a proviso, that *continued process* to save the statute of limitations, when the first process has not been executed, must be issued in continuation of a preceding writ *within one calendar month* after the expiration of such preceding writ, and shall contain a *memorandum indorsed thereon* or *subscribed* thereto, specifying the day of the date of the first writ. It must be kept in view that the enactments in 2 W. 4, c. 39, are strictly confined to the teste or date of process in *personal* actions; and in other cases of writs that can only properly be issued in term time, as a writ of *certiorari* or *mandamus*, it must still be tested in term, though if by mistake it should be tested in vacation, it might be amended. (u)

The day of issuing process now to all intents the commencement of action.

Before the 2 W. 4, c. 39, we have seen that process (excepting when by special original) might be issued before the cause of action was complete, and it sufficed if a cause of action accrued before or during the term in which the writ was returnable, and before the time of which the declaration was enti-

(p) *Anonymous*, 1 Dowl. 654; *Perring v. Turner*, 3 Dowl. 15; and yet as regards appearance or bail above the date is immaterial, for the defendant has eight days from the service or arrest.

(q) *Perring v. Turner*, 3 Dowl. 15; post, "twenty seven."

(r) *Lewis v. Davison*, 3 Dowl. 275.

(s) This may be the very day on which

the sheriff actually returned or delivered the writ to the proper officer, or of that on which such officer subsequently marked the return, *Lewis v. Davison*, 3 Dowl. 275.

(t) *Tidd's Supp.* 1833, p. 99, n. (d).

(u) *Rowell v. Breedon*, H. T. 1835; 9 Legal Observer, 299.



tled;(x) but now if either of the writs prescribed by that act were issued before the cause of action was complete, the plaintiff would be nonsuited, or if the objection were apparent, the process might be set aside for irregularity.(y) However unless the objection be apparent and clear, the defendant might be put to his plea in abatement or to wait till the trial.(y) A *capias* as well as a writ of *summons*, are now considered the commencement of the action, and neither can be issued, still less executed, before the cause of action is complete.(x) We shall presently find, that before the writ has been *executed*, it may be amended in the teste or in any other matter, provided it be resealed; if the mistake was in the teste not truly stating the day when the writ was actually issued, then the real day must be inserted; but if the defect were in any other matter, the original teste should stand, and the writ would be considered as issued on the day when *originally sealed*. After the writ has been executed, we shall find that it cannot be amended, excepting, perhaps, in the single case of the danger of a statute of limitation becoming a bar.(a) But the same strict rule does not extend to *final* process, and a ca. sa. may be amended in its teste by leave of the Court, even so as to affect bail.(b)

By a great improvement in practical forms the General Rules of H. T. 4 W. 4, prescribes, that in the *issue* and *nisi prius* record, and writ of trial to the sheriff, *the date of the first writ* in the action shall be accurately stated in the commencement of each of those forms, by which means at the trial all difficulty respecting the time of commencing the action is now removed. An alias or pluries need not, since the 2 W. 4, c. 39, be tested of the return day of the first writ, and their issuing is not confined by sect. 10 to any given period after the expiration of the first writ, except it issued to prevent the operation of the statute of limitations.(c)

*Eighteenthly, Memorandum as to duration of writ, &c.*— At the foot of the writ of *summons* and *capias* issued under 2 W. 4, c. 39, the forms in the schedule prescribe that a memorandum shall be subscribed (now usually *printed*), stating

*Eighteenthly, Memorandum, Notices and Warnings subscribed to writs.*

(x) *Best v. Wilding*, 7 T. R. 4; *Swan-cott v. Westgarth*, 4 East, 175; *Hall v. Obder*, 11 East, 118; *ante*, 159.

(y) *Lamb v. Pegg*, 1 Dowl. 447; *Kerr v. Dick*, 2 Chit. Rep. 11; 1 Arch. K. B. 122, 577.

(z) *Alsten v. Underhill*, 1 Crom. & Mec.

492; *Thompson v. Dicus*, *id.* 768; *ante*, 159.

(a) *Post*, "twenty nine."

(b) *Engleheart v. Dunbar*, 2 Dowl. 202.

(c) *Nicholson v. Lemon*, 4 Tyr. 308; *ante*, 204.

CHAP. V.  
REQUISITES OF  
WRITS.

that it will continue in force only four calendar months, (d) viz. at the foot of a writ of summons, to be served on a defendant in general, and of a writ of summons to a member of parliament, in order to enforce the provisions of the 6 G. 4, c. 16, s. 10, in the following form:—"N.B. *This writ is to be served within four calendar months from the date thereof, including the day of such date, and not afterwards;*" and there is a similar form to be subscribed to a writ of capias, excepting that the word "*executed*" is to be substituted for "*served*." The omission of or deviation from the prescribed form might constitute an irregularity under the rule M. T. 3 W. 4, r. 10.

At the foot of a writ of *distringas* there is to be another prescribed notice to the party, of his goods having been distrained, and of the necessity for his appearance in eight days, and that the plaintiff may enter an appearance for him, and proceed thereon to judgment and execution, or sometimes it may be that the plaintiff will proceed to outlaw the defendant, (e) but not in the alternative; (f) and at the foot of a writ of capias, besides the memorandum, there is to be indorsed a *warning* to the defendant. (g) The memorandum, notice and warnings are usually printed on the writs, and several of the prescribed *indorsements*, presently noticed, are also printed in blank before the writ is either signed or sealed; but, it would seem, that it would suffice to make each indorsement after the writ has been sealed.

### OF THE INDORSEMENTS ON WRITS.

Nineteenthly,  
Of the Indorse-  
ments on writs  
before served or  
executed in gen-  
eral.

*Nineteenthly, Indorsements on Writs.*—By the 2 W. 4, c. 39, certain indorsements must be made upon *every writ and copy* thereof served, and which indorsements are enforced by the rule 3 W. 4, r. 10, declaring that any *omission* shall be deemed an *irregularity*, to be set aside by the Court or a judge. It has been remarked that the rules M. T. 3 W. 4, prescribing

(d) 2 W. 4, c. 39, sched. No. 1, 4.

(e) *Id.* No. 3.

(f) *Fraser v. Case*, 9 Bing. 464.

(g) 2 W. 4, c. 39, schedule, No. 4.

It is rather singular that amongst the *warnings* at the foot of a writ of capias there is no intimation to the officer or the defendant of the duty of the officer not to carry the defendant to a tavern or prison, &c. within twenty-four hours from the time of the arrest, but to take him to some safe and convenient dwelling-house of his own nomination or ap-

pointment, within three miles in the same county, not being his own house, in pursuance of 32 G. 2, c. 28, s. 1. The allowance of those 24 hours afford a party time to obtain money and pay the debt and costs, and thereby avoid the expense of bail bonds and prison fees, or exactions for civility money; and it would be a very salutary rule to require an indorsement of this warning upon every writ, copy and warrant. See *Dewhurst v. Pearson*, 1 Crompt. & Mee. 365.

the forms of writs into the counties palatine, singularly contain no direction as to *indorsements* on those writs, but that nevertheless they must be observed. (k) The several requisite indorsements are, *first*, the indorsement in a bailable action of the sum sworn to; *secondly*, the indorsement of the name and place of abode of the plaintiff's attorney and of his agent; *thirdly*, the indorsement of plaintiff's name and residence when he sues in person; and *fourthly*, an indorsement of the time of service or arrest after the same has been effected. Each of these matters must, when the nature of the process so requires, be indorsed, or the proceeding will be *irregular*. There is also a *fifth* indorsement on process, whether serviceable or bailable, when the action is strictly for a *debt*, which is required by *rule 5* of M. T. 3 W. 4, directing, that in such action (i. e. for a *debt*) the amount of the debt and costs claimed shall be indorsed, with a notice, that if the defendant pay the amount *within four days* no further proceedings will be had. (i) But this latter indorsement not being required by a *statute*, but only by a *rule*, the Court will in general permit an amendment. (j)

The *first indorsement* prescribed by the forms in 2 W. 4, c. 39, sch. No. 4 and 5, and usually found printed in blank on a bailable writ of *capias* and writ of *detainer*, and in the *copies* of each, is the statement of the amount of the *sum for which bail is to be required*, according to the affidavit to hold to bail or by a judge's order, and which is usually in these words:—

1. Indorsement of the sum sworn to, and for which bail is to be required.

"Bail for £——(k) by affidavit." (l)

or when by a judge's order, thus,

Forms of indorsement.

"Bail for £——, by order of the Honourable Mr. Justice ——, made on the —— day of ——, A.D. 1835."

This requisition is merely a repetition of the direction of 12 G. 1, c. 29; but now under the 2 W. 4, c. 39, and the rule of M. T. 3 W. 4, r. 10, its observance has become more *important*, because the 12 G. 1, c. 29, was holden to be merely *directory*, and consequently the non-compliance with the direction was considered unimportant. (m) But now under the

(k) 1 Arch. Pr. C. P. [40].

(i) See rule, ante, 160, in notes.

(j) *Cooper v. Waller*, 3 Dowl. 167; post, "Twenty-nine."

(k) N.B. The precise sum sworn to.

(l) Sometimes at the end of these words a statement of the time when the

affidavit was filed is made, thus—"filed 14th January, 1835, one o'clock, G.H." But the statute 2 W. 4, c. 39, does not require the statement of such time.

(m) *Whiskard v. Wilder*, 1 Burr. 330; *Grice v. Allen*, Barnes, 414; *Mitchell v.*

CHAP. V.  
REQUISITE  
INDORSEMENTS.

2 W. 4, c. 39, and rule M. T. 3 W. 4, r. 10, the non-observance would be holden a fatal irregularity. (m) Indeed this indorsement on the writ and copy delivered to the defendant, is the best authoritative intimation as well to the sheriff and the officer as the defendant, for what precise sum, by the affidavit to arrest, the defendant is to be required to give bail, and, therefore, it seems extraordinary, that even under the 12 G. 1, c. 29, the requisition was held to be merely directory. Where, however, the indorsement was "bail for £40 and upwards by affidavit," it was held that the words "and upwards" did not constitute any irregularity; (n) and this indorsement on a *capias* requires no date, (n) unless when made in virtue of a judge's order, when the form in the schedule, No. 4, requires the date to be stated. Where a defendant was arrested a *second* time on a fresh writ upon the same affidavit, by a rule of Court permitting such second arrest, it was decided not to be necessary to notice such *rule* in the indorsement. (o)

Indorsed direction not to arrest one of several defendants.

When a *capias* has been issued against several defendants, and it is not intended to arrest one of them, then it may be advisable, under the authority of the 4th section of the 2 W. 4, c. 39, to indorse on the writ and copies the order to the sheriff not to arrest the particular defendant immediately under the above indorsement, as thus:—"Arrest the within named C. D. and E. F., and only serve a copy of this writ and indorsements on the within named G. H." (p)

2. Indorsement of the name and place of abode of plaintiff's attorney or agent issuing the writ, or of plaintiff's name and address when there is no attorney.

The 12th section, in order to afford information to the defendant, to whom he may apply in order to settle the action, requires that *every writ* issued by authority of that act shall be *indorsed* with the *name* and *place of abode* of the *attorney actually* suing out the same; and in case such attorney shall not be an attorney of the Court in which the same is sued out, *then also* with the name and place of abode of the attorney of such Court in whose name such writ shall be taken out; but in case no attorney shall be employed for that purpose, then with a *memorandum*, expressing that the same had been sued out by the plaintiff *in person*, mentioning the city, town or parish,

*Gibbons*, 1 H. Bla. 76; *Dorrington v. Bricknell*, 11 Moore, 445; *Martin v. Bidgood*, 12 Moore, 236; 4 Bing. 63, S. C.; *Tidd*, 159; *id.* Supp. A.D. 1833, p. 92, (k); *Miller v. Bowden*, 2 Tyr. R. 112, *acc.*; but see *Hill v. Heale*, 2 New Rep. 202; *semble contra*.

(m) *Semble*, *Webb v. Lawrence*, 1 Cromp. & Mee. 806; but see *Tidd's Supp.* 1833, p. 92, n. (k), *contra*.

(n) *Webb v. Lawrence*, 1 Cromp. & Mee. 806.

(o) *Richards v. Stuart*, 10 Bing. 322.

(p) See further, *post*, Chap. VIII.

and also the name of the hamlet, street, and *number* of the house of such plaintiff's residence, if any such there be. The rule M. T. 3 W. 4, r. 9, further ordered, that when the attorney actually suing out *any* writ shall sue out *the same as agent* for an attorney in the country, *the name and place of abode* of such attorney in the country shall also be indorsed upon the said writ. (p)

The 2 W. 4, c. 39, sched. No. 1, prescribes the *form* of such indorsement upon a writ of *Summons*, as thus:

"*This writ was issued by E. F., of —, attorney for the said A. B.*"

Forms of indorsements as to attorney who issued the writ.

And No. 4, on a *Capias*, thus:

"*This writ was issued by E. F., of —, attorney for the plaintiff [or plaintiffs] within named.*" (q)

Or if issued by an attorney *as agent* for another, then the indorsement may be in this form:—

"*This writ was issued by L. M. of No. 1, Inner Temple Lane, in the Temple, London, attorney, as agent for N. O. of Maidstone, in the county of Kent, attorney for the said A. B. within named.*"

If there be no indorsement of the name and abode of such attorney or attorneys, the Court would set aside the process for irregularity, (r) as an omission of a matter directed by 2 W. 4, c. 39, s. 12, contrary to Rule 10 of M. T. 3 W. 4, A. D. 1832, and in a bailable action, discharge the defendant out of custody, or order the bail bond to be delivered up to be cancelled. (r) And where the name of a person who was not an attorney of the Court of Exchequer, out of which the writ had been issued, was indorsed, the Court, on motion for that purpose, stayed the proceedings until the name of some other proper attorney should have been substituted, and ordered the attorney whose name was so indorsed to pay the costs of the application. (s) But where the indorsement was "Poole and Gamlen, Gray's-Inn, London," it was held a sufficient description as well of the attorney issuing the writ as of his residence, (t) although there can be only *one* attorney on the record, and although Gray's-Inn is in Middlesex, and not in London, (t) and although the Christian name of both the attor-

(p) See rule, ante, 161, in note, and 2 Moore & S. 335; 9 Bing. 445.

(q) Sometimes also the date of the writ is here added, as thus—"the 27th day of May, 1834;" but this is not required by the forms in 2 W. 4, c. 39.

(r) *Sheppard v. Shum*, 2 Tyr. Rep. 742.

(s) *Constable v. Johnson*, 1 Crompt. & Mee. 38; 3 Tyr. 231; 1 Dowl. 598.

(t) *Engleheart v. Eyre*, 2 Dowl. 145; 6 Legal Observer, 138; and see *King v. Monkhouse*, 4 Tyr. 234; 2 Dowl. 221; 2 Crompt. & Mee. 314, S. C.; *Jelks v. Fry*, 3 Dowl. 37; and see *James v. Swift*, 4 B. & C. 681.

CHAP. V.  
REQUISITE  
INDORSEMENTS.

nies was omitted; (u) and a description of the attorney's abode, as of "Ely-place," was holden sufficient, (x) and this because attorneys can be more readily found than other individuals. (y) But the omission in the *copy of* a writ of the word "London" in the description of the attorney's residence in the principal writ, was deemed to be a fatal irregularity. (z) It will be observed, that when a plaintiff, whether an attorney or not, sues *in person*, then the form in the schedule requires his *residence* to be stated, and the merely describing him as *of* such a place, would be insufficient; (a) but an indorsement of the attorney's addition, describing him as "William Searle, Bread-street, Cheapside," without the word "London," or "of," or "*residing at*" was held sufficient, (b) though the party was discharged on another ground.

The object of these regulations was to enable a defendant to know and immediately to refer to the person or persons supposed to have been concerned in issuing the process, and this probably with two objects, first, that the defendant might ascertain the precise object of the proceeding, and either pay the debt and costs within the four days allowed by the General Rules Hil. T. 2 W. 4, and M. T. 3 W. 4, or propose terms of compromise; or if the authority of the named attorney should be doubted, then to investigate the same. In furtherance of the latter object, the 2 W. 4, c. 39, s. 17, (c) and the General Rule thereon, M. T. 3 W. 4, r. 14, (d), empower the defendant to ascertain whether or not the attorney be authorized, and if he answer in the affirmative then the defendant is entitled

(u) See preceding note. And see express decision as to omission of Christian name, *Pickman v. Collis*, 9 Leg. Obs. 232. It will be observed, also, that the 24 G. 2, c. 44, s. 1, requiring *notice of action* to a justice of the peace, and that the name of such attorney or agent, and his place of abode, shall be indorsed, it was held that a signature by initial of the Christian name sufficed, *Mayhew v. Locke*, 7 Taunt. 63; 2 Marsh. 377, S.C.; and where one part of the Christian name was omitted, the notice was holden sufficient, *James v. Swift*, 4 B. & C. 681; 6 D. & R. 625; 2 Car. & Payne, 237, S.C. So as to residence describing an attorney of Birmingham suffices, though so large a place, though at Durham would not suffice, *Osborn v. Gough*, 3 Bos. & Pul. 551; *Taylor v. Fenwick*, 7 T. R. 635. But describing an attorney as of a place in London, when in fact it was in Westminster, was holden fatal in a *notice*

*of action*, *Steele v. Smith*, 6 Esp. 138; *Mills v. Collett*, 6 Bing. 90.

(z) *Engleheart v. Edwards*, 9 Legal Observer, 138; 2 Dowl. 145, S.C.

(y) *Engleheart v. Eyre*, 2 Dowl. 145.

(x) *Smith v. Pennell*, 2 Dowl. 654.

(a) *Hodson v. Gamble*, 3 Dowl. 174.

(b) *Knight v. Moses*, January, 1835, per Patteson, J. on a summons. However, in consequence of the attorney for the defendant representing that there was a rule to the contrary, the learned judge discharged the defendant. *See quere* whether any distinction between attorneys and other persons is tenable, for the 12th section equally requires the place of abode of an attorney as the residence of the plaintiff when suing in person; and what is the difference between the words *abode* and *residence*? See *Hodson v. Gamble*, 3 Dowl. 174.

(c) *Ante*, 153, note.

(d) *Ante*, 161, in note.

to a written particular of the plaintiff's profession and residence. (c)

CHAP. V.  
REQUISITE  
INDORSEMENTS.

Neither the stat. 2 W. 4, c. 39, nor the rule Mich. T. 3 W. 4, refer to or notice the enactment in 7 & 8 G. 4, c. 71, s. 8 & 9, which prohibited sheriffs from granting any warrant upon a bailable writ unless it were *delivered to him by an attorney, or the clerk or agent of an attorney, or the writ were indorsed by such attorney, &c.* in the presence of the *sheriff, under-sheriff, or other officer*, having the execution of process, *with the name and place of abode of such attorney*. This enactment was to prevent the fraudulent indorsement of an attorney's name by some unknown person, and thereby obtaining a vexatious arrest, and it should seem still in force, so as to require bailable process either to be *delivered by the regular attorney himself*, or his clerk or agent, to the sheriff's officer, or that one of the latter should be *seen to indorse the writ* by the under-sheriff or his officer. But where the plaintiff sues in person, and himself indorses the process as required by the statute, the case seems not to be within the 7 & 8 G. 4, c. 71. (f)

When either of the five writs is issued *in person*, or by a plaintiff himself, without the intervention of a third person, as an attorney, (as is usual when the plaintiff is an attorney,) the 2 W. 4, c. 39, s. 12, requires a still more particular indorsement, "expressing that the same has been sued out by the plaintiff in person, mentioning the city, town, or parish, and also the name of the hamlet, street, and number of the house of such plaintiff's residence, if any such there be;" (g) and the schedule No. 1 prescribes the form of such indorsement to be as follows:

3. Indorsements upon writs issued by a plaintiff in person.

"This writ was issued in person by A. B., who *resides at* ———, [mention the city, town, or parish, and also the name of the hamlet, street, and number of the house of the plaintiff's residence, if any such.]"

Form of such indorsement.

An indorsement thus, "This writ was issued in person by W. H. King, who resides at No. 7, Gray's Inn Square, London," was holden sufficient, although it was objected that Gray's Inn Square is in Middlesex and not in London, the Court saying, that as Gray's Inn Square is a place not within any city,

(c) And see proceedings, post, at the conclusion of this chapter.

(f) See suggestions, 1 Arch. Pr. C. P. [41], and 1 Arch. K. B. 4th edit. 124.

(g) But it will be observed that this

act does not adopt the salutary precaution in 7 & 8 G. 4, c. 71, s. 8 & 9, requiring the plaintiff to sign his name in presence of the sheriff or other officer.

CHAP. V.  
REQUISITE  
INDORSEMENTS.

town, parish, or hamlet, the description was as good as could be given under the circumstances. (h) With reference to a decision upon a rule for security for costs, or a statement of the plaintiff's residence, it has been held that describing him as residing at Peel's Coffee House, Fleet Street, is not sufficient. (i) In the prescribed form, it will be observed, the *residence* of the plaintiff in person is to be stated; and therefore where the indorsement merely was, "This writ was issued by Charles Lewis, of No. 6, Bernard Street, Brunswick Square, the plaintiff within-named in person," this was held irregular, as the word *of* was not synonymous with "*resides*," as the place might merely be his office. (k)

4. Indorsement of amount of debt and costs, and notice when same may be paid to avoid further costs.

The rule Hil. T. 2 W. 4, A. D. 1832, Rule II. made before the statute 2 W. 4, c. 39, required that "upon every bailable writ and warrant, and upon the *copy* of any process *served* for the payment of *any debt*, the amount of the debt shall be *stated*, and the amount of what the plaintiff's attorney claims for the *costs* of such writ or process, arrest, or copy and service, and attendance to receive debt and costs; and that upon payment thereof within four days to the plaintiff or his attorney, further proceedings will be stayed. But the defendant shall be at liberty, notwithstanding such payment, to have the costs taxed, and if more than one-sixth shall be disallowed, the plaintiff's attorney shall pay the costs of taxation. The indorsement shall be written or printed in the following form:

Form of such indorsement.

"*The plaintiff claims £ — for debt, and £ — for costs, and if the amount thereof be paid to the plaintiff or his attorney within four days from the service (l) hereof, further proceedings will be stayed.*"

As the 2 W. 4, c. 39, abolished all prior mesne process, and perhaps affected the last-mentioned rule, it was deemed expedient by the general rule of Mich. T. 3 W. 4, made subsequent to and in order to enforce the 2 W. 4, c. 39, expressly to order that such rule of Hil. T. 2 W. 4, shall be applicable to all writs of summons, distringas, capias, and detainer, issued under the authority of 2 W. 4, c. 39, and to the *copy* of every such writ. (m) The form of indorsement prescribed by the rule of Hil.

(h) *King v. Monkhouse*, 2 Crompt. & M. 314; 4 Tyr. 234, S. C. The decisions on the form of notice of action required by 24 G. 2, c. 44, and other acts, may assist in questions of this nature, see *ante*, part iii. vol. ii. 68; and Chitty's Col. Stat. 648, note (q).

(i) *Hodson v. Gamble*, 3 Dowl. 174.

(k) *Lewis v. Davison*, 3 Dowl. 272, 273.

(l) It is now settled that the word *service* is always proper, *post*, 213.

(m) See rule, *ante*, 160, in note.



T. 2 W. 4, it will be observed, does not say "arrest" or "execution," but merely uses the term *service*, and which term was probably prescribed to be indorsed alike as well on bailable as on serviceable process, because in both cases a *copy* of the writ is to be delivered to the defendant, and he is to have four days from the *service* of *that copy*, and not from the arrest or execution of the writ. The word *service*, therefore, referring to the delivery of the copy of the process, is most appropriate, and the use of the word arrest or execution might in that respect actually mislead and be improper, unless the copy were served *immediately* after the arrest. (m) There has, however, been some difference of opinion on that point, though it seems to be now settled that the very word *service*, used in the rule of Hil. T. 2 W. 4, and referred to in rule Mich. T. 3 W. 4, ought *always* to be adopted, (n) and not the word "execution" or "arrest." (n) But as this particular indorsement is not directly prescribed by the *statute* 2 W. 4, c. 39, but merely by the *rule of Court* of Mich. T. 3 W. 4, the judges have come to a general resolution to permit the plaintiff to *amend* bailable or serviceable process when *this* indorsement is defective, or even entirely omitted, although in general no amendment of process is now allowed except in the single instance when the statute of limitations would otherwise constitute a bar; and now, when a motion has been made to set aside process, or the copy served in respect of a defect of this nature, the course is for the Court or a judge to permit an amendment on payment of costs, and allowing to the defendant four days from the time of the amendment for payment of debt. (o)

Perhaps the requisition of this indorsement, the terms of which are compulsory on the plaintiff, is one of the most important and essential improvements in modern practice. Before this regulation, it was the practice of some inferior practitioners to issue a writ returnable even on the same day, or to serve the writ on the return day, and immediately after the service to declare *de bene esse*, so that the defendant could not avoid an accumulation of costs; and even if ready to

(m) *Evans v. Bidgood*, 4 Bing. 63; *Elliston v. Robinson*, 2 Dowl. 241; and the omission was at first considered an *irremediable irregularity*, because the rule Mich. T. 3 W. 4, is to be considered *compulsory*, and not merely *directory*, *Ryley v. Boismomes*, 1 Dowl. 383; *Tomkins v. Chilcot*, 2 Dowl. 187; *Urquhart v. Dick*, 3 Dowl. 17; *Colls v. Morpeth*, *id.*

23; *Shirley v. Jacobs*, 5 Moore & Scott, 67; 3 Dowl. 101, S. C.; *Cooper v. Walker*, 3 Dowl. 167. But now the Courts permit an *amendment*, *Shirley v. Jacobs*, 5 Moore & Scott, 67, and other cases, *post*.

(n) *Shirley v. Jacobs*, 5 Moore & Scott, 67; 3 Dowl. 101, S. C.; *Hooper v. Walker*, 1 Cropp. M. & R. 437;

(o) *Id. ibid.*

CHAP. V.  
REQUISITE  
INDORSEMENTS.

pay he could not effect a settlement without taking out three several summonses for staying proceedings on payment of debt and costs, during which the latter continued to accumulate; but the effect of this amelioration in the practice is to allow the defendant four clear days, exclusive of that on which the process was executed, to pay the debt and costs, even without the expense of a summons; and, on the other hand, he is only allowed four days, for after that time it is reasonable that during the remaining four days antecedent to appearance or bail above, the plaintiff should be preparing his declaration, in order to declare on the ninth day, so as to avoid further delay. And therefore, unless the defendant pay the debt and costs within the allowed four days, he cannot afterwards do so without a summons and order, and paying what further costs may have been incurred. (p)

With analogy to some decisions upon the 12 G. 1, c. 20, (viz. that the indorsement of the sum for which the defendant was to give bail, according to affidavit, was only *directory*;) it might be supposed that this rule of Court also was merely *directory* in requiring such indorsement, but as the object of the rule of Hil. T. 2 W. 4, repeated in the rule of Mich. T. 3 W. 4, 1832, was to afford the defendant an opportunity, in serviceable as well asailable process, to pay the debt and costs, to prevent an increase of expense, the omission of or imperfection in such indorsement is now considered a fatal though amendable irregularity, (q) and extends as well to writs against attorneys as against other defendants, although it was insisted that as they are acquainted with the law, so much strictness in proceedings against them ought not to be required. (r)

But the very terms of the rule only apply to a writ issued for a debt, (s) and not to a writ partly for a debt and partly for damages, (t) as an action of assumpsit for the value of a stack of hay, the price of which the plaintiff had paid to the defendant, and for damages for not having had the unmolested standing thereof on the defendant's land, pursuant to agreement; (u) and in an action on a bail bond, or a replevin bond, it is not necessary to indorse the amount of the debt and costs. (x)

(p) Price's Gen. Pr. 66.

(q) Ryley v. Boissomes, 1 Dowl. 383; Tomkins v. Chilcote, 2 Dowl. 187.

(r) Tomkins v. Chilcote, 2 Dowl. P. C. 187.

(s) Curwin v. Mosley, 1 Dowl. 432.

(t) Perry v. Patchett, 1 Cromp. M. & Ros. 87; 2 Dowl. 667; S. C. Curwin v.

Mosley, 1 Dowl. 432; and see analogous decision, Mansfield v. Brearey, 1 Adol. & El. 347.

(u) Perry v. Patchett, 1 Cromp. & M. 87; 4 Tyr. 725, S. C.

(x) Rowland v. Dakeyne and others, 2 Dowl. 832; 1 Crom. M. & R. 29; Smart v. Loveck, 3 Dowl. 34.

An indorsement thus: "The plaintiff claims 20*l.* 4*s.* 6*d.* for debt, with interest thereon, from the 13th day of March last, and 3*l.* for costs; and if the amount thereof be paid, &c.," but without calculating and stating the amount of the interest, was holden in full Court to be sufficiently certain. (*y*)

It would be improper to indorse as the debt a sum more than is really due; and if much too large a sum should be indorsed, and afterwards on payment into Court of a less sum, the plaintiff should accept it, and proceed no farther, the Court would no doubt, on an early application in the vacation by the defendant, deprive the plaintiff of more than the costs of his writ, or at least make such rule or order that he would proceed at his peril as to further costs. (*x*) If there should be no indorsement, or one clearly insufficient, the Court or a judge might set aside the writ as irregular, (*a*) or in a bailable action order the bail bond to be cancelled; however, as this indorsement is not enjoined by *statute*, but only by the *rule of Court* Michaelmas term, 3 W. 4, the Court or a judge will now, we have seen, allow a defect in *this* indorsement to be amended. (*b*)

Supposing that there should be a mistake in the indorsement, either in stating the debt too high or too small, it should seem that either party might obtain an amendment in the amount on summons, and if defendant should not pay the sum indorsed and costs within the named time, the plaintiff would be at liberty to declare and deliver particulars for and proceed and recover a larger sum, and would not be absolutely bound by the sum named in the indorsement, although it might *prima facie* appear to be the limit of his claim. It has been insisted that this indorsement ought to be *dated*, but the objection was overruled, because the prescribed form does not require any date; (*c*) and it has been decided that if the defendant improperly gets possession of a writ of summons, and thereby prevents an indorsement of the amount of the plaintiff's claim, the Court will compel the defendant to pay the costs. (*d*)

The rule Hilary term, King's Bench, 2 & 3 G. 4, in order to prevent the arrest of a wrong person, ordered that the defendant's attorney or agent should indorse on the writ *the place of abode and addition of the defendant or such other descrip-*

No indorsement on bailable process of the abode, addition or other description of the defendant is now necessary, though perhaps advisable.

(*y*) *Copello v. Brown*, 3 Dowl. 166; *Seely v. Hearn*, *id.* 196.

(*z*) *Elliston v. Robinson*, 2 Cromp. & M. 343; 2 Dowl. 241.

(*a*) *Ryley v. Boissomas*, 1 Dowl. 383; *Jones v. Price*, 2 *id.* 410.

(*b*) *Ante*, 213, (*e*); *Urquhart v. Dick*, 3

Dowl. 17; *Cooper v. Waller*, *id.* 167; *Shirley v. Jacobs*, 5 Moore & Scott, 67; 3 Dowl. 167, S. C.; *Hooper v. Walker*, 1 Crom. M. & R. 437.

(*c*) *Webb v. Laurence*, 1 Dowl. 81.

(*d*) *Brook v. Edridge*, 2 Dowl. 647.

CHAP. V.  
REQUISITE  
INDORSEMENTS.

tion of him as such attorney or agent might be able to give. (e) But it has been suggested that since 2 W. 4, c. 39, requires the *residence* of the defendant to be stated in a summons and *capias*, and does not notice the above *indorsement*, or any statement of the defendant's addition, it may be inferred that such indorsement is no longer necessary; and when such indorsement was required, although the sheriff might refuse to execute the writ unless so indorsed, (f) yet the Court would not on that account set aside the writ for irregularity, but only relieve the sheriff. (g) In cases, however, where the name of the defendant is very common, or where it is known that there are several persons of the same name, then a very particular description of the intended defendant is certainly advisable, although not expressly required; and indeed the most eminent work on the practice of the Courts has appeared to consider that the above rule is still in force in the Court of King's Bench. (h)

OTHER GENERAL POINTS.

Twentieth, Of  
Concurrent  
Writs into dif-  
ferent Counties  
at the same  
time.

*Twentieth*, Although the 2 W. 4, c. 39, is silent on the subject, and does not in *terms* permit a plaintiff to issue and have in force *at the same time* several *original* or *first* writs of *summons* or *capias*, &c. into different counties, and at first it seems to have been supposed that such proceedings would not be regular; (i) yet it is *now* settled that a plaintiff may at the same time, in order to expedite his proceedings, and take the earliest opportunity of executing mesne process in one county or the other, issue several writs of *the same nature simultaneously* into different counties, and when it is supposed that the defendant is shifting from one to the other, it may be advisable thus to issue two or more writs of summons or *capias* into different counties at the same time, so as to serve or arrest the defendant in one or other of the counties; but this cannot perhaps be done so as to charge the defendant with the expense of more than one of such concurrent writs, (k) unless it be clearly

(e) See rule in 5 Bar. & Ald. 560.

(f) *Kenrick v. Nanney*, 1 Dowl. 58.

(g) *Clarke v. Palmer*, 9 Bar. & Cres. 153; 1 Arch. K. B. 4th ed. 124.

(h) Tidd's Supp. 1833, p. 93, *sed quere*.

(i) *Coppin v. Potter*, 10 Bing. 445; but see *id.* 555.

(k) *Dunn v. Harding*, 10 Bing. 553; 2 Dowl. 803, S. C., overruling that part

of *Coppin v. Potter*, 10 Bing. 445, where the contrary was supposed. It is the same as to final process, as to several writs of *fi. fa.* or *ca. sa.*, though after the sheriff has taken *any thing*, however small, under one *fi. fa.*, there could not be any levy under another writ of execution, before the writ, in part executed, has been returned, *Hodgkinson v. Walley*, 2 Tyrw. 174; *Dicas v. Warne*, 10 Bing. 341.

CHAP. V.  
OTHER  
GENERAL  
POINTS.

---

Forms of Con-  
current writs.

established that the defendant was purposely shifting from one county to another to avoid service; and it has been recently decided, where a plaintiff had issued three several serviceable writs in the same action, and without discontinuing had also issued a *capias* and arrested the defendant, yet having previously given the defendant notice not to appear to the serviceable writs, such proceedings were regular. (l) In case of *Concurrent* writs into different counties, whether of summons or *capias*, the form of each is to be *exactly the same*, with the exception of the difference in the description of the defendant's supposed residence in the second writ of *summons*, and the direction to the sheriff in a *capias*. And it should seem that then the form of an *alias* or *pluries* summons, prescribed by the rule of Michaelmas term, 1832, as to the double description of the defendant's residence, would not apply. A *Recipe* of each writ, stating the county into which it is issued; and if a *capias*, stating where the *original affidavit was filed*, (m) should be left with and filed by the officer, who signs the second or subsequent process. And it is not, as has been supposed, necessary even to file with the officer, who signs such second or subsequent *capias*, an *office copy* of the original affidavit to hold to bail, and still less is it necessary to file any fresh affidavit. (n) In case the defendant should be arrested upon either of the concurrent writs, then it is advisable for the plaintiff's attorney immediately to give notice to the undersheriff and officers, who have in their possession the other writ, of such arrest, so as to prevent a second arrest for the same debt. (o)

*Twenty-first*, The statute 2 W. 4, c. 39, abolishes most writs not thereby prescribed; and as it gives no form of a *testatum* writ formerly issued into another county, that form is virtually abolished. But under the 14th section, the judges pronounced the general rule of Mich. T. 3 W. 4, (2 Nov. 1832,) ordering that any *alias* or *pluries writ of summons* may, if the plaintiff shall think it desirable, be issued into another county; and any *alias* or *pluries writ of capias* may be directed to the sheriff of any other county; but in such case it is ordered that the plaintiff shall, upon the *alias* or *pluries writ of summons*, describe

*Twenty-first*, Of  
*Alias* and *Pluries*  
writs of  
summons and  
*capias*.

(l) *Chapman v. Vanderveide*, Hil. T. 1835, K. B. Prac. Court, 9 Leg. Obs. 300; and see *Bishop v. Powell*, 6 Term R. 616, S. P.

(m) See form in *Dunn v. Harding*, 10 Bing. 553.

(n) *Id. ibid.* It is singular how that supposition originated, certainly the 12

G. 1, c. 29, contains no such requisition.

(o) But *semble*, no action could be supported for a second arrest in consequence of the neglect, *semble*, *Scheibel v. Fairbairn*, 1 Bos. & P. 388; *Page v. Wiple*, 3 East, 314; *Powell v. Henderson*, 1 Chitty's Rep. 392.

CHAP. V.  
OTHER  
GENERAL  
POINTS.

the defendant as late of the place of which he was described in the first writ of summons; and the *alias* or *pluries* writ of *capias* must refer to the preceding writ or writs as directed to the sheriff, to whom they were in fact directed. (*p*) But an *alias* or *pluries* need not, since the 2 W. 4, c. 39, be tested of the return day of the first writ, unless in proceedings to save the statute of limitations. (*q*) With respect to the continuation of process to prevent the operation of a *statute of limitations*, they are particularly regulated by the 10th section of 2 W. 4, c. 39, and must be strictly observed, as will be shewn in a subsequent distinct chapter. It has however been decided, that an *alias capias* may be issued more than four months after the expiration of the first *capias*, without affecting the validity of the former writ, and the continuances between the first writ and the subsequent writ may, as formerly, be entered at any time, unless the writs were issued with a view to avoid the statute of limitations, *in which case only* the direction in sect. 10 must be strictly observed. (*r*)

Form of *Alias*  
or *Pluries* sum-  
mons.

The same rule farther ordered, that the *alias* or *pluries* writ of summons into another county shall be in the following form :

William the Fourth, &c.

To C. D. of —, in the county of —, late of —, in the county of —, [the original county]. We command you as before [or often] we *have commanded* you, &c. (*s*) [as in the writ of summons No. 1 in the schedule of the said act].

The like of  
*Alias* or *Pluries*  
*Capias*.

And that the *alias* and *pluries* writ of *capias* shall be in the following form :

William the Fourth, &c.

To the Sheriff of —.

We command you, as *heretofore* we have commanded the

(*p*) See observations of Tindal, C. J., in *Coppin v. Potter*, 10 Bing. 444. But the plaintiff may have concurrent writs of *capias* into different counties at the same time, *Dunn v. Harding*, 10 Bing. 555; and this upon the same affidavit of debt, *Rodwell v. Chapman*, 1 Dowl. 634; 1 Crom. & M. 70, S. C.; and in that case it is presumed that each concurrent writ would be independent of and not refer to the other. But in the case of an *alias* or *pluries* writ of *capias*, it has been supposed that there should be an affidavit or copy of affidavit of debt, filed with the filacer or proper officer for each county, per Tindal, C. J., *Dunn v. Harding*, 10 Bing. 555, and see *post*, 219. But

see 12 G. 2, c. 29, which seems only to require one affidavit of debt to have been made and filed, or left in a proper office.

(*q*) *Nicholson v. Lemon*, 4 Tyr. 308.

(*r*) *Id. ibid.*; 2 Dowl. 296; 2 Crom. & M. 468.

(*s*) This *alias* or *pluries* clause is only required where an *alias* or *pluries* writ is issued, and not when several writs of summons or *capias* are issued, and concurrent at the same time in different counties, in which case the writ may, it is presumed, be exactly alike, excepting in the name of the sheriff, and residence or description of defendant; *semble*, *Dunn v. Harding*, 10 Bing. 553; and see the form of *precipe*, *id.*; *post*, 219, note (*g*).

*sheriff* of —, (t) that you omit not, &c. [as in the writ of capias No. 4 in the schedule of the said act].

CHAP. V.  
OTHER  
GENERAL  
POINTS.

And the 94th rule of Hil. Term, 2 W. 4, orders that it shall not be necessary that a *pluries capias* be stamped by the clerk of the warrants to authorize the exigenter to make out an exigent.

With analogy to the decision in favour of concurrent first writs of summons or capias, it would seem that there might be concurrent alias and pluries writs of summons or capias into several different counties. (u)

*Twenty-second*, Although there is *no enactment* requiring more than *one* affidavit of debt to be made and filed before arrest, yet for a long time it was supposed that upon issuing *every* process, whether a duplicate of the first writ into another county, or an alias or pluries capias, when signed by an officer who was a different person to the signer of the first process, there must be either a *fresh affidavit* or an *office copy of the original affidavit* at the same time filed; so that the defendant, when he had been arrested, might resort there and obtain a copy of the affidavit on which he had been arrested. (x) But this we have seen was held unnecessary in the case of a second *concurrent* writ of capias into another county, although even then it may be advisable in the *præcipe* for the second or subsequent writ, to state *where* the original affidavit was filed, whereby the defendant would be informed to what officer he should apply to obtain a copy of such affidavit. (y) Afterwards it was held, that even on issuing an *alias* or *pluries capias* into a different county, no *fresh affidavit* or even an *office copy* was necessary to be filed with the officer signing and issuing the latter, provided he was the *same place or officer*, or even the same deputy who signed the first writ. (z) And now it seems that the *swearing to any second affidavit* is in no case requisite; but that it suffices to file an *office copy of the original affidavit* with the officer who signs and issues an alias or pluries capias,

*Twenty-second*,  
Of the sup-  
posed necessity  
for filing a *Se-  
cond Affidavit*  
to hold to bail  
or office copy.

(t) See the last note.

(u) *Dunn v. Harding*, 10 Bing. 553; 3 Dowl. 803, S. C.

(x) It has been supposed that the 13 G. 1, c. 29, requires the affidavit of debt to be sworn before the issuing of even continued process, upon which the defendant is actually arrested; see argument in *Coppin v. Potter*, 10 Bing. 443. But it suffices to swear the affidavit

either before the officer issuing the process or in Court, or before a judge or commissioner, and no intention to require several affidavits appears from the act.

(y) *Dunn v. Harding*, 10 Bing. 553, where see the form of *præcipe* as thus:—  
“Oath for 300*l.* as per affidavit on issuing capias into Middlesex. November 16, 1833.”

(z) *Evans v. Bidgood*, 4 Bing. 63.

Form of *Præcipe*  
of *Capias* into  
another county

CHAP. V.  
OTHER  
GENERAL  
POINTS.

and that only when such officer is a person different to the officer with whom the original affidavit was filed. (a) It seems, however, as the safest course, to be advisable in all cases to file with the officer signing or issuing every second or subsequent process of any description, an office copy of the first process; and also a *præcipe* distinctly referring to the original affidavit, as thus :—"Oath for £——, as per affidavit on issuing *capias* into Middlesex, November 16, 1833," the form adopted in a late case. (b)

Twenty-third,  
The *Præcipe*  
for every writ.

*Twenty-third, Præcipe.*—As soon as the body of mesne process had been duly filled up, and before it is taken to be signed, it has always been the *practice* for the plaintiff's attorney to draw up a *præcipe* or *concise memorandum* of the substance of such writ, of course varying according to the nature and particulars of each writ, and although the uniformity of process act, 2 W. 4, c. 39, is silent as to such *præcipe*, this is still the practice in all the Courts; and in the Exchequer such a document was, by a particular rule, promulgated before that act, but still in force, (because not inconsistent with its provisions,) *expressly* required, (c) and which must specify the county into which the writ is to be issued, the names of every party, plaintiff and defendant, the name and *address* of the attorney issuing the same, and the day of the date on which the writ shall be issued. (c) And although the Court of Common Pleas in one case treated this document as wholly devoid of

(a) *Baker v. Allen*, 7 Bar. & Cres. 526; *Rodwell v. Chapman*, 1 Crompt. & M. 70; *Coppin v. Potter*, 10 Bing. 441; *Dunn v. Harding*, *id.* 553; *semble*, that the sole object of the 12 G. 1, c. 29, was to require an affidavit of debt upon which a party was to be arrested, to be made, and perhaps filed; so that the party swearing might be indicted for perjury, if he swore falsely, but without any regulation requiring more than one affidavit; and *quare* now whether in any case an office copy of the principal affidavit need be filed, and on what legal authority it can be required?

(b) *Dunn v. Harding*, 10 Bing. 553; and see *Coppin v. Potter*, *id.* 441.

(c) Rule Mich. 1 W. 4, 1 Tyr. Rep. 157; Price's Prac. 50; Price's Prac. of all the Courts, 25, 24; Reg. Gen. Exch. Easter, 45 G. 3; 8 Price, 506; 1 Chitty's Rep. 186; Tidd, 9 ed. 149, 154. And see Tidd's Supplement, 1833, pages 72, 73, 77. The Rule M. 1 W. 4, in the Exchequer, is thus: "That a *præcipe* or

"particular of every writ to be thereafter  
"issued in the office of pleas in this  
"Court, containing the county into  
"which the same shall issue, the names of  
"every party, plaintiff and defendant  
"therein, the name and *address* of the  
"attorney issuing the same, and the day  
"of the date on which the same shall be  
"so issued, shall be delivered to the officer  
"of the Court on his being required to  
"sign such writ; and which *præcipe*  
"shall be duly filed on files to be pro-  
"vided by said officer for each term and  
"vacation, according to the county into  
"which the same shall be issued, which  
"shall be kept on a similar file by the  
"officer of the Court; and to which  
"*præcipe* any attorney of this Court, or  
"his clerk, shall have access on payment  
"of the fee payable in respect thereof." See Price's Gen. Prac. 23, 24, in note. It would be desirable if this rule were extended to all the Courts; and at all events its requisites should be observed in practice.



utility, and termed it as a worthless instrument, (d) it nevertheless is useful to be adopted in all the Courts, so as to provide against difficulties and disputes respecting the terms of the writ itself, in case of loss or non-production of the original, or of the copy thereof served on the defendant, (e) or of some error therein, or in case the defendant should lose the copy of the writ served upon him, and forget and be unable readily to obtain the particulars of the writ, in such case it has been held that a new writ may be drawn up from such præcipe, (f) or the defective writ might be amended, in cases where the statute of limitations would otherwise constitute a bar. (g) By reference also to the præcipe of a *capias* properly framed in shewing where the *original affidavit of debt* has been filed, the defendant may always be informed when he may search for and obtain a copy of such affidavit. (h) The præcipe, however, in K. B. and C. P. certainly has been treated as forming no essential part of the proceeding in an action; and it has been held, that a variance between the same and a *capias* will not in general be material; (i) nor need it disclose that a *capias* was indorsed for bail by *affidavit*. (k) The subscribed forms of præcipes will for the present suffice. (l)

(d) *Boyd v. Durand*, 2 Taunt. 161; and see *Usborne v. Pennell*, 10 Bing. 531,

(e) *Coppin v. Potter*, 10 Bing. 445.

(f) MS. in a case where in answer to a plea of the statute of limitations, it was necessary to reply and prove the issuing of a writ that had been actually delivered to the undersheriff of Kent, and lost in his office, he was allowed, after a lapse of several years, to return non est inventus on a fresh writ framed from the præcipe

in the office.

(g) *Green v. Rennett*, 1 T. R. 782; *Adams v. Luck*, 6 Moore, 113; 3 Brod. & B. 23; *Walker v. Hawkey*, 1 Marsh. 399, 5 Taunt. 853.

(h) *Coppin v. Potter*, 10 Bing. 441; *Dunn v. Harding*, id. 553.

(i) MS. 1814, 1 Arch. Pr. K. B. 4 ed. 126, note (b).

(k) *Husband v. Pennell*, 10 Bing. 531.

(l) Middlesex.\* *Summons*.\* James Atkins and Thomas Adams against Benjamin Thompson, of the White Hart Inn, Barnet, in the County of Middlesex, and John Dewar of the same place and county. On Promises.\* Dated Feb. 1, A. D. 1835. By E. F. of —, Attorney for the Plaintiffs.

Claim indorsed £ — debt, £ — costs.

Middlesex. *Capias* for George Dunn against Phillip Harding, of Barnet, in the county of Middlesex. On Promises. By RHODES and BEZVOZ,

16, Chancery Lane, London, Attornies for the Plaintiff.

Indorsed for bail for £ —, by affidavit.

Indorsed claim, debt £ —, costs £ —.

Devonshire. *Capias* for George Dunn against Phillip Harding, of —, in the county of Devon. On Promises. By RHODES and BEZVOZ,

16, Chancery Lane, London, Attornies for the Plaintiff.

Oath for £300, as per affidavit on issuing *capias* into Middlesex, Nov. 16, 1833.†

\* It will be observed that the form of præcipe here given is as concise a statement of the substance of the peculiarities of the writ as practicable. Sometimes after Middlesex are introduced, "to wit;" and in lieu of the word *summons*,

"writ of summons;" and in lieu of promises, "action upon promises." But the above concise form would suffice.

† See form taken from *Dunn v. Harding*, 10 Bing. 553.

Form of a  
præcipe for a  
writ of *summons*.

Præcipe for  
*Capias*.

The like for a  
*Concurrent capias* into another county.

CHAP. V.  
OTHER  
GENERAL  
PRINCIPLES.

Upon the particular rule of the Court of Exchequer, expressly requiring, as we have seen, a formal *præcipe*, it has recently been decided that the mere fact of a *præcipe* for an alias *capias* not being to be found, is no ground for setting aside the proceedings to outlawry, it being positively sworn that a proper *præcipe* was *originally left* in the office. (m) The forms of *præcipes* to be found in the books of practices are less particular than might be recommended; as for instance, in describing the plaintiffs as A. B. *and others*, and the defendants as C. D. *and others*, although the rule in the Exchequer expressly requires the names of *every party* to be inserted in the *præcipe*. As a general rule it is recommended that, according to the varying circumstances of each case, every *præcipe* do at least state concisely *every particularity*, which ought to be filled up in the blanks in the printed forms of the writ itself and indorsements thereon, so that in case of loss, the plaintiff's attorney, or the defendant, may at any remote time be able, by search in the proper office, to ascertain the exact terms of the writ that had been issued.

Twenty-fourth,  
By what officer  
each writ is to  
be Signed and  
how.

*Twenty-fourth, Signing of Writ.*—The writ itself is usually on parchment when completely filled up, and with the memoranda, notices and warnings, when requisite, printed thereon and usually also with printed *indorsements* in blank; (n) first, for the insertion of *the sum sworn to* on a bailable *capias*; secondly, for the *name and residence of the plaintiff's attorney*, or the name and precise residence of the plaintiff, when suing in person, who issued the writ; thirdly, for the amount of the *debt and costs* intended to be *claimed*; and fourthly, for inserting the day the writ was served or executed. The parchment writ, when filled up in all respects in the body of the writ, is to be taken to the proper officer, to be by him duly signed. The offices and officers are different, according to the Court into which the writ is to be returnable.

The 2 W. 4, c. 39, s. 1, enacts that every writ of summons "shall be issued by the officer of the Courts *respectively* by whom process, serviceable in the county therein mentioned, hath been heretofore issued from such Court, and that such writ shall be served in that county; but 3 & 4 W. 4, c. 67, after

(m) *Probert v. Rogers*, 3 Dowl. 170.

(n) It is not material whether the indorsements be completed before or after

the writ is sealed, provided they be before executed.

reciting the expediency that all writs in K. B. should be *signed* by the *same officer*, repealed that enactment pro tanto, and annulled the rule thereon for K. B. of Mich. T. 3 W. 4, and enacted from and after the passing of the latter act, all writs of summons, distringas, capias, and detainer, issued into *Middlesex* from the Court of King's Bench, shall be *signed, sealed, and issued*, and the fees thereon shall be taken and accounted for *by the same person*, as all the same writs are when issued into *another county*, so that now and henceforth, when a writ is issued from and returnable in the *Court of King's Bench*, the same is in all cases to be *signed* by the *signer* of the writs at the King's office at the bottom of King's Bench Walk. (p)

If the writ be from the *Common Pleas*, it must, as heretofore, of whatever name or description, without distinction, be *signed* either by the *filacer* in Elm Court, Temple, or at the Chief Justice's Chambers, according to the county into which the writ is to be issued. (q)

When either of these writs is from the *Exchequer* it is to be *signed* by one of the *masters* and prothonotary of that Court or his deputy in attendance at 9, Old Square, in Lincoln's Inn, in the name of the chief clerk of the pleas. (r) The practice of Exchequer as to proceedings there in outlawry will be presently considered.

The fee to be paid for *signing* is fixed by the rule Mich. T. 3 W. 4, to be 2s. 6d. in all the Courts. In the King's Bench, in a bailable action, the affidavit of debt is usually sworn before the officer who signs the writ, and at the same time, (s) though it may be previously sworn in Court, or before any judge, or before a commissioner in the country. When sworn before the officer who *signs* the writ, he is to be paid one shilling for the same. In all cases the *affidavit* of debt, with the *præcipe* for the writ, *must be produced to the proper officer* before the writ is signed, and is immediately to be left with and filed by him before a

(p) 3 & 4 W. 4, c. 67, repealing pro tanto 2 W. 4, c. 39, and rule K. B. 3 W. 4.

(q) Impey's Prac. C. P. 6 edit. 85; 2 W. 4, c. 39, s. 1, viz. the *filacer* is appointed by the chief justice, and is now Mr. Best, at the chief justices's chambers, and who acts as *filacer* for Cumberland, Devon, Exeter, Kingston upon Hull, Newcastle, Northumberland, York, Yorkshire, and Westmorland; and Mr. Rose and Mr. Jennings, No. 4, Elm Court, act as

*filacers* for and sign all writs into the rest of England. Rule Hil. 23 G. 3, r. 2, and see Arch. C. P. [81].

(r) Tidd, 72.

(s) *Howard v. Wilkins*, 7 Bar. & Cres. 783. If sworn in the country, it is sworn before a commissioner of the Court in which it is to be used, *Howard v. Brown*, 4 Bing. 393; and it may be sworn before a commissioner who is attorney, or agent, or clerk of the attorney of the plaintiff; rule Hil. T. 2 W. 4, r. 6.

CHAP. V.  
OTHER  
GENERAL  
POINTS.

*bailable writ* can legally be issued. (t) In C. P. also the affidavit may be sworn before the filacer who signs the writ.

The *mode of signing* the writ in the King's Bench is by the signer of the writs writing his surname immediately under the concluding word in the writ, and in the Common Pleas by the filacer writing his name in like manner, and in the Exchequer by the master writing his surname. But it should seem that the *signing* of a writ is not so material as to render the omission an irregularity that can be taken advantage of; and provided a writ be *duly sealed*, the Court will not set the same aside, (u) because the signature of the filacer is a mere private mark for his own convenience and in order that information may easily be obtained at the office, as to who was the filacer who issued the writ, (x) and although the writ itself is signed by the filacer or other officer, yet it was held before the 2 W. 4, c. 39, that such name need not appear on the copy served. (y)

Twenty-fifth,  
By what officer  
each writ is to  
be Sealed.

*Twenty-fifth, Sealing of Writs.*—Original writs issued out of the Court of Chancery, were not only in the king's name, but sealed with his *Great Seal*, but mesne process thereon always issued under the *private seal* of the particular Court, and not under the Great Seal, and are tested, not in the king's name, but in the name of the chief justice or chief baron of the particular Court. (z)

In the King's Bench and Common Pleas, after the writ has been signed, it is without any distinction as to the nature, description or name of the writ, to be taken to the *Seal Office* at No. 3, Inner Temple Lane, where the deputy sealer of the writs will seal the same on being paid sevenpence. (a) By rules of K. B. and C. P. no printed blanks or other writs are to be sealed before the same have been *regularly made out and filled up*, (b) and by other rules of those Courts no signable writs are to be sealed till they have been duly signed by the proper officer. (b) But there seems to be no such rule in the Exchequer, and there the practice in this respect differs materially, and writs *already sealed* in blank for names of parties and other particulars may be obtained from the bag bearer, or even from a stationer, and may be afterwards filled up and then

(t) 12 G. 1, c. 29, s. 2, see *post*, chapter on *capias* as to the affidavit and necessity for filing the same.

(u) *Wilson v. Joy*, 2 Dowl. 182; 1 Legal Observer, 413, S. C.; *Burt v. Jackson*, 3 Moore & Scott, 553; 2 Dowl. 747, S. C.; and see *Clutterbuck v. Wildman*, 2 Tyr. 276; as to a quo minus before 2 W. 4, c. 39, Tidd. Supp. 1833. 66, n.(c).

(x) Per Tindal, C. J. *id.*

(y) *Clutterbuck v. Wildman*, 2 Tyr. 276.

(z) 3 Bla. Com. 273, 282.

(a) R. M. 3 W. 4. s. 2.

(b) Tidd, 9 ed. 54; but the 6 G. 1, c. 31, s. 53, there referred to, only applies to sheriff's warrants.

signed by one of the masters or his deputy, and in addition to the same fees of 2s. 6d. for signing, and 7d. sealing, 1d. is to be paid for the bag bearer procuring the seal to be affixed, and 1d. to the stationer for the parchment and printing of the form. (c) This peculiarity in the practice of the Exchequer, however on principle objectionable, has been considered advantageous in facility and expedition, as it is essential in that Court only to take the writ to one office instead of two. In the King's Bench and Common Pleas the *sealing* of the writ is considered of principal importance, and is the act which completes its authenticity, (d) but it should seem that in the Exchequer the signature of the officer is substantially most important, because the writ is there permitted to be sealed before it has been filled up.

*Twenty-sixth*, Upon a review of these several proceedings and requisites the practical mode of issuing a writ appears to vary according to the nature of the writ, and in some respects, the Court out of which it issues. As regards a *writ of summons*, the plaintiff's attorney having received his *retainer* and *instruction* to sue, usually purchases from a law stationer a *writ of summons*, printed on parchment with blanks, in which he or an intelligent clerk must very carefully fill in the varying particulars, which we have seen are principally the christian and surname of the defendant and statement of his residence of place and county, the form of action, and at whose suit, carefully *repeating* the christian and surname of the plaintiff in each blank, the Court, and the day on which the writ is actually issued; and therefore the blank for the same should never be filled up until the instant before the writ is to be signed, and at the office of the signer of the writ; the practitioner may also, in the first instance, fill up all the proper indorsements, excepting the date of serving the writ or of the arrest, which must necessarily be left in blank until the copy has been actually served on the defendant. The plaintiff's attorney then prepares the proper *præcipe*, the form of which we have considered; (e) and takes such writ and *præcipe*, and in bailable actions the affidavit to hold to bail, and, if not already sworn, the intended deponent, to the proper officer for signing such writ, and who, on payment of his fee, *signs* his name and receives and files the *præcipe* and affidavit. The practitioner then

*Twenty-sixth*,  
The practical  
proceedings  
upon issuing  
process in general.

(c) Price's Prac. of all the Courts, 27. 552; 2 Dowl. Pr. C. 747.  
(d) Burt v. Jackson, 3 Moore & Scott, (e) Ante, 220.

CHAP. V.  
OTHER  
GENERAL  
POINTS.

---

takes the writ thus signed to the *Seal Office*, if the writ be issued from K. B. or C. P., where the proper officer *seals* the same on payment of his fee. (f) In the Exchequer we have seen that the writ is usually sealed in anticipation. (g) The attorney then fills up at least as many blank writs of summons, printed on paper, as there are defendants, and which must be *exact copies* of the principal sealed writ, and one *very exact copy* of which must be delivered to each defendant immediately after the service of the writ of summons or arrest on a *capias*. A very small variance between the original writ and the copy delivered would be fatal, as the omission of the *s* in sheriffs. (h) The writ and copy or copies being thus complete, both are usually delivered to an intelligent clerk for him therewith to serve the defendant or defendants, or if the process be a *bailable capias*, it is taken to the office of the undersheriff of the proper county, who on receiving the principal signed and sealed writ issues his warrant to one or more officers of the sheriff, who will receive from the attorney or the plaintiff himself a very particular description of the defendant, so as to secure the arrest of the proper party.

In issuing a *writ of capias*, it will be observed that the proceeding is nearly the same as in issuing a summons, excepting that it is *preceded* with the *affidavit to hold to bail*, which, whether *previously sworn* in the country before a commissioner, or in Court, or before a judge, or *to be sworn* before the signer of the writ, is, with the writ of *capias* and *præcipe*, to be taken to the proper signer of the writ and delivered to him with his proper fee before he signs, and he then, or afterwards, perhaps at his leisure, files the *præcipe* and *affidavit*. The writ is then to be sealed the same as the writ of summons, and the attorney having made perfect copies, then proceeds to the proper office of the undersheriff in London, or forwards the writ and copies to an agent in the country. At the undersheriff's office a *warrant* is then obtained, directed in general to one of the regular bailiffs or officers of the sheriff, and delivered to such officer, who thereupon receives particular instructions descriptive of the defendant, and proceeds to make the arrest.

Twenty seventh,  
Consequences of  
nonobservance  
of requisites of

*Twenty-seventh, Consequences of Mistakes, &c.*—The statute 2 W. 4, c. 39, and its schedule, although it prescribes that *certain forms shall be observed*, is in its own terms silent as to

(f) *Ante*, 224.

(g) *Id.*

(h) *Hodgkinson v. Hodgkinson*, 3 Nev. & Man. 564; 2 Dowl. 535; *Nichol v.*

*Boyn*, 10 Bing. 339; *Smith v. Pennell*, 2 Dowl. 654; *Street v. Carter*, 2 Dowl. 671; but see post, 232.

the *consequence* of *nonobservance*. But sect. 14, authorized the judges or a majority, including the chiefs of each Court, to pronounce general rules for the better enforcing the provisions of the act, and accordingly the judges, by their general rule Mich. T. 3 W. 4, r. 10, ordered, "that if the plaintiff or his attorney shall omit to insert or indorse on any writ or copy thereof, any of the matters required by the said act, (2 W. 4, c. 39,) to be by him inserted therein or indorsed thereon; such a writ or copy thereof shall not on that account be held void, but may be set aside as irregular upon application to be made to the Court out of which the same shall issue or to any judge."

CHAP. V.  
OTHER  
GENERAL  
POINTS.

mesne process prescribed by 2 W. 4, c. 39, and rules thereon. Rule 10, Mich. T. 3 W. 4, declaring omissions to be irregularities but not to render writ void.

But application must be made in due time.

The general rule Hil. T. 3 W. 4, rule 33, orders that no application to set aside process or other proceedings for irregularity shall be allowed unless made within a reasonable time (even in vacation), (i) and even in an action against a prisoner, who is entitled to no particular indulgence in this respect, (h) nor if the party applying has taken a fresh step after knowledge of the irregularity; (i) and it should seem that in general every motion or summons on account of any defect in a writ of summons, or capias, or copy, or service thereof, actually served on or made known to the defendant, should be made within the eight days allowed for appearance or bail above, or at least within eight days after his first knowledge of the process, and at all events before he has entered his appearance or put in bail above. (l) It has been held that it sufficed to make the application in respect of the irregularity in six days after the delivery of the copy of the writ to the defendant. (l) But as regards a *distringas*, it has been decided that eighteen days after the service thereof was a very unreasonable delay, in objecting to the irregularity of the indorsements thereon, unless the defendant could shew that he could not come earlier. (m) And where the defendant had been served with a writ on 25th October, 1834, it was decided that a motion to the Court to set aside the proceeding for irregularity, made on the 3d November following, was too late, and should have been made at latest on the 1st November, and therefore the rule was discharged with costs. (n) And if the irregularity occur in vacation it should be taken immediately, and the party must not wait till the term and then move the Court. (o)

(i) *Elliston v. Robinson*, 2 Cr. & M. 343; *Gurney v. Hopkinson*, 3 Dowl. 189.

(h) *Primrose v. Baddeley*, 2 Crom. & M. 468.

(l) *Smith v. Pennell*, 2 Dowl. 654

(m) *Wright v. Warren*, 3 Moore & S.;

Tidd, 71.

(n) *Tyler v. Green*, Exch. Mich. T. 1834, 9 Legal Obs. 173.

(o) *Lewis v. Davison*, 3 Dowl. 372; ante, 22 (a).

CHAP. V.  
OTHER  
GENERAL  
POINTS.

But where a writ was in trespass and indorsed for a *debt* and served on 4th October, 1833, and the declaration was in *trespass on the case upon promises*, and was delivered on 29th October, upon a rule for setting aside the *proceedings* on the ground of *variance* between the writ and declaration, the Court set aside the *writ* as well as the *declaration*, saying that the objection, on the ground of variance, did not arise until the declaration was delivered, and that objection affected both the writ and declaration. (p) And in proceeding to outlawry, where the irregular *capias* had been filed, the Court held that the defendant ought to have objected within a reasonable time after he might have searched, and that it was too late afterwards to object, though as soon as the defendant had actual notice of the outlawry. (q)

The objection must not only be taken within a *reasonable time*, but it must be *effectually* so taken; and if a judge should even erroneously refuse to give effect to the objection, it will be too late at any subsequent stage; as where a judge had refused to discharge a defendant arrested on a *capias* in an action irregularly described to be "*trespass on the case on promises*, and after such refusal he executed a bail bond and put in bail above, and the bail then moved the Court to set aside the *capias*, the Court admitting that the writ was irregular, nevertheless refused to interfere, saying it was too late; (r) the proper course would have been, upon the first refusal of the judge, to have applied to the Court. The Courts and judges have so frequently expressed their disapprobation of objections of this technical nature, and their satisfaction when they are defeated, (s) that a question naturally arises, then why are such trifling objections suffered to have effect? The answer, is, that when the legislature have explicitly declared that it is important to observe certain forms and *uniformity* in mesne process, the judges are obliged, in order to secure observance of the regulations, to enforce them strictly in individual cases.

It has been truly observed that the object of the judges in promulgating the above rule of Mich. T. 3 W. 4, 1832, was not to *create* or *increase* objections to process or to render them *more fatal* than they would otherwise have been, but rather to *prevent* the defendant from treating the writ or proceeding as

(p) *Edwards v. Dignam*, 4 Tyr. 213.

(q) *Lewis v. Davison*, 3 Dowl. 274.

(r) *Gurney v. Hopkinson*, 3 Dowl. 189.

(s) See *Hodgkinson v. Hodgkinson*, 3 Nev. & Man. 566; *Gurney v. Hopkinson*, 3 Dowl. 193.



altogether *void*, and in bailable cases, perhaps *bringing an action* of trespass for an arrest or proceeding under the irregular process, for if it had not been for that general rule, process framed differently to the form prescribed by statute might have been absolutely *void*; (t) but at the same time the defendant is allowed by the rule to apply to set aside the writ or copy, if the Court or judge should deem such omission an irregularity. (t) It must be kept in view that the rule of Mich. T. 3 W. 4, is strictly confined to *omissions*, and that therefore the judges are not precluded from making rules for the *addition* of any other matters in improvement of process or the indorsements thereon, and in exercise of that power, it will be remembered that the judges, by the rule 5 of Mich. T. 3 W. 4, required the amount of the debt and costs claimed to be indorsed on process when issued for a *debt*; and it would seem, that provided there be no *technical material omission* or *alteration* in the *sense* or *sound* (u) of either of the prescribed forms of writs or indorsements or of the memorandum of appearance, practitioners are still at liberty to *add* whatever they may think advisable; though as a general rule, it is safer closely to adhere to the forms as prescribed by the statute 2 W. 4, c. 39, even to a letter.

We have seen that the general rules to be observed in practice have either been prescribed by particular *statutes*, or by *all* the Courts, or by one Court in *particular*. When prescribed by *statute*, (as in the forms in the uniformity of process act, 2 W. 4, c. 39,) they *must* be *strictly* observed, or the process or other document, defective in any respect *technically* considered *material*, may, on motion or summons, provided it be made *in due time*, (i. e. in general within the eight days allowed for entering the appearance or putting in bail above,) be set aside; and in the earliest cases, after the 2 W. 4, c. 39, and rule Mich. T. 3 W. 4, thereon, it was considered that any argument that the defect could not mislead or was not in matter of substance tenable, because the *expediency* of the regulation was matter for the consideration of the *legislature*; and having been *enacted*, Courts of justice collectively and judges individually

What Deviations fatal.

(t) Per Bayley, B. in *Price v. Husley*, 2 Crom. & M. 211; 2 Dowl. 232; 1 Arch. C. P. [23].

(u) It will be observed that in one of the earliest cases on the statute that was the rule adopted and laid down by the Court of K. B. and the contradiction in the cases has only been in the application

of that rule to each particular case. See *Hodgkinson v. Hodgkinson*, 3 Nev. & Man. 565, 6. In that case the Court *misapplied* the rule by holding that the omission of the *l* in *Middlesex* was material and altered the sense. See *Colston v. Berens*, 3 Dowl. 253, where the Court of Exchequer held the omission *immaterial*.

CHAP. V.  
OTHER  
GENERAL  
POINTS.

are bound to give it effect, by setting aside every proceeding that deviates from the prescribed form to an extent even *technically material*. And that much laxity, doubt, uncertainty, and confusion in practice, has arisen from allowing nice and refined distinctions between what prescribed requisites shall be holden merely directory and what *imperative*, and that attempted distinctions tending to make a rule nugatory ought to be denied. (u) And it has been observed, that when Courts begin to decide upon nice and evanescent distinctions infinite *trouble* and *uncertainty* is occasioned. (x) At first, the Courts perceiving the encouragement to indolence and want of due care in practitioners in not adhering to prescribed forms, were even more strict than formerly, as regards objections of this nature, in the expectation that more uniformity and certainty in practice would ere long be established. (y) This result may be collected from the numerous decisions already noticed, but it may nevertheless be expedient here to give a combined view of the leading decisions even at the risk of repetition.

Where a defendant was detained on a *pluries capias*, in which a *blank* was left for his place of residence, contrary to the form No. 4 in the uniformity of process act, 2 W. 4, c. 39, (z) and also where the residence was *indorsed* instead of being *incorporated*, (a) the Court, in the first case, set aside the service, and in the last the bail bond, declaring "that it is much better for the public to adhere in all practicable cases to the strict, close, *literal compliance with the forms prescribed* by the act, rather than to yield to particular cases of supposed hardship on individuals when those requisites have not been properly complied with;" (b) and this, even in a case where it was sworn that the reason why the defendant's residence, mentioned in the antecedent process, was not continued in the *pluries capias* was, that the defendant had removed and it was not known where. (b) So, as respects the *form* of action, although it was formerly considered that "trespass on the case upon promises" was the correct technical description of an action of *assumpsit*, yet as the 2 W. 4, c. 39, gives the form "action on *promises*," the introduction of the words "*trespass on the case upon promises*" would be a false irregularity, although not an *omission* within the meaning of rule 10 of Mich. T. 3 W. 4;

(u) Per Taunton, J., in *Ryley v. Boissomus*, 1 Dowl. 383; *Tomkins v. Chilcote*, 2 id. 187.

(x) Per Williams, J., in *Rex v. Newton*, 1 Adol. & Ellis, 244.

(y) *King v. Sheffington*, 3 Tyr. 318.

(z) *Roberts v. Wedderburne*, 1 Bing. N. C. 4.

(a) *Lindredge v. Roe*, 1 Bing. N. C. 6.

(b) Per Tindal, C. J., in *Roberts v. Wedderburne*, 1 Bing. N. C. 6; and see *Price v. Husley*, 1 Crompt. & M. 211.

and it should seem that the Court would not reject the objectionable words as superfluous as might have been hoped; (c) and although in one case the Court said, that a *capias* directed to the sheriff of London instead of sheriffs might suffice, yet that as the 2 W. 4, c. 39, s. 5, requires that the party arrested shall have a *copy* of the writ delivered to him, if the supposed copy were sheriff and the writ sheriffs the variance would be fatal. (d) This last decision appears to require even more exactness in the *copy* of the process than in the process itself, and seems to negative the distinction whether the deviation be *material*, for whether the word were sheriffs or sheriff, or Midsex or Middlesex, it should seem that the defendant could not well be misled or prejudiced by the mistake, for the mistake in the name of the sheriff was not connected with any thing the *defendant* was required to perform. Where the copy of a *capias* delivered to the defendant upon his arrest omitted the teste or date, that omission was holden fatal. (e) And in a later case it has been decided, that if a writ of *capias* be directed to the sheriffs instead of sheriff of Middlesex, it is fatal. (f)

Still, however, the Courts have established a *general exception* to the rigid rule, viz. that if the *sound, or sense, or meaning* of the writ or copy, or an indorsement thereon, has not been altered by the *omission* or other mistake, then the deviation from the prescribed form will not constitute an irregularity to be objected to with effect, (g) and the only difficulty is *in the application of that principle to particular cases*. It is admitted that the Courts have in some of the earliest cases after the passing of 2 W. 4, c. 39, decided mistakes to be material when they should have been decided otherwise. (g) Thus, the omission of immaterial participles in either the writ or copy, not altering the sense or meaning, is not an irregularity of which the Court will take notice; (h) and, therefore, where in the *copy* of a *capias* served on the defendant after his arrest, the word "*the*" before "*date*" and the word "*by*" before "*any judge*" were omitted in the usual form of the *capias* itself, the Court refused to discharge the defendant out of custody, though it was argued that the legislature intended that

Mistakes, not altering the sense, meaning, or sound, now holden immaterial.

(c) *King v. Steffington*, 1 Crompt. & M. 363; 1 Dowl. 686; *Gurney v. Hopkinson*, 3 Dowl. 189.

(d) *Byfield v. Street*, 10 Bing. 27; *Nichol v. Boyn*, 10 Bing. 239; 1 Arch. K. B. 4 ed. 140; *Hodgkinson v. Hodgkinson*, 3 Nev. & M. 564; and see *Sutton v. Burgess*, ante, 186, 187, and post, 232 (n).

(e) *Farring v. Turner*, 3 Dowl. 15.

(f) *Barker v. Weedon*, 1 Cr. M. & R.

396; *Jackson v. Jackson*, id. 438.

(g) *Hodgkinson v. Hodgkinson*, 3 Nev. & Man. 565; 2 Dowl. 536; *Colson v. Berens*, 3 Dowl. 253; and *Sutton v. Burgess*, post, 232, admitting the principle in *Hodgkinson v. Hodgkinson*, but denying its application in that case; and see *Forbes v. Mason*, 3 Dowl. 104.

(h) *Forbes v. Mason*, 3 Dowl. 104, and see the cases in the next note.

CHAP. V.  
OTHER  
GENERAL  
POINTS.

the prescribed form should invariably be adopted, and that no exertion of intellect should be required on the behalf of persons served with process to ascertain whether or not the deviation was material; and Tindal, C. J. said, the *meaning* of the writ is not altered by these omissions; and therefore the copy is unobjectionable, and the other judges concurred; (i) one of whom observed, that if the copy served should omit the cross to a *t* in a word in the writ it might as well be insisted that it was not a *strict copy*; (k) and in another case it was observed, that bad spelling will not prejudice unless it *alter the sense*, as if in the word *sheriff* one of the *f*'s should be omitted, that would not constitute a fatal irregularity; (l) and though we have seen that where the *l* had been omitted in Middlesex, that was deemed a fatal irregularity: (m) yet, in more recent cases, the Court of Exchequer treated that decision as erroneous, because the omission of the *l* did not alter the sense nor could mislead any defendant; (n) and in the last case, although the copy of the *capias* delivered to the defendant after her arrest was thus: "take Marian Burgess if h (instead of '*she*') shall be found in your bailiwick, &c." the Court discharged with costs a rule nisi for cancelling the bail bond, saying that the inaccuracy did not alter the sense. (o) So where the copy of a summons described the defendant by the name Andrew Bryon, though the writ itself was *Andrews Bryan*, the Court held the variance immaterial. (p) And upon a motion to set aside the service of a writ of summons against J. F. Partridge, on an affidavit that the defendant's real name was John Charles Partridge, and that he never signed any document by the name of J. F. Partridge; on shewing cause, a bill of exchange was produced signed with ambiguous initials before the surname Partridge, and an affidavit of two persons was produced swearing that they read the signature as J. F., Lord Abinger said, the document shews that the defendant makes his C's like other men's F's, and if men will write so ambiguously they must take the consequences, and the rule was discharged. (q) And the most recent publications on practice have drawn the conclusion that it is

(i) *Pocock v. Mason*, C. P. Mich. T. 1834, 2 Bing. N. C. 245; and *Legal Observer*, 7 Dec. 1834; *Forbes v. Mason*, 3 Dowl. 104; and see *Tyser v. Bryan*, 2 Dowl. 640. The case of *Hodgkinson v. Hodgkinson*, 3 Nev. & Man. 565; 2 Dowl. 536, to the contrary was overruled by *Colson v. Berens*, 3 Dowl. 253.

(k) *Forbes v. Mason*, 3 Dowl. 104.

(l) *Nicol v. Boyne*, 10 Bing. 359; 3 Moore & Scott, 812; 2 Dowl. 763.

(m) *Hodgkinson v. Hodgkinson*, 3 Nev. & Man. 565; 2 Dowl. 536, S. C.

(n) *Colson v. Berens*, 3 Dowl. 253; and see *Sutton v. Burgess*, Exchequer, 21st January, 1835, per Parke, B., and Alderson, B., Mr. Tyrwhitt's MS.

(o) *Sutton v. Burgess*, *supra*, note (n).

(p) *Tyser v. Bryan*, 2 Dowl. 640.

(q) *Dennis v. Partridge*, Exch. January 21st, 1835.

only in *material* deviations that the defects will be treated as irregularities. (r) The term *material*, however, has been so *technically* construed as in some cases to give effect to objections which in *ordinary acceptance* would be considered *immaterial*, for who but a lawyer would consider that the omission or addition of an *s*, in the description of the sheriff of Middlesex or sheriffs of London, can be material as respects the defendant, more especially as it is a maxim in law that Courts are to take notice *ex officio* of the division of England into counties, and not even a lawyer could doubt the county intended? (s) The result, therefore, seems to be, that although the Courts are now indisposed to give effect to summons or motions on account of mistakes, that have not altered the *sense* or *meaning* of process, nor *could have misled* the most ignorant person, yet, unless in the clearest cases, it will be found most judicious to abandon any objectionable process and proceed *de novo*.

*Twenty-eighth, Of Amendments before executed.*—If a mistake or irregularity be discovered in the writ *before it has been executed* it seems that it may as of course, without obtaining the leave of the Court or a judge, be amended, and afterwards even twice *resealed*; and this, although between the first and subsequent sealing the statute of limitation had run, (t) nor is it necessary to prove the time of resealing; and before the 2 W. 4, c. 39, this might have been done even after the defendant had been served, (u) provided a term had not intervened between the teste and the altered return day; (v) and it seems that by the present practice a writ may be altered and re-sealed *before* it has been *served or executed* without any order of the Court or a judge, but if altered without being resealed, the Court or a judge would set aside the proceeding on payment of the debt without costs, or the writ might be treated as a nullity, (w) unless, perhaps, in cases where a statute of limitations would bar the remedy, when, if the writ issued before the statute had completely operated should afterwards be amended, it would have retrospective validity *nunc pro tunc*; and where a writ of summons, tested in time to save the statute of limitations, was resealed, in consequence of an alteration in the description of the

*Twenty-eighth,  
Of amending  
and resealing a  
writ before  
executed.*

(r) *Freeman v. Mason*, Mich. T. 1834, C. P.; 9 *Legal Observer*, 109; T. Chit. Arch. K. B. 4 ed. 112, 123, 513, 517, 518, 530, 532; and 1 Arch. C. P. [23].

(s) 2 Inst. 557; March's Rep. 174; *Rex v. Greep*, Comb. 463.

(t) *Braithwaite v. Ld. Mountford*, 2 Cr. & M. 408; 4 Tyr. 276, S. C.

(u) *Israel v. Middleton*, 1 Chitty's Rep. 321; *Anon. id.* 398.

(v) *Durden v. Hammond*, 1 Bar. & Cres. 111; 2 Dowl. & R. 211, S. C.

(w) *Siggers v. Sansom*, 3 M. & Scott, 194; 2 Dowl. 746, S. C.; *Anon.* 2 Chitty's Rep. 237; *Taylor v. Phillips*, 3 East, 155.

CHAP. V.  
OTHER  
GENERAL  
POINTS.

defendant and the county in which he resided, and was not served until after the six years had elapsed, it was decided that the resealing did not amount to a re-issuing of the writ and that it was not necessary for the writ to shew when the resealing took place; (x) but if the name of one county for another be substituted without resealing, the Court will set aside proceeding for irregularity and without costs, notwithstanding the defendant obtained an order to stay proceedings on payment of debt and costs, and the Court observed that the attorney in so altering the writ had been guilty of *gross misconduct*. (y)

Notice to defendant not to appear when prudent.

If serviceable process has been executed by service of the copy upon the defendant and a material defect be discovered, and it be apprehended that the defendant will take advantage of the irregularity, then the safest and least expensive course is to serve a written notice on the defendant not to appear and that the writ or the service is abandoned; (z) after which, in case the defendant should move the Court or take out a summons to set aside the proceeding for irregularity, the Court or a judge would refuse and discharge the application, (a) and after service of such notice the plaintiff might proceed *de novo* if the writ were defective, or serve a fresh copy if the defect were merely in the service. (b) The form of notice in the note may be applied to each case as circumstances may vary. (b) A similar notice might be given where the defect is in bailable process or in the copy thereof delivered to the defendant.

Twenty-ninth,  
Of amendments  
of writs or copies

*Twenty-ninth, Of Amendments after executed when not allowed.*—Before the uniformity of process act, 2 W. 4, c. 39, the

(x) *Braithwaite v. Ld. Mountford*, 2 Cr. & M. 408.

(z) See forms, *infra*, note (b).

(y) *Siggers v. Sansom*, 3 M. & Scott, 194; 2 Dowl. 745.

(a) *Tidd's Sup.* 65; *Chitty's Summary*, 30; 4 Man. & R. 100.

Form of notice to defendant not to appear to process discovered to have been irregular.

(b) In the King's Bench (or "Common Pleas" or "Exchequer.")

Between { A. B. plaintiff,  
and  
C. D. defendant.

Take notice, that as a defect has been discovered in the writ of summons (or *capias*) issued in this cause, (or "in the copy of the writ of summons (or *capias*) served on you,") the plaintiff hereby abandons the said writ (or "abandons the service of the said copy"), and that until further notice the plaintiff will not take or require you to take any further proceedings in this cause, and you are not to appear (or "put in bail above"), nor are you to take any proceedings to set aside the said writ or the service thereof, or the copy of the same, and if you have incurred any necessary expense the plaintiff will immediately, on being informed thereof, pay the same. Dated this — day of —, A. D. 1835.

To Mr. C. D. the above named defendant.

E. F.  
plaintiff's attorney.

See another form, *Tidd's Appendix*, chap. ix. s. 4; and *T. Chitty's Forms*, 698; *Imp. K. B.* 494; 4 Man. & Ryl. 100.

CHAP. V.  
OTHER  
GENERAL  
POINTS.

---

after executed  
and when not  
allowed.

Courts frequently permitted amendments of mesne as well as final process, upon payment of costs, (though in general not so as to affect bail,) and it was frequent, when a defendant had obtained a rule nisi for setting aside process for irregularity, for a plaintiff's counsel to move for and obtain a cross rule for leave to amend, and the respective rules came on to be heard at the same time; (c) and a *capias ad satisfaciendum* is still frequently amended. (d) *And unquestionably the Courts still have jurisdiction and power to permit amendments in all cases,* (e) and they will exercise it when great injury would otherwise ensue, as where it would be too late to commence a fresh action; (f) but, as a rule of practice, all the judges have, in order the better to compel the observance of the directions in the uniformity of process act, come to a resolution not to permit, after process has been executed, any amendment of irregularities contravening the forms *prescribed by that act,* (g) excepting in cases where a statute of limitation would otherwise bar the remedy, (h) when the Court will permit such amendments. (i) Nor will they permit amendments even of mistakes in a mere matter of fact, as in the name of a defendant (k) or plaintiff. (l) But when the defect is merely in the nonobservance of some matter, enjoined only by a *rule of Court*, a less strict practice in allowing an amendment prevails. (m) When the deviation is from the forms enjoined by the *statute*, they consider they have no discretion but must enforce the enactment; but that a departure from or nonobservance of a rule made by the judges themselves ought not to be so rigorously punished. (n) Thus the indorsement of the debt claimed and costs is not required by 2 W. 4, c. 39, but only by the rule Mich. T. 3 W. 4, A. D. 1832, r. 5, and, therefore, if omitted or imperfect the Courts now in general permit the plaintiff to amend on payment of costs and allowing

(c) See authorities cited in *Byfield v. Street*, 10 Bing. 27; *Inman v. Huish*, 2 New Rep. 133; *Marsh v. Blachford*, 1 Chitty's Rep. 323; *Bradshaw v. Davis*, id. 374; *Wakeling v. Watson*, 1 Tyr. 377.

(d) *M'Cormack v. Melton*, 3 Nev. & Man. 881.

(e) Recently the Court permitted the amendment in the teste of a writ of certiorari from vacation unto the preceding term, although the judgment of an inferior Court had thereby been irregularly removed; *Rowell v. Brendon*, 9 Legal Observer, 299, 300.

(f) *Ante*, 173; *Horton v. Borough of Stamford*, 1 Crompt. & M. 773; 2 Dowl. 96, S. C.; *Baker v. Neave*, 3 Tyr. 238.

(g) Per Parke, B., *Easter T.*, 1834, 1 Arch. C. P. [25]; *Hodgkinson v. Hodg-*

*kinson*, 3 Nev. & Man. 565; *Lakin v. Massie*, 4 Tyr. 839; *Colson v. Berens*, 3 Dowl. 288.

(h) *Ante*, 173; but the Courts permit amendments of ca. sa. and other final process; *M'Cormack v. Mellor*, 1 Adol. & El. 330.

(i) *Horton v. Stamford*, 3 Tyr. 868; *Lakin v. Massie*, 4 Tyr. 839.

(k) *Ante*, 173.

(l) *Ante*, 200.

(m) *Urquhart v. Dick*, 3 Dowl. 17; *Colles v. Morpeth*, id. 234; *Shirley v. Jacob*, 5 Moore & S. 67; 3 Dowl. 101, S. C.; *Hooper v. Walker*, 1 Crompt. M. & R. 437; 3 Dowl. 167, S. C.; *ante*, 213.

(n) *Cooper v. Walker*, 3 Dowl. 167.

CHAP. V.  
OTHER  
GENERAL  
POINTS.

the defendant four days for paying the debt and costs if he think fit; (o) and where a motion had been made to cancel a bail bond on an objection of that nature, Parke, B. stated that he had conferred with the judges of the other Courts and they thought it proper that a plaintiff in these cases should have leave to amend, and that he should be allowed to shew the amendments as cause against the rule for setting aside proceedings and which would be accordingly discharged upon payment of costs, the defendant being allowed four days from the time of the amendment to pay the debt; and it was recommended by the Court that notice to that effect should be given to the plaintiff's attorney that no further proceedings should be had if he would take out a summons to amend, and pay the defendant his costs, occasioned by the irregularity, up to that time, but that if he refused to do so, then the rule as prayed was to be drawn up. (p)

Consideration whether there is any and what difference between a defect in a writ or in a copy.

A distinction was at first taken between the mistake in the *copy* of the writ served upon the defendant, and a mistake in the *writ itself*, upon the supposition that the latter was the act of the Court itself but the copy merely the act of the defendant, and that although possibly the Court might permit an amendment in the writ as being its own act, no such amendment could be admitted in a *copy*. (q) But as the writ and copy are alike prepared in the office of the plaintiff's attorney without any interference of the Court or even one of its officers, (excepting the mere acts of signing and sealing,) there is not on principle any such distinction. (r) And certainly in practice no such distinction now prevails, and a mere mistake in spelling in the *copy*, not altering sense or sound, is not now material; (s) and Vaughan, B. observed, that if the cross to a *t* of the "the" in the writ were omitted in the copy it could not strictly be a copy, but still could such an omission be treated as a fatal irregularity? (s)

*Thirtieth*, When and how to object to writ or copy and of motions and summons and for irregularities, and when and how to be made. (t)

*Thirtieth, Of objections to writ, &c.*—If the copy of the writ delivered to the defendant be defective, he may reasonably suppose that the writ corresponds and is equally defective, and may with propriety, unless he has previously ascertained that the writ is perfect, move or obtain a summons to set aside as

(o) *Cooper v. Walker*, 3 Dowl. 167; *Shirley v. Jacobs*, 5 Moore & S. 67, 68.

(p) *Cooper v. Walker*, 3 Dowl. 167.

(q) *Byfield v. Street*, 10 Bing. 28; 2 Moore & S. 812; 2 Dowl. 739, S. C.

(r) Per Taunton, J., in *Hodgkinson v. Hodgkinson*, 3 Nev. & Man. 565.

(s) *Forbes v. Mason*, 3 Dowl. 104; and as to misspelling in a copy see *Nicol v. Boyne*, 10 Bing. 340, 341; and see *Tyser v. Bryan*, 3 Dowl. 640.

(t) See *post*, as to irregularities in general.



well the writ as the service of the copy.(u) But if the service be regular and only the writ itself irregular, then the application should be merely to set aside the writ.(u)

And in some cases, although an irregularity may have already occurred, yet if the same be afterwards repeated or continued in a subsequent stage, it may suffice then to take the objection, and therefore although a writ "in an action of trespass" having been indorsed for a debt of 11l. 12s. 9d. might have been objected to immediately, yet if the plaintiff afterwards declare in *assumpsit*, it is not then too late to move to set aside the proceedings.(x) It is considered better here only to advert generally to the necessity for immediate activity of a defendant on his first knowledge of process having been issued, and to consider the subject of motions and summons on account of irregularities in a subsequent separate chapter.

With respect to the time within which the application to set aside the proceedings for irregularity should be made, the general long established practice of the Court requires the application to be made promptly, so as to prevent an increase of costs, and the rule 33 of Hil. T. 2 W. 4, expressly requires the motion for an irregularity to be made within a reasonable time.(y) And it should seem that the motion or summons on account of irregularity in a writ, or copy, or service, should be within the eight days allowed for entering the defendant's appearance or putting in bail above. The rule 10 of Mich. T. 3 W. 4, also authorizes the application to the Court or a judge, and a judge has therefore jurisdiction to interfere in vacation, and when an irregularity is discovered in vacation a summons must be promptly obtained, and before the party objecting has himself taken a fresh step after notice of the irregularity.(z) But where the plaintiff had improperly indorsed on the summons a larger sum than was due, the Court, even after improper delay on the part of the defendant, on motion, stayed the proceedings on payment of the debt and all costs incurred up to the time of the motion, but without paying the plaintiff's costs of the motion; (z) and if a declaration be delivered on 24th October, thereby shewing an irregularity in an indorsement on the writ of the debt claimed, the defendant should take out a summons immediately within eight days, and before the 1st November following.(z) As

Time for application.

(u) *Harker v. Jarman*, 1 Dowl. 655;  
*Cohen v. Watson*, 3 Tyr. 238; *Border v. Levi*, 3 Dowl. 150.  
(z) *Edwards v. Dignan*, 2 Crompt. & M. 346; 4 Tyr. 213, S. C.

(y) *Ante*, 227.  
(z) Per Bayley, B. in *Elliston v. Robinson*, 2 Cr. & M. 345; 4 Tyr. 214; *ante*, 227.

CHAP. V.  
OTHER  
GENERAL  
POINTS.

respects the *mode* or *form* of taking the objection, it would seem that if the irregularity be confined to the writ, then the motion or summons should be to set aside only such writ; and in one case where the writ was irregular, but the service was regular, and the defendant moved to set aside the *service* for irregularity, the Court discharged the rule. (a) So where the defendant must be aware that the writ is sufficient, and that the copy delivered of the service thereof alone is irregular, then perhaps his motion or summons should only be to set aside the latter. But in general, when the copy delivered is defective, the defendant may reasonably suppose that the writ itself may correspond, and he may therefore fairly apply to set aside *both*, and although the writ afterwards appear sufficient but the copy is defective, the defendant's application will succeed *pro tanto*. (b) It seems therefore to be advisable in general, when the copy delivered is insufficient, to apply to set aside the writ and copy and service, unless it has been previously ascertained that the writ itself was sufficient, in which case, if the rule should require too much, the Court might refuse costs.

It is usual when there is an omission in the writ or copy served to draw up the rule nisi for cancelling the bail bond or discharging the defendant out of custody, or setting aside the writ or service for a defendant to make it part of the terms "on his entering a common appearance," which, if accepted, would preclude the plaintiff from commencing a fresh action or arresting him again; but this is entirely optional, and even the Court could not without the defendant's consent order such appearance; (c) nor if offered by the defendant is the plaintiff bound, at least in a bailable action, to accept such common appearance, for he might resolve to arrest the defendant in a fresh action. (e) But in order to arrest again, an application at Chambers should be made for leave to arrest a second time, and the plaintiff must first discontinue his former action. (d)

Thirty-first,  
Preparing to  
serve or execute  
the writ.

*Thirty-first*, The intended writ having been duly filled up on parchment, and signed and sealed, and a *præcipe* thereof left at the proper office, and all the indorsements to be made antecedent to service or execution having been properly filled

(a) *Hasker v. Jarman*, 1 Dowl. 654; and see *Cohen v. Watson*, 3 Tyr. 238; Tidd, Supp. 1833, p. 75.

(b) *Hasker v. Jarman*, 1 Dowl. 655.

(c) *Perring v. Turner*, 3 Dowl. 15, 16, and *Jackson v. Jackson*, 3 Dowl. 182, as to a second arrest.

(d) *Jackson v. Jackson*, 3 Dowl. 182.

up, the plaintiff's attorney should make at least as many fair and *exact copies* of the whole, (without contractions, upon paper, and which are usually printed,) as there are defendants, so as to serve and leave with each defendant one copy of such process. Indeed, it seems prudent to make and carefully examine at least one copy of the writ *more* than may be required to be served, so as to have the same ready to be annexed to and verified by any affidavit that may afterwards arise, and it would even be advisable to file in the attorney's office an examined copy in every cause. In serviceable process, as a writ of summons, the person who is to serve each copy should keep the original and all such copies until the latter have been served. But in bailable process the original *capias* and the copies thereof are to be delivered to the undersheriff of the proper county, and after the warrant has been obtained, then to the officer who is to execute the process, so that he may have the same ready to produce to the defendant. (f)

*Thirty-second,* The writ, whether serviceable or bailable, together with the copies, having been filled up and fully indorsed according to the preceding directions, and the writ itself having been duly signed and sealed, after the whole have been *very carefully examined* with each other and with the præcipe, are then to be *delivered* to be executed. If serviceable, then usually to a clerk of the attorney, but sometimes to an experienced officer, when any great difficulties in effecting a service are expected, and if bailable, the original writ and copies are to be taken to the office of the proper undersheriff of the county in which the defendant is to be arrested, in order that he may thereupon issue a warrant to one or more of the sheriff's officers or bound bailiffs, or sometimes to a person not a general officer of the sheriff, but particularly named *pro hac vice* by the plaintiff's attorney, and each will thereupon be executed as hereafter stated when we consider the proceedings by summons, distringas, *capias*, &c. separately. We have seen that the sheriff of every county is now bound to have an office of his undersheriff in the metropolis, or within one mile of the Inner Temple, to which all process may be taken, (g) and it is the duty of such undersheriff promptly to forward the process left at such office to a proper officer in the proper county there to be executed; so that it is not absolutely es-

*Thirty-second,*  
The execution  
of the writ by  
service or arrest  
in general.

---

(f) 2 W. 4, c. 32, s. 4.

(g) 3 & 4 W. 4, c. 42, s. 20, *ante*, 47.

CHAP. V.  
OTHER  
GENERAL  
POINTS.

Defendant's  
attorney's writ-  
ten undertaking  
to appear.

sential for a London attorney to employ any agent in the country, but still it is usual to do so when there is great anxiety to see that the officer immediately performs his duty without collusion with the defendant, which it might be difficult afterwards to establish so as to fix the sheriff.

In cases when it is not apprehended that the defendant will attempt to avoid the service or execution of the writ, if previously informed of the intention to issue the same, it is a usual and proper courtesy for the plaintiff's attorney, with the concurrence of his client, (*h*) to request the defendant to name his attorney, who will either *undertake to appear, or to obtain a sufficient bail bond, or to put in and perfect bail above*, so as to avoid personal annoyance and imprisonment, whilst the office is searched, and some extra expense. It is essential thereupon to require a *written undertaking* from such attorney, and which the Court would on motion enforce by attachment or strike him off the roll; (*i*) but they would not thus interfere unless the undertaking were *in writing and signed* by the attorney. (*k*) If an attorney give an undertaking to the *plaintiff or his attorney* to appear to a bailable action, he must perfect bail above or render the defendant, or be attached or struck off the roll, (*l*) and an undertaking of this nature need not state the consideration, for it is not an engagement within the meaning of the statute against frauds, 29 Car. 2, c. 3, s. 4, or at least it may be enforced by attachment. (*m*) It may, however, be advisable so to frame the undertaking shewing sufficient consideration as to enable the plaintiff to sustain an *action* thereon, in case the remedy by attachment should be defeated by death or otherwise. (*n*) But such an undertaking by an

(*h*) It is advisable to obtain *express* concurrence, for otherwise if the defendant should abscond, the plaintiff's attorney might be subject to an action at the suit of his client for his unfortunate liberality.

(*i*) Rule Mich. 1654; *Anonymous*, 6 Mod. 42; *Lorymer v. Hollister*, 2 Stra. 693; *Mould v. Roberts*, 4 Dowl. & Ryl.

719.

(*k*) *Lorymer v. Hollister*, 2 Stra. 693; *Lofft*, 192; *Stratton v. Burgis*, 1 Stra. 114; see further post. chap. vi.

(*l*) *Sedgworth v. Spicer*, 4 East, 569; *Rogers v. Reeves*, 1 Term R. 422.

(*m*) *Re Greaves*, 1 Crompt. & J. 374; *Re Paterson*, 1 Dowl. 469.

Form of under-  
taking by a de-  
fendant's at-  
torney to the  
plaintiff or his  
attorney, to  
put in or perfect  
bail above.

(*n*) The following form is suggested.

In the Court of —. A. B. plaintiff against C. D. defendant. In consideration of the plaintiff having at my request agreed not actually to arrest the above-named defendant in this action, (or "to allow the defendant to be released out of the custody of the sheriff of — in this action, without executing a bail bond with sureties,") I, as the attorney for and on the behalf of the said defendant, agree for myself and my executors and administrators with the said plaintiff to cause bail above in this action to be put in and perfected in due time, or a sufficient deposit in Court to be made pursuant to the statute, or the defendant to be duly rendered in due time, or that I will myself pay the debt and costs. Dated this — day of — A. D.

E. F. defendant's attorney.

attorney, if given to the *sheriff* or *his officer*, is considered contrary to the policy of the 23 Hen. 6, c. 9, as leading to extortion in consideration of the indulgence, and would therefore be void.(o)

CHAP. V.  
OTHER  
GENERAL  
POINTS.

The 10th section of the 2 W. 4, c. 39, we have seen, enacts, "That no writ issued by authority of this act (and extending " to all the process to compel appearance or bail above therein " enumerated) shall be in force for more than *four calendar " months* from the day of the date thereof, including the day " of such date; but every writ of summons and *capias* may be " continued by alias and pluries, as the case may require, if " any defendant therein named may not have been arrested " thereon or served therewith." The same section then provides for writs to save the operation of a statute of limitations, and prescribes the requisites of continued process. The 11th section relates, as we have seen, to proceedings on the process during the vacation, and excepting certain proceedings between the 10th of August and 24th of October,(p) and which seem only to suspend *declaration* and *pleadings*. The principal advantage resulting from the enactments, that writs shall be dated on the day when issued, and thus continue in force for four months, is, that the vexatious practice of issuing and charging a defendant for several successive writs, returnable on the day when issued, or very soon after, and as to render it scarcely possible to execute the first process before it was returnable, has now been put an end to, and it can scarcely be necessary to issue more than one writ, unless in cases where the defendant purposely evades process, when a *distringas* may properly issue.

Duration of the writ and time within which it must be executed.

The service or execution of process on a *Sunday* would we have seen be illegal and void. But a writ may be served, or an arrest made, or a seizure made under a *distringas*, at any *hour* of the day or night, though not at a time when the defendant is privileged by attendance on a Court of justice, when it would be irregular even to serve him with process.

Time of execution.

With respect to the *place* where process is to be executed, there is less strictness in the service of a writ of summons than in executing a *capias* or *distringas*. Formerly, if the service, although actually out of the proper county, yet if it were on the confines, the Courts would not interfere to set the service

Place where to be executed.

(o) *Sedgworth v. Spicer*, 4 East, 509; (p) See sect. 11, *ante*, 152.  
*Lewis v. Knight*, 8 Bing. 271.

CHAP. V.  
OTHER  
GENERAL  
POINTS.

aside, and there was much uncertainty respecting the term confines, or the distance out of the county that should be permitted;(q) and therefore to put an end to any uncertainty, the 1st section of 2 W. 4, c. 39, enacts, "that a writ of summons must be served in the county in which the defendant is therein described to reside or be, or within 200 yards of the border thereof," and which, according to a recent decision, are to be measured in a straight line or bird's flight, without regard to intervening streets, ways or objects.

With respect to writs of *capias* and *distringas*, they must be executed within the precise boundary of the county to the sheriff of which they are directed, or the arrest or distress would be void, and subject the sheriff and officer to an action of trespass. The 2 W. 4, c. 39, s. 20, however, provides, that when a district or place, part of one county is situated within, and surrounded by some other county, then for the purpose of the service and execution of *every* writ and process, whether mesne or judicial, such district or place shall be deemed and taken to be part as well of the county wherein such district or place is so situate, as of the county whereof the same is parcel, and every such writ and process may be directed accordingly, and executed in either of such counties. An outer door must not be broken in order to execute a *capias* or serve a summons; and although the house of a third person may be entered when the outer door is open, for the purpose of arresting a defendant who is found there, yet if he were not there the officer would be a trespasser, unless he have the license of the occupier to search.

Mode of Service  
or execution of  
the process,  
serviceable or  
bailable, viz.,  
by delivering a  
copy of the writ  
to the defendant.

When we state each process *in particular*, we shall have to consider the precise mode of serving a writ of summons or *distringas*, or *capias*; but as essentially connected with the requisites of the writ itself, it is proper here to notice that the statute, 2 W. 4, c. 39, s. 1, 3, 4, 8 and 9, require *a copy* of each process to be delivered to the defendant, (or in case of a *distringas*, when the defendant cannot be *personally* served, to be *left for* the defendant,) with all notices, warnings, memoranda and indorsements, and the term *copy* is here construed strictly as to all the requisites enjoined by the 2 W. 4, c. 39, in the *writ* itself, though as to the indorsements of the claim of debt and costs, required only by the rule of Court of Michaelmas term, 3 W. 4, less strictness has been required, and we have

(q) *Coulson v. King*, 2 Crompt. & J. 474.

seen that an amendment in the latter instance is now in general permitted on payment of costs. (r)

It will be observed that accuracy in the *copy* of the process, delivered to the *defendant*, as respects information to the *defendant himself*, is even more important than any authority to the sheriff, because it is the document by which principally his proceedings are to be regulated. (s) It has therefore justly been held that nothing can in strictness be deemed a *copy*, unless it be *precisely* similar, and that the slightest omission in a supposed copy of a matter required by the statute, and to be found in the writ itself, would be fatal; and even the *omissions* of the *teste* or date of the writ, (t) or (at least it was formerly so) the omission of the letter *l* in Middlesex, (u) or of the *s* in the sheriffs of London, (x) or indeed any other omission, (y) or the improper addition of the letter *s* to sheriff of Middlesex, (z) though it will be observed neither could affect the steps to be taken by the defendant, is fatal, nor will the Court permit an amendment. (a) But still we have seen that the omission, or addition, or mistake of a *letter*, *not really altering the sound, sense or meaning*, has in the most recent cases been considered immaterial. (b) If a proper copy of the process be not delivered to the defendant, the arrest or service of the writ is to be deemed incomplete, for the object of the statute was to give the defendant information of the precise demand made against him. (c)

*Thirty-three*, The other requisites to be observed, after the service or execution of the writ, might perhaps be more properly considered after we have stated the particular mode of executing each writ by service, arrest, &c; (d) but as we have proposed in this chapter to take a general and comparative view of all mesne process and proceedings thereon, we will here give a summary. The 2 W. 4, c. 39, s. 1, enacts, that the person serving a *writ of summons* shall indorse *on the writ* the day of the month and week of the service thereof; and the

*Thirty-three*,  
Indorsements of  
time of serving  
or executing  
writ.

(r) *Ante*, 213.

(s) *Byfield v. Street*, 10 Bing. 28; and see *Street v. Carter*, 2 Dowl. 671.

(t) *Perring v. Turner*, 3 Dowl. 15; *Byfield v. Street*, 2 Dowl. 739.

(u) *Ante*, 186, 187; but see *id.*

(x) *Nichol v. Boyn*, 10 Bing. 339.

(y) *Ante*, 187; *Hodgkinson v. Hodgkinson*, 3 Nev. & Man. 564; 2 Dowl. 535; *Smith v. Pennell*, 2 Dowl. 651; *Street v. Carter*, *id.* 671.

(z) *Barker v. Weedon*, 1 Crompt. M. & R. 396; *Jackson v. Jackson*, *id.* 438; 3 Dowl. 182, S. C.

(a) *Byfield v. Street*, 10 Bing. 27; 2 Dowl. 739; but see 3 Nev. & Man. 564.

(b) *Forbes v. Mason*, 3 Dowl. 104; and see *Nichol v. Boyn*, 10 Bing. 340, and *ante*, 231, 232, as to misspelling.

(c) Per Tindal, C. J., in *Nichol v. Boyn*, 10 Bing. 339.

(d) *Post*.

CHAP. V.  
OTHER  
GENERAL  
POINTS.

rule 3 of M. T. 3 W. 4, orders, that he shall make such indorsement *within three days* at least after such service, and that otherwise the plaintiff shall not be at liberty to enter an appearance for the defendant according to the statute, and that every *affidavit* upon which such an appearance shall be entered shall mention the day on which such indorsement was made. (f) The 4th section, 2 W. 4, c. 39, as to a *capias*, enacts, that the officer executing the same shall *forthwith*, after the execution of such process, cause *one copy* of the writ, with every memorandum or notice subscribed, and all indorsements thereon, to be delivered to every person upon whom such process shall be executed, whether by service or arrest, and shall indorse upon such writ the true day of the execution thereof, whether by service or arrest. And rule 4 of M. T. 3 W. 4, orders, that the sheriff or other officer or person to whom any writ of *capias* shall be directed, or who shall have the execution and return thereof, shall *within six days* at the least after execution thereof, whether by service or arrest, indorse on such writ the true day of execution thereof, and in default thereof shall be liable, in a summary way, to make such compensation for any damage which may result from his neglect, as the Court or judge shall direct. Moreover, the form of *capias*, as prescribed in schedule 4, requires the sheriff, immediately after he has executed the writ, to return the same, together with the manner *and day of* execution.

Forms of indorsement of service or execution of mesne process.

Consequences of sheriff's non-compliance.

The form of indorsement on a writ of summons or on a *capias* may be as subscribed. (g)

If a sheriff should neglect to comply with this rule, by not indorsing on the writ of *capias* the day of its execution, the plaintiff's remedy is not by attachment, but by a motion to the Court for a rule calling on the sheriff to shew cause why he should not amend his return according to the fact, as to the time of the arrest stated in an affidavit in support of the motion,

Indorsement of time of service on a writ of summons.

The like on a writ of *capias*.

(f) See form of such affidavit next chapter.

(g) The indorsement on a writ of summons may be thus:—

*This writ was served by me, John Atkins, on the within named C. D. on Monday the 8th day of January, A.D. 1835.*

John Atkins.

The form of indorsement on a *capias*:—

*"C. D. was arrested by me, G. H. by virtue of this writ on the — day of —, 1835, and forthwith after such arrest I on the same day delivered to the said C. D. a copy of this writ. G. H." [or if the defendant or one of them was served with the *capias*, then as to him indorse thus:—"This writ was served by me, G. H. on the within named C. D. on the — day of — 1835. G. H."]*



and also make compensation to the plaintiff as the Court shall direct for the delay and damage stated in the same affidavit, and also why he should not pay the costs of the application. (h)

CHAP. V.  
OTHER  
GENERAL  
POINTS.

*Thirty-four.* As a general rule to be observed with reference to the execution of all process that may afterwards require an *affidavit*, specifying the mode of executing the same, it is advisable, especially as now there is no expense of stamp duty, to make such affidavit in the *first* instance, for from want of it, in case of the death or absence of the officer or party who served or executed the process, the Court would not receive or act upon mere hearsay evidence of the service. (i) The forms of such affidavits applicable to the service of each process will be found in the succeeding chapters.

*Thirty-four,*  
Affidavits of  
execution of  
process.

*Thirty-five.* Rules or orders to return writs.—The 2 W. 4, c. 39, s. 10, enacts, that the *return* to *bailable* process shall be made by the *sheriff* or *other officer* to whom the writ was directed, or his successor in office; and *process not bailable* is to be returned by the *plaintiff* or *his attorney* suing out the same, as the case may be; but any return to process not bailable is not usual, excepting in proceedings to save the statute of limitations, when it may become necessary to return the first non-bailable process "*non est inventus*," and to enter the same of record within the time and in the manner enjoined by the same section.

*Thirty-five,*  
Return to writ,  
by whom to be  
made.

It will be observed that the prescribed forms of the writs of *capias* and of *detainer* command the sheriff or other officer "*immediately*" after the execution of the writ of *capias* or service of the writ of *detainer* to return the writ to the proper Court, together with the manner in which he executed the same, and the day of the execution thereof; and rule 4 of M. T. 3 W. 4, we have seen, requires that the sheriff or other officer, having the return of a *capias*, shall within six days after he executed it, indorse the true day of the arrest. The 11th and 12th rules of H. T. 2 W. 4, ordered, that where the rule to return a writ expired in the vacation, the sheriff should file the writ at the expiration of the rule, or as soon after *as the office shall be open*, and that the officer with whom the return was filed should indorse the day and hour when filed. (j)

(h) *Ridley v. Weston*, 2 Moore & S. 724; Tidd, 97; *Moore v. Thomas*, 2 Dowl. 760, S. C.

(i) *Daniels v. Varsity*, 3 Dowl. 26.  
(j) See Jervis's Rules, 45, notes (l), and (m).

CHAP. V.  
OTHER  
GENERAL  
POINTS.

---

It has been observed, that perhaps the *return* may be reckoned of the day of the officer's so marking the return, but not *always* so as regards the teste of a writ of exigent founded thereon, which might be of the day when the sheriff actually *left* his return in the proper office, (k) or of that made by the officer.

*Enforcing return to, and proceedings upon writs in vacation by a rule of Court in term time, or judge's order in vacation, and subsequent attachment thereon.*

The stat. 2 W. 4, c. 39, s. 15, enacts, that "it shall be lawful in term time for the *Court* out of which *any writ* issued by authority of this act, or any writ of *capias ad satisfaciendum*, *fieri facias*, or *elegit* shall have issued, to make *rules*, and also for any judge of either of the said Courts, *in vacation*, to make *orders* for the return of any such writ; and every such order shall be of the same force and effect as a rule of Court made for the like purpose; provided always, that no attachment shall issue for disobedience thereof until the same shall have been made a rule of Court." The rule M. T. 3 W. 4, ordered, that in case a judge shall have made an order in vacation for the return of *any writ* issued by authority of the aid act, or any writ of *capias ad satisfaciendum*, *fieri facias*, or *elegit*, on any day in vacation, and such order shall have been duly served, but obedience shall not have been paid thereto, and the same shall have been made a rule of Court in the term then next following, it shall not be necessary to serve such rule of Court, or make any fresh demand of performance thereon, but an *attachment* shall issue forthwith for disobedience of such order, whether the thing required by such order shall or shall not have been done in the meantime. And by rule H. T. 3 W. 4, "in case a rule of Court or judge's order for returning a bailable writ of *capias* shall expire in vacation, and the sheriff or other officer shall return *cepi corpus* thereon, a judge's order may thereupon issue, requiring the returning officer (within the like number of days after the service of such order as by the practice of the Court is prescribed with respect to rules to bring in the body issued in term,) to bring the defendant into Court, *by forthwith putting in and perfecting bail above to the action*; and if the returning officer shall not duly obey such order, and the same shall have been made a rule of Court in the term next following, it shall not be necessary to serve such rule of Court, or to make any fresh demand thereon, but an attachment shall issue forthwith for disobedience of such

---

(k) *Lewis v. Davison*, 3 Dowl. 275.

order, whether the bail shall or shall not have been put in and perfected in the meantime." (l)

These rules requiring an *immediate return in vacation*, altered the previous practice, according to which the sheriff in such a case had until the whole of the first day of the ensuing term *to file* his return, which in mesne process occasioned unnecessary delay pending vacation; (m) and it has been recently decided that a sheriff is bound to pay the necessary extra fee of 5s. 10d. for opening the treasury during vacation, in order to file his return, if an order to make the return under this 15th section of the uniformity of process act has been made; and that the 3 & 4 W. 4, c. 67, s. 2, as to making writs of execution returnable immediately, applies also to *executions* issued on *judgments* obtained as well before as since it passed. (n)

In the King's Bench it appears to be the practice to require two distinct motions in these cases, one for making the judge's order for the sheriff's returning the writ a rule of Court, and another motion and rule for an attachment against the sheriff for not duly returning the writ in pursuance of such order; (o) but in the Court of Exchequer, adverting to the terms of the above rule, *one* motion and rule suffices. (o)

A sheriff may and ought *voluntarily*, and without any rule or order for the purpose, to return to the Court what he has done in obedience to the command of the writ; but if he neglect to do so within eight days after he has executed the writ, then the plaintiff, or his attorney, may as a matter of course enforce a return by a rule of Court in term time, or by a judge's order in vacation.

The *rule of Court* in term time to return a writ, is a side bar or treasury rule, which may be obtained in term time from the clerk of the rules in King's Bench, or from the filacer in Common Pleas and Exchequer; (p) and by rule 1 Hil. T. 2 W. 4, s. 96, it may be obtained on the last as well as any other day in term. The *rule* expires in four days after service in London or Middlesex, and in six days in any other city or county. (q) It has been suggested that the time thus allowed a sheriff, especially of a distant county, to return a writ, since the rule

Rule to return writ, when and how obtained.

(l) See the rule 3 Tyr. 241.

(m) 5 East, 386; Jervis's Rules, 45, note (i).

(n) *Rees v. Sheriff of Surrey*, 3 Dowl. 82.

(o) *Stainland v. Ogle*, 3 Dowl. 99;

*Howell v. Bulkeel*, 2 Cr. & M. 339.

(p) Tidd, 9th edit. 484; see practice 1 Arch. K. B. 4th edit. 152; T. Chitty's Forms, 50 to 56; and post.

(q) Tidd, 9th edit. 307; Dax's Pri. 116; Chitty's Summary, 71.

CHAP. V.  
OTHER  
GENERAL  
POINTS.

may be served at his London office, to be kept, under 3 & 4 W. 4, c. 42, s. 20, is now too short, and that in some cases it might be impracticable to return the writ within the prescribed time. (r) The proceedings on a rule or order on a sheriff to *return a writ* will be more properly fully considered when we examine the whole of the proceedings against a sheriff for non-performance of his duty, especially in bailable actions, where the defendant has escaped, or has not put in and perfected bail above. It is, however, expedient here to consider the different forms of returns to writs of *capias*.

Forms and re-  
quisites of  
Returns to  
mesne process.

When the sheriff returns *cepi corpus* to a writ of *capias*, *i. e.* that he has arrested the defendant, the usual form indorsed on the parchment writ may be one of the following four, adopting that most applicable to the facts. If the defendant be *not found*, the sheriff is to return *non est inventus*, as below, where also will be found the forms of several other returns to mesne process. The returns to process issued in order to *outlaw* a defendant, or to save the statute of limitations, will be found in subsequent chapters. (s)

---

(r) 9 Legal Observer, 147, 148. And v. *Gibbs*, C. P. Hil. T. 1835, 1 Harrison's  
see the observations of Park, J. in *Grant* Rep. 58.

Return of *cepi corpus*, and bail-bond taken.

(s) On the — day of —, A.D. 1835, (a) I took the within-named C. D. in my bailiwick, and forthwith delivered to him a copy of this writ, and him safely kept until he † gave me bail in the within action, as by this writ is required, and as I am within commanded. (b)

The answer of

Samuel Wilson, }  
James Harmer, } Sheriffs.

Return to a *capias* of *cepi corpus*, and a deposit of debt, and £10, pursuant to 43 G. 3, c. 46.

[The same as above to the †, and then as follows :] until he deposited in my hands, by delivering the same to my officer appointed for that purpose, the sum of £—, being the sum indorsed on the said writ by virtue of the affidavit for holding to bail in this action, together with £10 in addition to such sum to answer costs, pursuant to the statute, and which said sums I have paid into the hands of, &c.

In King's Bench, "of the signer of writs of and in the Court of King's Bench;" in Common Pleas, "of the prothonotaries of the Court of Common Pleas;" and in the Exchequer, "of the clerk of the pleas of the Court of Exchequer." (c)

Return to a *capias* of *cepi corpus et paratum habeo*, &c. where a defendant remains in sheriff's custody.

On the — day of —, A.D. 1835, I took the within-named C. D., and forthwith delivered to him a copy of this writ,\* and whose body I have ready as within I am commanded. (d)

The answer of L. M., Sheriff.

(a) The rule Mich. T. 3 W. 4, Rule 4, requires the *true day* of the execution to be indorsed by the sheriff, &c.

(b) *Semle*, the words in italic, though usual, may be omitted.

(c) The form of return sometimes states a deduction by the sheriff for his fees, but according to *Stewart v. Brucebridge*, 2

Bar. & Ald. 770; 1 Chitty's Rep. 529; *Hunn v. Brine*, 6 Moore, 124; *Haines v. Nairn*, 2 Dowl. 43; neither the sheriff's nor any other officer's poundage or fee can be deducted on an order for payment of this money out of Court, 1 Arch. K. B. 4th edit. 147.

(d) *Supra*, note.

If the sheriff return non est inventus to a capias, the Courts will not, even upon strong affidavits of an arrest and collusion between the defendant and officer, compel the sheriff to alter his return, but will leave the plaintiff to his remedy by action for the escape and false return, as a better mode of trying the fact than by affidavits.(t)

CHAP. V.  
OTHER  
GENERAL  
POINTS.

Proceeding on  
a return of non  
est inventus to  
a capias.

*Thirty-sixth*, When process has been served or executed upon a defendant, there are various circumstances to be forth-

*Thirty-sixth*,  
Summary of  
the circumstan-

[Same as last to the \*, and then as follows:] whose body remains in the prison of the lord the king, under my custody.

The answer of L. M., Sheriff.

The like, and  
defendant in  
prison.

[Same as the third form to the \*, and then as follows:] whose body I have ready as within I am commanded, but the within-named E. F. is not found in my bailiwick.

The answer of L. M., Sheriff.

Return of  
arrest of one  
defendant, and  
non est inventus  
as to another.

[Same as the third form to the \*, and then as follows:] who remains in my custody as such sheriff under the said writ, but is so weak and infirm, that without great peril and danger of his life I cannot take his body to any prison, but whose body I have ready.

The answer of L. M., Sheriff.

Return of cepi  
corpus and  
languidus. (a)

[Same as the first form, ante, 248, note, to the t, and then proceed thus:] safely kept until and upon the — day of —, A.D. —, when and on which day I received an order under the hand of William Bolland, knight, one of the Barons of the Court of Exchequer, which is in the words and figures, or to the purport and effect following, that is to say, [here set out the judge's order for discharge of defendant verbatim, and at the end the officer's certificate that defendant had entered an appearance, being one of the terms of the order, and was indorsed on order thus:] Indorsed, I certify that an appearance hath been entered for the defendant herein. Dated the 5th day of November, A.D. 1834. Wm. Perry. (L.S.) In obedience to which said order I discharged the said C. D. out of my custody, and permitted him to go at large. Therefore I cannot have his body before the Barons of His Majesty's Exchequer at Westminster, as I am within commanded.

The answer of

Alexander Raphael, } Sheriff.  
John Illidge, }

Cepi corpus  
and detention  
until defendant  
was discharged  
by a judge's  
order.

The within-named C. D. is not found in my bailiwick. Dated this — day of — A.D. 1835. (b)

The answer of L. M., Sheriff.

Return to a  
capias of non  
est inventus.

(a) This form differs from that in T. Chitty's Forms, 53, but is adapted to a case where an officer has arrested a defendant, and cannot safely remove him to any prison, and retains him in custody even in the defendant's own house, and as he certainly lawfully may.

(b) Some forms omit the date of the return, but it seems preferable to insert it, as the writ of exigent and proclamations are to be dated on the day the sheriff's return took place, *Lewis v. Davison*, 3 Dowl. 275.

(t) *Goubot v. De Crouy*, 3 Tyrw. 906.

CHAP. V.  
OTHER  
GENERAL  
POINTS.

ces to be attended to by a Defendant promptly after service or execution of process in general.

with attended to by him. Some of these are of a *general* nature, extending more or less to *all* process, and others confined or limited to one of the five forms of writs we have thus generally examined; those of the former nature, according to the intention of this chapter, may be *here* properly noticed; those of the latter description will be more properly stated when we consider each process and proceedings thereon in particular. There is, however, one general advice, viz. that every defendant, *immediately* he has intimation of process, should examine and take advice upon every circumstance in his favour, and *promptly* act, because he may otherwise lose the benefit. Thus he has only four days during which he *must* pay the indorsed debt and costs, or incur further expense; and in general he must object to every irregularity *within eight days* after he has been served with a copy of the writ of summons or capias, or he will be too late, if he have any intimation of the proceeding; and he must also enter his appearance or put in bail above in eight days, or certain inconveniences and expenses may ensue.

The principal circumstances to be attended to by a defendant upon whom process has been executed, are, first, the right to inspect the original parchment writ and warrant, and immediately to receive an *exact copy* of the former. He has in the next place, if arrested, a right to insist on being taken to any friend's house in the county within three miles of the place of arrest, for the first *twenty-four* hours, and before he can be legally taken to any prison, lock-up house, tavern, &c. He may also immediately deposit the sum indorsed on the writ as sworn to, with £10 in lieu of a bail-bond; or he may, with two friends having sufficient property in the county, so as to be probably known to the officer, tender and execute a bail-bond; or sometimes he may prevail on his attorney to give his undertaking to the plaintiff's attorney to put in and perfect bail above; or he may be exchanged into the custody of a more friendly officer, or one who has a more convenient lock-up house in the county; or, if privileged from arrest, may apply to a judge for his discharge; and which, if arrested whilst attending a superior Court, may be obtained instanter. Within four days he may pay the debt and costs indorsed, as the extent of the plaintiff's claim, without incurring any further costs. He may also require the supposed plaintiff's attorney to state whether the writ was issued with his authority, and if he answer in the affirmative, to state in writing the profession, occupation, and residence of the plaintiff. He may also now in all the Courts, in some actions, obtain particulars of the plaintiff's *demand*

before appearance or bail above, and without affidavit. He must also, within the eight days allowed for entering his appearance or putting in bail, cause a motion to the Court to be made, or a summons, obtained in general on a proper affidavit of facts, to set aside the proceeding for irregularity.

CHAP. V.  
OTHER  
GENERAL  
POINTS.

*Thirty-seventh*, There is one proceeding on the part of a defendant applicable to *all* writs, which it will be proper to notice in this chapter, on the *general* requisites of process, and proceedings thereon, viz. the right of a defendant, under the 2 W. 4, c. 39, s. 17, (u) to require the attorney whose name is indorsed on mesne process as having issued the same as attorney for the plaintiff, to *declare* whether the writ was issued with his authority, and if he answer in the affirmative, then the Court or a judge may order such attorney to declare in writing the profession, occupation, or quality and place of abode of the plaintiff, and if he neglect to do so he may be attached; and if the attorney declare that the writ was not issued by his authority, then the Court or judge may order the defendant's immediate discharge from imprisonment; (u) and the rule of Court, Mich. T. 3 W. 4, r. 14, ordered, that if any attorney shall, as required by the said act, declare that any writ of summons or writ of *capias*, upon which his name is indorsed, was not issued by him, or with his authority or privity, all proceedings upon the same shall be stayed until further order. (x) The form of such request, and of the attorney's compliance, may be to the effect subscribed in the note. (y) The forms of affidavit

*Thirty-seventh*, A defendant's proceedings to ascertain as well the authority of the plaintiff's attorney to proceed, as also the description and residence of the plaintiff.

(u) See the enactment, ante, 153, in note, and also ante, 210, 211.

(x) See the rule, ante, 161, note.

(y) In the —.

Sir,

I do hereby, in pursuance of the statute in that case made and provided, demand and require you to declare to me forthwith in writing, whether a writ of summons, dated on, &c. and indorsed as having been issued against me C. D., of, &c. by you E. F., of —, as the attorney for A. B., has been issued by you, or with your authority or privity; and if you shall answer in the affirmative, then I hereby require you to declare in writing, within — days from the service hereof, the profession, occupation, or quality and place of abode of such plaintiff. Dated this — day of —, A.D. 1835.

Yours, &c.

To Mr. E. F., of, &c.

Between { A. B., Plaintiff,  
and  
C. D., Defendant.

C. D., the above-named defendant,

or,

L. M. of, &c. attorney for the said C. D.

In the Court of —.

Between { A. B., Plaintiff,  
and  
C. D., Defendant.

In pursuance of your request, I hereby declare that the writ of summons with which you have been served at the suit of A. B., was issued by me and with my authority,

Demand in writing under stat. 2 W. 4, c. 39, s. 17, by a defendant on plaintiff's attorney requiring him to declare whether the process was issued by him or with his authority, and also to state the place of abode, &c. of the plaintiff.\*

Attorney for plaintiff's compliance with request. †

\* See another form, T. Chitty's Forms, 43, where see a form of a judge's order for plaintiff's attorney to state the pro-

fession, &c. of plaintiff.

† See form of statement in obedience to a judge's order, T. Chitty's Forms, 44.

**CHAP. V.  
OTHER  
GENERAL  
POINTS.**

---

to obtain the defendant's discharge, on the ground that the writ was issued without the attorney's authority, and of the order of a judge and rule of Court, and writ of supersedeas therein, will also be found in print. (z) This enactment and rule now enable a defendant not only to ascertain whether the plaintiff's attorney has adequate authority to receive a debt and costs, or compensation, but also enable the defendant to find out the claimant, and make terms with him personally if he think fit.

---

and that the said A. B. resides and carries on the business of a —, at the house and premises situate and being No. —, in — Street, in the parish of —, in the county of —, and that the same house was and is the place of the abode of the said A. B. Dated, &c.

Yours, &c.

E. F., of, &c. plaintiff's attorney.

---

(s) T. Chitty's Forms, 44 to 46.



## CHAPTER VI.

OF THE WRIT OF SUMMONS, PROCEEDINGS THEREON, AND  
APPEARANCE.

Consideration, what process to issue.  
Plaintiff's right to abandon service-  
able process and issue *capias* ....

SECT. I. *Form and requisites of writ  
of summons, and indorse-  
ments and service thereof.*

*First*, The enactments and rules  
relating to

1. The 2 W. 4, c. 39, s. 1,  
and 3 & 4 W. 4, c.  
67, s. 1.....
2. The Rules Mich. T. 3  
W. 4.....

*Second*, Form of writ with in-  
dorsements .....

*Third*, When this writ preferable.

*Fourth*, Of several concurrent  
writs of summons .....

*Fifth*, Practical proceedings on  
issuing same.....

*Sixth*, Service of, how to be  
made .....

1. Of what copy .....
2. By whom to be served .
3. On whom.....
4. Time of service .....
5. Place of service .....
6. Mode of service by de-  
livering a copy.....

*Seventh*, Indorsements of day of  
service .....

*Eighth*, Return of summons, non  
est inventus .....

*Ninth*, Proceedings in case of  
defendant's default of appear-  
ance .....

*Tenth*, Of disputed service ....

SECT. II. *Proceedings of the defendant  
after service of summons .*

1. Demanding inspection of  
the principal writ and  
taking copy thereof ..
2. Search for and examina-  
tion of *præcipe* ....
3. Demand whether writ  
issued by authority of  
attorney, &c. ....
4. Discovery of Irregulari-  
ties and time and mode  
of objecting to same .
5. Payment of indorsed  
debt and costs .....
6. Summons to stay pro-  
ceedings on payment  
of debt and costs, and  
taxing costs thereon..
7. Time when to appear ..
8. Mode and form of ap-  
pearance by defendant  
or by plaintiff for him.  
1. By defendant .....
2. By plaintiff for de-  
fendant.....
9. Of declaring on a sum-  
mons.....

AN attorney having been retained and fully instructed, and hav-  
ing considered all the circumstances of the particular case, as  
recommended in the preceding chapter, (a) the next question is,  
*what process should be issued?* and as the *first* process is the  
root of the action from which all subsequent proceedings  
spring, (b) and it *now* in general governs the subsequent pro-  
ceedings and *may materially* influence the successful result of  
the action, (b) this part of practice (especially as mistakes

CHAP. VI.  
PROCEEDINGS  
ON SUMMONS,  
&c.

Consideration  
what process  
should be issued.

(a) *Ante*, 114 to 139.

(b) An eminent special pleader, partial  
to *fanciful illustrations*, has resembled an  
*action*, and the proceedings therein, to a  
*tree*, considering the writ or process as the  
root, the declaration the *stem* or body, the  
pleas the *main branches*, the replications

and subsequent pleadings, issues, verdict  
and judgment as the *smaller ramifications*,  
and the execution for debt, damages and  
costs as the *fruit*. As, however, any  
utility in following this supposed analogy  
is not very obvious we will not pursue it.

CHAP. VI.  
PROCEEDINGS  
ON SUMMONS,  
&c.

therein now may occasion such an infinity of troublesome, dilatory, and expensive summonses, or motions to set aside the proceedings for irregularity,) demands particular attention. Although the ancient process has been entirely abolished as regards *personal* actions, and five newly framed writs have been substituted by the uniformity of process act, 2 W. 4, c. 39, yet the principal object of all the different processes, whether ancient or modern, has always been, and must continue to be, that of *compelling the appearance of a defendant to answer a plaintiff's complaint*, and in *bailable* process also to secure the ultimate satisfaction of the claim or the render of the defendant to prison; so also the principal question is, and will continue to be, *how are those objects to be best attained?* This must depend in a great measure on the varying circumstances of each case. If there be a debt of twenty pounds or upwards which can be sworn to, and it is expected that before judgment can be obtained the defendant will probably dispose of his tangible property and abscond, then a *bailable writ of capias* or a writ of detainer to *arrest* or *detain* the defendant, and have him imprisoned or continue his imprisonment, and compel the security of bail, may be proper; but if there be no such debt, or if there be no reason to suspect that the defendant will abscond, then a *writ of summons* should be preferred. (c) If the defendant evade process, but has *goods which may be distrained*, then a writ of *distringas* to seize such goods, but always to be preceded by a writ of summons, will be proper; but if the defendant has already *absconded*, or *will avoid process*, or is *abroad*, then proceedings to *outlawry* should be preferred.

A plaintiff's right to abandon serviceable process and issue bailable without first discontinuing.

It was held, before the uniformity of process act, 2 W. 4, c. 39, that a plaintiff who has issued and even actually served on the defendant serviceable process *may abandon the same* by giving him notice of such abandonment, and requiring him *in writing not to appear*, and may afterwards, without first discontinuing, issue bailable process for the same debt, and arrest the defendant; (d) and since the uniformity of process act the same practice has been decided to be regular. (e)

We will now proceed to examine each of the several modern process with more particularity; in doing which, to avoid repe-

(c) See the question whether or not it be expedient to arrest considered, *ante*, 137 to 139, and *post*, chap. viii. of a writ of *capias*.

(d) *Bishop v. Powell*, 6 Term R. 616.  
(e) *Chapman v. Vanderelde*, Hil. T. 1835, K. B. 3 Dowl. 313; 9 Legal Obs. 300.

tion, it will constantly be necessary to keep in *recollection* or to refer to the last preceding chapter, where we purposely took a view of *all* the *principal requisites* and *incidents* more or less affecting *every description* of mesne process as the best mode of examining the subject.

CHAP. VI.  
PROCEEDINGS  
ON SUMMONS,  
&c.

SECT. I.—THE REQUISITES OF A WRIT OF SUMMONS, AND THE PROCEEDINGS THEREON.

*First*, The 2 W. 4, c. 39, s. 1, enacts, “ that the process in “ all *such* (i. e. personal) actions commenced in either of the “ said Courts, in cases *where it is not intended to hold the de- “ fendant to special bail or to proceed against a member of par- “ liament*, according to 6 Geo. 4, c. 16, (viz. as a trader and “ subject to the bankrupt law, and provided for in section 6, “ and schedule No. 6,) *shall* (whether the action be brought by “ or against any person entitled to the *privilege* of peerage or “ of parliament, or of the Court wherein such action shall be “ brought, or of any other Court, or to any other privilege, or “ by or against any other person,) *be according to the form con- “ tained in the schedule to this act annexed, marked No. 1. (and “ before stated), (f) and such process may issue from either of “ the said Courts and shall be called a writ of summons, and in “ every such writ and copy thereof, the place and county of the “ residence or supposed residence of the party defendant, or “ wherein the defendant shall be, or shall be supposed to be, “ shall be mentioned, and such writ shall be issued by the officer “ of the said Courts respectively, by whom process serviceable “ in the county therein mentioned hath been heretofore issued “ from such Court, (g) and every such writ may be served in the “ manner heretofore used in the county therein mentioned or “ within two hundred yards of the border thereof, and not else- “ where, and the person serving the same shall and is hereby “ required to indorse on the writ the day of the month and “ week of the service thereof.”*

*First, The enact-  
ments and rules  
relating to a writ  
of summons.*

Enactment of  
2 W. 4, c. 39.

The schedule No. 1, then prescribes the *form of the writ of*

Schedule and  
prescribed form

(f) *Ante*, 150 and 154, in note.

(g) See alterations as to *such officer* in K. B. by 3 & 4 W. 4, c. 67, s. 1, which enacts, that all writs of summons, distringas, capias, and detainer issued into *Middlesex* from the Court of K. B. shall be *signed, sealed, and issued*, and the fees

thereon shall be taken and accounted for by the same person or persons, and in like manner as all other writs of summons, distringas, capias, or detainer issued from the said Court of K. B. under and by virtue of the said recited act.

CHAP. VI.  
PROCEEDINGS  
ON SUMMONS,  
&c.

of writ of sum-  
mons.

Rule Mich.-3  
W. 4, 2nd Nov.  
1832.

The duration of  
a writ of sum-  
mons.

*summons*, and of the *memorandum* at the foot, and *some* of the *varying indorsements* thereon. *(h)*

The general rule Mich. T. 3 W. 4, (referring to that of Hil. T. 2 W. 4,) in actions for a *debt* requires an *indorsement* of the *sum claimed and costs*, and a notice in the form prescribed by the antecedent rule of Hil. T. 2 W. 4, that on payment of the same within four days further proceedings will be stayed. *(i)*

The 10th section prescribes the *duration* of the writ of summons to be four calendar months inclusive of the day of issuing, but authorizes *the continuance* of such process by alias and pluries writs of summons. The 12th section requires the writ to be *dated* on the day it is issued, and to be *tested* in the name of the chief justice or chief baron of the Court out of which it is issued, and to be *indorsed* with the name and place of abode of the *attorney* actually suing out the same, and in case such attorney shall not be an attorney of the Court in which the same is sued out, *then also* with the name and place of abode of the attorney of such Court in whose name such writ shall be taken out; and in case *no attorney* shall be employed for that purpose, then with a memorandum expressing that the same has been sued out by *the plaintiff in person*, mentioning the city, town, or parish, and also the name of the hamlet, street, and number of the house of such plaintiff's residence, if any such there be. *(k)*

Secondly, The  
Form and Re-  
quisites of a  
Writ of Sum-  
mons, Memo-  
randum and In-  
dorsements.

*Secondly*, We have seen that the 2 W. 4, c. 39, s. 1, and other sections, contain some enactments as to the *form* and *requisites* of the writ of summons itself; and the schedule No. 1 gives the *form* of such writ against a single defendant, with certain initials and blanks, in lieu of which certain facts, applicable to and varying in each particular case, are to be inserted. *(l)* It will be observed that, 1st, In lieu of the initials C. D., the actual full Christian and Surname of the defendant is to be stated: *(m)* 2dly, The particular place as well as county of the defendant's residence, or supposed residence, is to be stated in the body of the writ, *(n)* and if there be several defendants, each must be separately described by his full Christian and Surname, and place and county of residence: 3dly, The Court in which the appearance is to be entered, but without stating any particular office, so that the defendant, unless

*(h)* See the forms in blank, *ante*, 154, in note, and *post*, as to the several blanks or points which are to be filled up according to the facts of each case.

*(i)* See form of rule, *ante*, 160, in note, and see the decisions on that rule and consequences of nonobservance, *ante*, 212 to

215.

*(k)* See the several requisites, *ante*, 202 to 212.

*(l)* *Ante*, 154, and see notes.

*(m)* *Ante*, 165 to 174.

*(n)* *Ante*, 174 to 181.

he employ an attorney, must himself ascertain such office: (o) 4thly, The form of action must, we have seen, be described succinctly with great care and precision, and yet by no means conveying any certain knowledge of the particulars of the subject-matter or ground of action: (p) 5thly, The Christian and Surname of the plaintiff or plaintiffs must be described fully and accurately: (q) 6thly, In lieu of the initials A. B., printed in the schedule in that part of the writ of summons, which intimates to the defendant that in default of his causing an appearance to be entered in due time, an appearance will be entered for him, the full Christian and Surname of the plaintiff or plaintiffs must be repeated, and not the mere reference to the prior statement, by using the words "the said plaintiff:" (r) 7thly, The name of the chief justice or chief baron of the proper Court for the time being must be inserted in the next blank, as "Witness, Thomas Lord Denman, Chief Justice," or "Sir Nicholas Conyngham Tindal," or "James Lord Abinger, at Westminster," or in case of a temporary vacancy in either office, then in the name of the senior puisne judge of the particular Court: (s) and 8thly, The true day when the writ is actually issued must be inserted in the last blank. (t)

As respects the memorandum at the foot of the writ, stating its duration, the form is invariably in the words prescribed in the schedule. (u)

With respect to the indorsements on a writ of summons, there appears to be only one that must be invariably indorsed on a writ of summons, i. e. that of the name and abode of the plaintiff's attorney, (x) or agent and attorney; (y) or of his own residence when he sues in person. (z) When the action is strictly for a debt or money demand, then there must also be an indorsement of the amount of the claim for such debt and costs. (a) The forms of such indorsements are usually as stated in the notes. (b)

(o) Ante, 193.

(p) Ante, 194.

(q) Ante, 198.

(r) Ante, 200, n. (p).

(s) Ante, 202.

(t) Ante, 202.

(u) Ante, 205.

(x) Ante, 208.

(y) Ante, 209.

(z) Ante, 211.

(a) Ante, 212.

(b) 1. This writ was issued by John Tompkins, of No. 7, King's Bench Walk, Temple, London, attorney for the said John Atkins.

2. This writ was issued by John Tompkins, of No. 7, King's Bench Walk, Temple, London, Attorney, as agent for James Adams of Chelmsford, in the county of Essex, attorney for the said John Atkins.

Indorsements.

1. Of the name &c. of principal attorney issuing a writ.

2. The like, where the attorney issues writ as agent for another attorney.

CHAP. VI.  
PROCEEDINGS  
ON SUMMONS,  
&c.

We have seen, however, that after a copy of the writ of summons has been served upon a defendant, and within three days at least, there must be an indorsement made on the writ of the time of such service, (c) and which must afterwards be sworn to, or the plaintiff cannot enter an appearance for the defendant under the statute 12 G. 1, c. 29. The form of such indorsement is as in the note. (d)

Thirdly, When a writ of summons is or is not proper.

Thirdly, The writ of *summons* is the proper and only process against all persons whatsoever, when the defendant is not to be arrested, and when he is not a member of parliament and trader intended to be proceeded against according to the Bankrupt Act, 6 G. 4, c. 16, s. 9 and 10; and it may be adopted, whether or not the defendant be privileged as a peer or member of parliament, or officer of the Court, or an attorney, or a corporation, or hundredors; and even in cases where the defendant is a prisoner in actual custody in some other

3. Indorsement when plaintiff sues in person.

3. "This writ was issued in person by John Ade, who resides at No. 208 in the Strand, in the Parish of St. Clement's Danes, in the county of Middlesex."

4. Indorsement on copy of writ of debt and costs prescribed by rule 5, Mich. T. 3 W. 4, and Hil. T. 2 W. 4.

4. "The plaintiff claims 50l. 10s. 6d. for debt, and 1l. 17s. 6d. for costs, and if the amount thereof be paid to the plaintiff or his attorney within four days from the service hereof, further proceedings will be stayed."

See the usual form of indorsement, as prescribed by the two rules Hilary term, 2 W. 4, and Michaelmas term, 3 W. 4, referring to the same, ante, 160, in note. With respect to the claim for costs, it is only stated in the aggregate, without shewing the items. See the work intituled Bills of Costs, page 4. Such aggregate is in general thus composed.

The costs where a writ is served in London or Middlesex may be thus.

	£	s.	d.
Letter for payment of debt (when sent)	0	3	6
Instructions to sue . . . . .	0	6	8
Writ of summons . . . . .	0	12	0
Copy and service . . . . .	0	5	0
Bill of costs . . . . .	0	2	0
Attending settling, when debt above 20l., (if under 20l. then only 3s. 4d.).	0	6	8
Letters . . . . .	0	9	0
	1	17	10

If the service be near to but out of London, and no attorney reside near to the defendant, then a further charge of 1s. a mile, according to the distance from London, may be made, in respect of the journey to make the service.

When process is served in the country by an agent for a town attorney, properly concerned, or when the country attorney, properly concerned, employs an agent in London, the bill of costs is increased by 3s. 6d. for a letter to the agent, and his charge for copy and service, and postages, and 3s. 6d. for letter in reply. See Bills of Costs, p. 4 and 5.

(c) Gen. Rule, Mich. T. 3 W. 4, r. 3, ante, 160 and 242.

5. Indorsement on writ of time of service.

(d) 5. This writ was served by me, William Cartwright, on the within named defendants, Henry Butler, Thomas Poole, and James Adams, on Saturday, the eleventh day of May, 1835. William Cartwright. And see form, ante, 244, note (g).

action, he *may* be *personally served* with a copy of this process whilst in prison, when it is not intended to detain him in the action in which process is issued. When there are *several* parties to be sued jointly, and one is to be arrested and the other only served with process, then a copy of a *capias* jointly against all the defendants may be personally served on the latter; but it has been held that in an action against one *defendant alone* a service of the copy of a writ of *capias* would not be regular. (c) A writ of summons may be issued, and afterwards a *distringas* and proceedings to outlawry may be founded thereon; consequently this process is by far more frequent and extensive in practice than either of the other forms, and on that account, as well as because it stands first in the uniformity of process act, 2 W. 4, c. 39, s. 1, and schedule No. 1, we will here give it particular consideration. The form of the writ against a single defendant, as printed in blank in the schedule No. 1 of the 2 W. 4, c. 39, has been already stated in a note, (d) and which may be readily altered and applied against *several defendants*.

*Fourthly*, If it be doubtful in which of several counties the defendant is to be found, the plaintiff may at the same time issue and have in force *several different original writs of summons* into each county, by describing the defendant in one writ as *residing or being* in some place in one county, and in another writ or writs describing him as *resident* in another place and county. But it has been supposed that the defendant could not be charged with more than the expense of that writ, with which he has been first actually served. (e)

*Fourthly*, Of several concurrent writs of summons.

*Fifthly*, Having received the *full instructions* from the client, as before recommended, (f) (and which should state at all events the Christian and Surname of the plaintiff and of the defendant, and the residence of the latter, into the county of which residence the writ is to be issued, and the cause of action so fully as to enable the attorney or agent in London to decide upon the best *form of action*,) the regular course, and which in the Court of Exchequer is indispensable, (g) is for the plaintiff's attorney to make out a *præcipe*, or short instructions for and abstract of the writ of summons, and which *præcipe*,

*Fifthly*, Practical proceedings in issuing a writ of summons.

(c) M9. Nov. 1833, K. B.; 1 Arch. K. B. 4th ed. 512,  
(d) *Ante*, 154, in note.

(e) *Dunn v. Harding*, 10 Bing. 553.  
(f) *Ante*, 117 to 124.  
(g) *Ante*, 220, 221.

CHAP. VI.  
PROCEEDINGS  
ON SUMMONS,  
&c.

being the substance of the writ, forms its basis, and is to be left and filed (*h*) with the officer, who afterwards signs the process. It is also a prudent precaution to enter a copy of such præcipe, as well as of the writ and indorsements, in a book kept in the office of the plaintiff's attorney, so as to avoid the consequence of loss in the office or elsewhere; and such præcipe may be in the form in the note. (*i*)

A writ of summons, printed in blank on parchment, with at least two copies printed in blank on paper, and a copy for each defendant, when there are several, are then to be purchased of a stationer, and when issued from the Court of Exchequer may be purchased *already sealed*. (*k*) These, with all the indorsements, excepting that relating to the time of serving the writ, are then to be filled up and carefully examined with each other, so as to avoid a variance. These, when the writ is from the King's Bench, are to be taken to the signer of the writs, (*l*) and when from the Common Pleas, to the filazer for the proper county, (*m*) and when from the Exchequer, to a master of that Court, (*n*) and to each 2s. 6d. is to be paid for *signing*, and at the same time the before mentioned præcipe is to be left with and filed by the signing officer. (*o*) The writ is then, when issued from the King's Bench or Common Pleas, to be taken to the Seal Office and *sealed* on payment of 7d.; but in the Exchequer we have seen that the writ of summons may be purchased *already sealed*. (*p*)

Sixth, Service to be personally of an exact copy of the writ, as before the 2 W. 4, c. 39.  
1. Of what copy.

*Sixth*, The statute 2 W. 4, c. 39, s. 31, requires service "*as heretofore*," and which refers to 12 G. 1, c. 29, which required *personal* service of a *copy* of the writ. (*q*) Hence strictly the service should be of an exact *copy*, and not with the

Form of Præcipe  
for a writ of  
summons.

(*h*) But the omission of the *filing* will not affect the validity of the proceedings, *ante*, 220, 221.

(*i*) *Middlesex. Summons for John Atkins and John Ford against Thomas Poole of Tabernacle Row, Stepney, Middlesex, and James Hood of the same place and county. Promises.*

*Tested 1 February, 1835.*

*Indorsed E. F. of No. 7, King's Bench Walk, Temple, London, attorney for plaintiff. Indorsed claim £ — debt, £ — costs.*

(*k*) *Ante*, 224.

(*l*) *Ante*, 223.

(*m*) *Ante*, 223.

(*n*) *Ante*, 223.

(*o*) *Ante*, 220.

(*p*) *Ante*, 224, 225.

(*q*) See a valuable note in Tidd's Supp. A. D. 1833, p. 73, note (*e*), as to the *mode* of serving process before 2 W. 4, c. 39, and to which that act, by the words "*as heretofore*," manifestly refers.



original writ of summons, (r) which is to be retained in order to indorse thereon the time of service, as directed by 2 W. 4, c. 39, s. 1, and rule Mich. T. 3 W. 4, r. 3 & 4. The copy should, in strictness, exactly correspond to a letter with the original, or at least there must be no difference that could alter the *sound or sense*; (s) but a trifling omission of a word or letter, not altering the sound, sense, or meaning, will not, according to the more recent decisions, prejudice. (s) And it is not necessary in the copy to insert the name of the officer who wrote his name as *signer* of the writ, or to imitate the *seal*. (t) Under the former act, 12 G. 1, c. 29, and when the process by quo minus was in force, the Court of Exchequer held that the defendant was entitled to a *complete* copy of the *whole* process; and the same principle still prevails. (u)

The *manner* of service referred to was by 12 G. 1, c. 29, by making a *precise copy* of the entire contents of the writ; and now of the memorandum and indorsements required by the 2 W. 4, c. 39, or its schedule. (x) Before that act it was held in the Exchequer that a variance in the body of the copy of the process from the writ itself, was a fatal irregularity; (y) and we have seen, that since the 2 W. 4, c. 39, a very *small* variance or omission, either in the copy of the body of the writ, (x) or of the indorsement, (a) especially when prescribed by that *statute*, is fatal, though a defect in an indorsement merely prescribed by *rule of Court* is amendable on payment of costs. (b) But according to some recent decisions, principally on bailable process, if the omission or mistatement in the served copy do not alter the *sound, sense, or meaning* of the process, then the Court will not interfere to set aside the service for irregularity. (c) We have seen that the Court have refused to amend the copy of a writ even in cases where they perhaps might have permitted an amendment in the writ itself; (d) but the precise ground or principle on which such distinction proceeds has been questioned. (e)

(r) *Smith v. Anderson*, Prac. Reg. 342; *Peter v. Reignier*, *id.*; Barnes, 410, S.C.; 1 Sell. Prac. 88; Imp. C. P. 163; *post*, "Mode of Service."

(s) *Ante*, 229, 231; and see *Sutton v. Burgess*, 1 Gale, Exch. Rep. Hil. T. p. 17, overruling *Hodgkinson v. Hodgkinson*, as to omission of l in Middlesex.

(t) *Clutterbuck v. Wildman*, 2 Tyr. 276, *ante*, 224.

(u) *Wright v. Hooper*, 2 Tyr. 283.

(x) *Id. ibid.*; Pr. Reg. 354; Barnes, 405, S. C.; Tidd, 167, 168.

(y) 1 Price, 245; Tidd, 168. But

see *Huggett v. Parken*, 7 Moore, 359; 1 Bing. 65, S. C.

(s) *Ante*, 236.

(a) *Ante*, 229, 231.

(b) *Ante*, 234 to 236.

(c) *Freeman v. Mason*, C. P. Mich. T. 1834, 9 Legal Observer, p. 109; *ante*, 233; and see *Sutton v. Burgess*, *supra*, note (s).

(d) See per Tindal, C. J.; and see *Sutherland v. Tubbs*, 1 Chit. R. 320, note (a); Tidd, 168.

(e) See per Taunton, J., in *Hodgkinson v. Hodgkinson*, 3 Nev. & Man. 565, *ante*, 236.

CHAP. VI.  
PROCEEDINGS  
ON SUMMONS,  
&c.

In practice, each of the writs prescribed by 2 W. 4, c. 39, is to be completed on *parchment*, and the copy, or copies in cases of several defendants, intended to be served, is printed on *paper*, with blanks, and may be purchased of any law stationer, and they are afterwards filled up by the plaintiff's attorney, or by himself, if he proceed in person.

2. By whom to  
be served.

It is not necessary that serviceable process should be executed by an officer of the sheriff, for it may be served by any person, even by the plaintiff himself or his attorney, though it is usually served by a clerk of the latter, or by some intelligent person. (f) As it will be observed that in the usual *affidavit of service* the deponent not only states the fact of *personal service* of a copy of the writ, and of the memorandum subscribed and indorsements made thereon, upon the defendant, but also *swears* that the writ of summons itself *appeared to the deponent to have been regularly issued*, it is obvious that not only should the party who is to serve such copy be able to read, (f) but should actually read and compare with minute attention the copy with the writ, after the same and all requisite indorsements have been filled up, and also *understand the legal requisites* of the proceeding, so as to be able afterwards with propriety to swear to the necessary affidavit; (g) as an imperfect service would put the defendant on his guard, so as probably afterwards more carefully to avoid a regular service, it is of importance to employ an intelligent person in the first instance. If the person who served the copy be aware of any irregularity or deviation from the proper requisites of the writ, or memorandum or indorsements, or the copy served, he could not with propriety swear to the service in the usual form; and in such case it might be advisable to annex to the affidavit a

(f) *Delafield v. Jones*, Prac. Reg. 345; *Cooke's cases*, Prac. C. P. 34; 1 Sel. Pr. 89; Imp. C. P. 163; Tidd, 168.

(g) In *Delafield v. Jones*, Cooke's Rep. 34; Inp. K. B. 16S, the Court declared that the service of process by a bailiff who could neither *write nor read*, was not good; for the statute 12 G. 1, c. 29, intended that process should not be served by illiterate persons, because it directs that affidavit should be made of the service of a copy of the process, but service by a person who can read writing suffices. It was strongly recommended by that experienced and excellent judge, Mr. Justice Bayley, that practitioners should not suffer youths inexperienced in law to swear

so frequently as is the practice to so many affidavits, the import of which they do not well understand. It certainly behoves all respectable practitioners systematically to enjoin in their offices the solemn obligation of an oath, lest by habit a laxity and want of due care in swearing should be encouraged, or at least culpably permitted. That conscientious judge in particular reprobated the then frequent practice of mere boys being permitted to swear to affidavits in opposition to bail, attacking their character and stating an hearsay narrative, in an affidavit obviously settled, if not prepared by some older practitioner, so as to fit the occasion, whatever it might be.

complete copy of the copy served on the defendant, and swear to the service thereof, and that such document is a copy of the original, but omitting the statement of his belief of the *regularity* of the proceeding. (h)

CHAP. VI.  
PROCEEDINGS  
ON SUMMONS,  
&c.

The statute 12 G. 1, c. 29, s. 1, in terms requires "*personal service on the defendant*," to enable a plaintiff afterwards to enter an appearance according to that statute, and the 2 W. 4, c. 39, s. 1, refers to that practice. The 13th section of that act enacts, "That every such writ of summons issued against a corporation aggregate, may be served *on the mayor or other head officer*, or on the *town clerk*, clerk, treasurer, or secretary of such corporation, and every such writ issued against the inhabitants of a hundred, or other like district, may be served on the high constable thereof, or any one of the high constables thereof; and every such writ issued against the inhabitants of any county of any city or town, or the inhabitants of any franchise, liberty, city, town, or place, not being part of a hundred, or other like district, on some peace officer thereof."

3. On whom to be served.

It will be observed, that although the service of a declaration in ejectment *on the wife* of the tenant in possession is admitted to be sufficient to enable the plaintiff to proceed to judgment and execution in default of an appearance, yet it is otherwise in *personal* actions; and therefore it was recently decided that if one of several defendants be abroad, the Court will not order that service of process *on his wife* shall be good, or restrain the other defendants from pleading his nonjoinder in abatement; (i) but now if a joint contractor be out of the jurisdiction, the plaintiff need not join him in the writ, as the other defendant could not plead the nonjoinder in abatement, without alleging in his plea, and swearing in his affidavit verifying such plea, that the defendant is resident in England and where. (j) It is clear that although in mercantile concerns, and in order to determine a tenancy a notice to quit, and some other notices, when served upon one of several joint-tenants or partners is deemed equivalent to notice to all, yet *in legal process* each defendant must *be actually served* or arrested before the plaintiff can proceed in an action against him. (k)

In an action against *husband and wife*, it suffices to serve the *husband* alone with a copy of the writ, who must thereupon

(h) Post, 289, 290, and form 291, note (g).

(i) *Davis v. Morgan*, 2 Tyr. R. 288; 2 Crompt. & J. 257, S. C.

(j) 3 & 4 W. 4, c. 42, s. 8.

(k) *Imperial v. Middleton*, 1 Chit. Rep. 319; *Worley v. Bull*, Pr. Reg. 351; Tidd's Supp. 1833, p. 74.

CHAP. VI.  
PROCEEDINGS  
ON SUMMONS,  
&c.

appear for himself and wife. (*k*) But in an action against *two or more* defendants, *each* must be served with an exact copy of the process and indorsements. (*l*)

Consequences  
of service on a  
wrong person.

As the very object of the *service of process* is to inform the intended defendant of the necessity for his appearing and pleading to the action, it seems scarcely necessary to observe that a service on a *wrong party* is inoperative, for the party serving the same cannot safely make the affidavit of *personal service* on the defendant named in the writ as required by the statute, before the plaintiff can enter an appearance for the defendant, so as to proceed to judgment. But if there have been a mistaken service upon a wrong party, the right person may *afterwards* be served with a copy of the same writ, or with an alias summons, or in bailable process an alias *capias* may be executed. (*m*)

We have before suggested, that when there are two or more persons of the same name, or nearly so, it is very material in or by the writ, or by some distinct instructions, to give some particular description, so as to identify the proper party, and to be particularly careful that the service be on him; for if a wrong person should be served and appear and defend the action to trial, *without collusion* with the intended party, or his interference in the conduct of the suit, the plaintiff would be nonsuited. (*n*) And if the mistake should be discovered before the trial, unless the collusion or interference of the proper party can be clearly proved, (*o*) the safest course would be to abandon that action and begin *de novo*.

4. Time of service.

The 2 W. 4, c. 39, s. 10, limits the duration of all the writs thereby prescribed to four calendar months from the day of the date, including the same; and of course it must be served before the expiration of that time. It may be served at any hour, however late at night, and after ten o'clock, for the rule of Court does not extend *to process*; (*p*) and before the uniformity of process act, 2 W. 4, c. 39, it was held good service even at eleven o'clock on the night of the return day. (*q*)

(*k*) *Baucombe v. Love and wife*, Barnes, 406, 412; Pr. Reg. 351, S. C.; Tidd's Supp. 1833, p. 74.

(*l*) *Israel v. Middleton*, 1 Chit. Rep. 319; *Worley v. Bull*, Pr. Reg. 351; Tidd's Supp. 1833, p. 74.

(*m*) — *v. Johnson*, 2 Bar. & Cres. 95; 3 Dowl. & Ry. 254, S. C.

(*n*) *Wilde v. Keep*, 6 Car. & P. 235.

And see *ante*, 168, note (*i*).

(*o*) As in the instance, *ante*, 168, note (*i*).

(*p*) *Anonymous*, 2 Chitty's Rep. 357; 1 Dowl. & Ry. 172; *Priddes v. Cooper*, 7 Moore, 358; 1 Bing. 66, S. C. See rule, *ante*, 110.

(*q*) *Woburn v. Neale*, 2 Burr. 813; 2 Wils. 372.

But *service on Sunday, Christmas day, or Good Friday* would be absolutely void, as well at law as in equity : (r) though all other holidays are abolished, as they affect process. (s) It may, however, be served on any day between the 10th August and 24th October, although no *declaration* or *pleading* can be filed or delivered between those days. (t)

We have however just seen, that an insufficient service, as upon a wrong person or on an improper day, does not determine the legal efficacy of the writ, and, therefore, a copy might *afterwards* be served upon the right party, or at a proper time. (u) It was long ago decided, that even serviceable process cannot be served on a party to a cause whilst he is attending the trial thereof at the sittings, (x) and a fortiori it would be so as to a witness ; (x) for if persons so attending a Court of justice were liable to be *served with process*, they might be deterred from attending at the risk of being served with process, and thereby enabling a plaintiff to prosecute his action against him with effect. (x) As the writ cannot legally be issued before the cause of action has accrued, it follows that it cannot be previously served. (y)

The *place* of the service or execution of mesne process, as regards writs of summons, is regulated by the statute 2 W. 4, c. 39, s. 1, which enacts, that the writ of summons may be served *in the manner heretofore used* (z) *in the county therein mentioned, or within two hundred yards of the border thereof, and not elsewhere.* And we have seen, that under the 20th section serviceable or bailable process issued into a county surrounding some other county, may be executed in either. (a)

5. *Place of service of summons or execution of capias.*

The 1st section requires the service of the copy of the summons to be in the *county therein mentioned*, or within two hundred yards of the border thereof, and not elsewhere. It is probable that such distance would be calculated in a straight line, and without regard to the more circuitous walking distance ; (b) and with reference to prior decisions, if there should be any dispute as to the boundaries of the county, or probably the exact distance of yards from its borders, the Courts would

(r) *Ante*, 105, 106. In equity, *Muckreth v. Nicholson*, 19 Ves. 367, but on terms of entering appearance.

(s) *Ante*, 105, 106.

(t) 2 W. 4, c. 39, s. 11.

(u) *Clarke v. Johnson*, 2 R. & C. 95 ; 3 D. & R. 254, S. C.

(z) *Cole v. Hawkins*, 2 Stra. 1094,

more fully reported in *Andrews*, 275 ; 1 Sellon, 90 ; *Tidd*, 168.

(y) *Ante*, 159.

(z) As to the *previous practice*, *Tidd*, 166 to 170 ; 241 to 243.

(a) *Ante*, 241, 242.

(b) *Leigh v. Hind*, 9 B. & C. 774 ; 4 Man. & Ryl. 597.

CHAP. VI.  
PROCEEDINGS  
ON SUMMONS,  
&c.

not determine it on motion.(c) The safer course in practice is to direct the writ, or describe the county in which the defendant is supposed to be, as the larger county surrounding another smaller district, which is a county of itself; in which case the 20th section of 2 W. 4, c. 39, renders the service in *either* of the two counties regular and sufficient.(d) If the defendant be served out of the proper county, he must shew by his affidavit in support of a motion to set aside such service that the place was not on the confines of the county, and must also shew what precise distance from the same the service actually took place, and an affidavit *swearing* that he was served "*some distance*" from the proper county will not suffice.(e)

6. *Modes of service of writ to be as heretofore, i. e. by personal service of a copy of the writ of summons.*

By the express terms of the enactment in 2 W. 4, c. 39, s. 1, "*writs of summons are to be served in the manner heretofore used*," (f) necessarily referring to the *antecedent* practice relating to serviceable process, which was in general governed by the 12 G. 1, c. 29, s. 1, and the decisions thereon.(g) The statute enacts, that when the plaintiff has not made an affidavit of debt, and does not proceed to arrest the defendant, "he shall *serve* the defendant or defendants *personally* within the jurisdiction of the Court with *a copy of the process*," (h) and not with the writ itself.(i) The term *served* as here used imports "*personal delivery of a copy of the writ to the defendant*," (k) and then enacts, that if the defendant do not appear to such process, it shall be lawful for the plaintiff, upon affidavit being made *and filed* in the proper Court of the *personal service* of such process as *aforsaid*, to enter a common appearance, or file common bail, for the defendant, and proceed thereon as if the defendant himself had appeared. Since this enactment *personal service* is indispensable, and must be *positively sworn* to in substance according to the form presently given, (l) excepting in one instance, in proceedings against

(c) See several cases, Tidd, 168.

(d) Dowl. Statute, 2 W. 4, c. 39, in notes, p. 144.

(e) *Coulson v. King*, 3 Crompt. & Jer. 474; *Storer v. Rayson*, 3 B. & C. 158. *Somble* overruling the dictum of Wood, B. in *Monday v. Lear*, 11 Price, 122.

(f) 2 W. 4, c. 39, s. 1; see previous practice, Tidd, 166 to 170; 241 to 243; Tidd's Supp. 1833, p. 73, n. (e), a valuable note.

(g) As to the decisions and prior practice, see Tidd's Supp. 1833, p. 73, n. (c).

(h) i. e. a copy of the *principal process* out of the superior Court. In one of the

latest cases it was determined in King's Bench, that where a non-bailable *latitat* issued into Lancashire, and a *mandate* thereon was obtained from the Chancellor to the sheriff, service of either the *latitat* or the *mandate* sufficed, *Ashbrook v. Townley*, 2 Barn. & Ald. 416; and Tidd's Supp. 1833, p. 73, n. (e); but see *Impey's C. P.* 164.

(i) *Worley v. Glover*, 2 Stra. 877; 1 Sellon, 89.

(k) *Smith v. Anderson*, Fr. Reg. 343; *Peter v. Reignier*, id.; Barnes, 410, S. C.; *Imp. C. P.* 163; 1 Sellon, 88.

(l) See form, post, 289.

persons who entered the king's service, in which case the 7 & 8 G. 4, c. 4, s. 130, permitted the leaving of process against such persons at the last place of residence of the defendant.

It is advisable to deliver an *exact copy* of the writ, and all the indorsements filled up, excepting that of the day of service to the defendant, without any intimation of its import until after he has read or accepted it. If he should then demand an inspection of the original, (but not otherwise,) (m) it must be produced and shewn, or the refusal would render the service irregular. (n) And where after an arrest the copy of a *capias* was delivered to the defendant, and in a quarter of an hour afterwards, and whilst the defendant remained in the same custody, the defendant demanded to see the original, which was refused by the officer, the service of the *capias* and the subsequent proceedings were set aside on that account. (o) If the defendant should upon tender of a copy of the process and explanation to him of its contents, refuse to receive it, it was held that it might be immediately left at his house, (p) or if he lock himself in, it may, after a simultaneous explanation of its contents, be put through the crevice of the door. (q) And in one case in Common Pleas it was considered that if the defendant keep out of the way to avoid being served, the writ may be sent to him in a letter *by the post*, and that such service sufficed if it were sworn that he opened the letter and took out the copy. (r) But that doctrine was overruled in a subsequent case, which establishes, that as the statute expressly requires *personal service*, the sending a copy of a writ in a letter by post will not suffice if the defendant refuse to receive it, however wilfully and vexatiously; (s) and even where a person was about to serve the defendant with a copy of process by a wrong name, and the defendant thereupon stated his correct name, and the person serving offered to alter the writ, but the defendant said "never mind, I am the person, and *will take care* of it," and took the copy, even that service was decided to be irregular, though the Court refused to give costs. (t) And the merely leaving a copy of the process with the defendant's shopman, (u) or at his house or place of busi-

(m) *Panchard v. Woolley*, Barnes, 302.  
(n) *Thomas v. Pearce*, 2 B. & C. 761;  
4 D. & R. 317, S.C.

(o) *Westley v. Jones*, 5 Moore, 162.

(p) *Wood v. Dodgson*, Barnes, 278;  
Imp. C. P. 164.

(q) *Smith v. Wintle*, Barnes, 505;  
Frac. Reg. 334; Tidd, 169; Imp. C. P.

164.

(r) *Boswell v. Roberts*, Barnes, 422;  
*Aldred v. Hicks*, 5 Taunt. 186; 1 Marsh.  
8, S. C.; *Rhodes v. Innes*, 7 Bing. 379.

(s) *Redpath v. Williams*, 3 Bing. 413.

(t) *Isaacs v. Middleton*, 1 Chit. Rep.  
319.

(u) *Thompson v. Phenev*, 1 Dowl. 441.

CHAP. VI.  
PROCEEDINGS  
ON SUMMONS,  
&c.

ness, (x) is not sufficient. And where one of two defendants in an action on a contract was abroad, the Court refused to order that personal service on his wife, who was in England, should be deemed good service, or that the other defendant should be restrained from pleading in abatement. (y) In a recent case (z) Mr. Justice Taunton decided in the Practice Court of King's Bench that the service must be *personal*, but which might be either by leaving the process with the defendant, or *bringing it clearly to his presence and knowledge*; and Mr. Justice Patteson decided to the same effect in a subsequent case in the same Court; (a) and it has been justly observed, that as plaintiffs under the third section 2 W. 4, c. 39, have now a method of proceeding to judgment and execution against defendants *without personal service*, viz. by distringas, the Court will no doubt hold the former (i. e. *personal service*) to great strictness in the affidavit of personal service; and Mr. Justice Patteson condemned the practice, which, it was stated, had crept in, of plaintiff's seeking to file common bail according to the statute 12 G. 1, c. 29, bringing in *any affidavit of any kind or sort*, which stated that the defendant had been served personally, and then set forth the particular mode of service, *which was not personal service at all*. He observed, "I do not mean to say that it is necessary to leave the process in the *actual corporeal possession* of the defendant, for whether the party touches him, or puts it into his hand, is immaterial for the purpose of personal service; and personal service may be where you see a person, and *bring the process to his notice*. *If the deponent had informed the defendant of the nature of the process, and thrown it down, that would have done*;" (a) and it seems that a person intending to serve the defendant may, if necessary, lay hands upon him for the purpose of so doing, taking care to do no more than is essential to inform him of the purport and intent of the process. (b)

At the same time, it seems that, if on behalf of the plaintiff, a *sufficient affidavit of personal service* has in fact been made and filed, the Court will not on a suggestion of perjury interfere to set aside an appearance *sec. stat.* unless it be *very clearly*

(z) *Digby v. Thompson*, 1 Dowl. 363; *infra*, n. (s).

(y) *Davis v. Morgan*, 2 Tyr. 288. But the 3 & 4 W. 4, c. 42, now provides a remedy.

(s) *Digby v. Thompson*, E. T. 1832;

Dowl. Stat. notes on 2 W. 4, c. 39, p. 141; and 1 Dowl. 363.

(a) *Thompson v. Pheney*, Dowl. Stat. 142, 143, a long note.

(b) *Harrison v. Hodgson*, 10 B. & C. 443.



*and positively sworn* that the defendant had not *even intimation* of the process. (c)

It is usual and proper *to deliver the copy of the writ open into the hand of the defendant himself*, and it is not advisable to inclose the copy in a sealed envelope, which, perhaps, the defendant may refuse to open and will return, unless a personal interview can be obtained, in which case, if the defendant should decline opening the letter, the person offering the same may himself open it and shew the writ to the defendant, or state its contents if he refuse to read it. (d) If the defendant attempt to go away leaving the copy unread, it would seem that the party employed to serve the writ might, after declaring his object to serve process upon him, and verbally stating at whose suit and in what Court or form of action, stop and detain him by gentle means, as by laying hold of his coat until the copy of the writ had been read and explained to him, and afterwards placed in his hands. (e) The parchment writ itself should be ready to be shewn to the defendant, but it is not necessary to produce it, (f) unless the defendant require it at or soon after the time of service, (g) when it seems necessary to shew it. (h) If the defendant refuse to receive the copy of writ when actually tendered or produced to him, it may be immediately afterwards *left for him* at his house, and personal service may be properly sworn to; (i) so if it can be sworn that the defendant received a letter, and took out the copy of the writ this might suffice. (k) And where a writ was put through the crevice in the door of a room in which the defendant had locked himself, that was deemed sufficient service. (l) But merely leaving a copy of a writ with the defendant's shopman, or at his place of business or residence, will not suffice, (m) and sending process by the post in a letter which the defendant

(c) *Morris v. Coles*, 2 Dowl. 79, post.

(d) It would be amusing to enumerate the instances in which variations in the modes of service have on discussion been held sufficient. Goldsmith, it will be remembered, narrates an instance, in which a writ was executed against him under colour of a supposed invitation from a noble lord to examine a poem he was about to publish, with a proffer of fifty guineas for his criticism, sent on embellished paper, and by his coachman and footman with his carriage, but which were in fact hired *pro hac vice* by a sheriff's officer.

(e) *Harrison v. Hodgson*, 10 Bar. & Cres. 445.

(f) *Worley v. Glover*, 2 Stra. 877;

*Panchard v. Wooley*, Barnes, 302; *Boswell v. Roberts*, id. 422.

(g) *Thomas v. Pearce*, 2 Bar. & Cres. 761; *Edgar v. Palmer*, R. T. Hardw. 138; *Westley v. Jones*, 5 Moore, 126; *Petit v. Ambrose*, 6 M. & Sel. 274.

(h) *Edgar v. Farmer*, Cas. T. Hardw. 138; 1 Sell. 89.

(i) *Bell v. Vincent*, 7 Dowl. & R. 233; *Pigeon v. Bruce*, 8 Taunt. 410; *Wood v. Dodgson*, Barnes, 278.

(k) *Boswell v. Roberts*, Barnes, 422; *Aldred v. Hicks*, 5 Taunt. 186.

(l) *Smith v. Wintle*, Barnes, 405.

(m) *Thompson v. Phenev*, 1 Dowl. 441; *Digby v. Thompson*, 1 Dowl. 363; but see observations on that case in *Phillips v. Ensell*, 4 Tyr. 815.

CHAP. VI.  
PROCEEDINGS  
ON SUMMONS,  
&c.

refuses to receive is not good service, although the refusal may have been wilful and accompanied by long avoidance of process ; (n) and yet, if from the knowledge of the handwriting or otherwise, it could be shewn that the defendant knew that the letter contained the writ, it seems to have been supposed that then such service might suffice. (o) In short, there appear to be many instances in which, if the party, who has served the copy of the writ, has *ventured to swear positively to the personal service of a copy of a proper writ in the common form* without disclosing the precise mode of service, the Court will not afterwards interfere to set aside the appearance or proceedings thereon, unless the defendant, by his affidavit, induce the Court to believe that he had *no knowledge* or even intimation of the process or contents in due time: thus where a father eluded the service of process, and the copy was served at his house on his son, who said his father was within, and that he should receive the process, and it did not otherwise appear but that it had come to the defendant's hands, the service was deemed sufficient ; (p) and where upon conflicting affidavits it appears doubtful whether or not the defendant has been duly served or served at all, the Court will not interfere, but will discharge a rule for setting aside the proceedings, (q) and in another case the Court of Exchequer held, that not only *service*, but also *knowledge* of the copy of process, as well as of the process itself must be denied, in order to induce the Court to set aside proceedings for irregularity and want of service of process. (r)

(n) *Ridpath v. Williams*, 3 Bing. 443 ; 11 Moore, 333, 8. C.

(o) *Aldred v. Hicks*, 5 Taunt. 186 ; 1 Marsh. 8, 8. C.

(p) *Rhodes v. Innes*, 7 Bing. 329 ; 5 Moore & P. 153, 8. C., observed upon in *Phillips v. Ensell*, 4 Tyr. 815.

(q) *Morris v. Colts*, 2 Dowl. P. C. 79.

(r) *Cohen v. Watson*, 3 Tyrw. Rep. 238.

As it is frequently of essential importance to the interest of a plaintiff to proceed with the utmost despatch in a cause, it is a great object to effect a *personal service* as soon as practicable, and to do this so effectually as not to endanger the result of a motion to set aside the service for irregularity. The party endeavouring to serve the process should, in the first instance, adopt all possible exertion to obtain an interview with the defendant, and for this purpose should immediately after he receives the writ and copy complete, call at the residence of the defendant with

the writ and copy ready to serve, and inquire for the defendant, and if stated to be within, should request to see him, and the delivery of any deceptive message as to the object of the call may be permitted. If it should be stated that the defendant is absent, he should then make an appointment to call again in the afternoon, at dinner hour, or some other appointed time, and if he suspect that the defendant is at that time at home, he should get some other person to call with the writ a short time after he has left, as probably the defendant may then be off his guard, in consequence of the afternoon appointment. But which, supposing the third person's attempt should be unsuccessful, should be punctually kept. If the latter should be unsuccessful, another person, after ascertaining the usual hours of the defendant's being at home, should make an appointment accordingly as on some totally different business for the next

CHAP. VI.  
PROCEEDINGS  
ON SUMMONS,  
&c.

*Seventh, Indorsement on writ of day of service of copy.*

*Seventh*, We have seen that the 2 W. 4, c. 89, s. 1, enacts that the person serving a writ of *summons* shall indorse on the writ the day of the month and week of the service thereof; (s) and the schedule No. 1, prescribes the *form* of indorsement, which with variations is subscribed. (t)

The rule Mich. T. 8 W. 4, also orders, "that the person serving a writ of summons shall, *within three days* at least after such service, indorse on such writ the day of the week and month of such service, otherwise the plaintiff shall not be at liberty to enter an appearance for the defendant according to the statute, and every affidavit upon which such an appearance shall be entered shall mention the day on which such indorsement was made," and it will be remembered that the 10th rule Mich. T. 3 W. 4, 1832, orders, that the *omission* of any insertion or indorsement shall be an irregularity. The object of this enactment was doubtless to compel the party serving the writ to indorse the time of service whilst the fact was fresh in his recollection, and if the indorsement on the writ should be omitted, such defect would be deemed an irregularity.

*Eighth*, Excepting in proceedings to prevent the operation of the statute of limitations, it is not usual to make any *formal return* to a writ of summons, but then it may be essential, and in other cases proper, at the expiration of the four calendar months, during which the writ is in force, for the plaintiff or

*Eighth, Indorsement on writ of summons of "non est inventus."*

day, and call at the time appointed. If, again unsuccessful at this third time, it may then be advisable to leave a copy of the writ with the servant, with a note to the defendant, stating that he will call again the next morning, at the same time to shew him the original, and that unless he will then afford an interview, he will publish a reward to any person for serving him personally with process, and circulate a placard amongst all persons in the neighbourhood. The late Lord Ten-terden, in an action against the sheriff for not taking a defendant, when, as alleged in the declaration, he had an oppor-

tunity, stated that such measures were justifiable and proper in *all proceedings*, and shewed proper diligence; and see also ante vol. i. 453, 4, as to notices to ascertain an event. But in order to proceed afterwards by *distringas*, there must be three repeated calls, at each stating to the servant or person opening the door, *the real object of the call*,\* and at the last a copy of the writ must be left,† and there must be an affidavit that the defendant keeps out of the way, shewing the circumstances.‡

(s) And according to Price Gen. Prac. 73, "the year."

(t) "This writ was served by me, X. Y. on Henry Butler, the defendant within named, (or on all the defendants within named, except L. M.) on Monday, the seventh day of January, 1835.

"And I served this writ on the said L. M. on — the — day of February, A. D. 1835.

Form of indorsement of service of process. § X. Y."

\* *Johnson v. Disney*, 2 Dowl. 400; 617; 1 Arch. K. B. P. 4th ed. 530.

*Willis v. Bowman*, id. 413.

‡ And post *distringas*.

† *Hill v. Maule*, 1 Crom. & Meeson,

§ *Ante*, 243, 244.

CHAP. VI.  
PROCEEDINGS  
ON SUMMONS,  
&c.

his attorney, under the authority of the 10 sect. 2 W. 4, c. 39, in case he has not been able to serve the defendant personally, to return the writ by indorsing the result as in the subscribed form. (x)

*Ninth*, The proceedings in case of defendant's default in appearance within eight days inclusive.

*Ninth*, It will be remembered that the sixteenth section of 2 W. 4, c. 39 enacts, "that *all such proceedings* as are mentioned in any writ, notice, or warning, issued under that act, shall and may be had and taken in default of a defendant's appearance or putting in special bail, as the case may be.

*Tenth*, Of disputed service.

*Tenth*, As the statute 12 Geo. 1, c. 29, requires a positive affidavit on the part of the plaintiff of *personal service*, (i. e. in general of the delivery of a copy of the writ into the hands of the defendant, or at least of the party serving the writ having distinctly brought the terms thereof to his knowledge, by tendering to him in person a copy of the writ and verbally communicating to him the substance of its contents,) (y) and as no deviation from the *substance* of the prescribed oath is permitted, and the deponent would be indictable for perjury if he should wilfully swear falsely, it might be supposed that scarcely a case could arise when any discussion on the sufficiency of the service could be raised; but it is sometimes otherwise, in consequence of either hasty swearing or mistakes in serving a wrong party. If the *usual positive affidavit of service* has been filed, (z) then the Court will not on motion interfere to set aside the service sworn to, when on reading the defendant's contradictory affidavits it appears *doubtful* whether the defendant was actually served personally, (a) and in order to induce the Courts to set aside the supposed service the defendant's affidavit must deny as well the service as his *knowledge* of the copy of the process; (b) and where the defendant moved to set aside a declaration on an affidavit that he had not been personally served with process, and the affidavits stated that the writ was twice

Return of "*non est inventus*" to a writ of summons.

(x) The within named C. D. is not found in the county of —, or within two hundred yards of the border thereof.

E. F. plaintiff's attorney,

or,

A. B. the above named plaintiff in person.  
(If the writ were so issued).

(y) *Ante*, 269, 270.

(z) See form, *post*, 289, 290.

(a) *Morris v. Coles*, Tidd, 75; Legal Observer, 315; *sed quære*, for *semble*, the 12 G. 1, c. 29, seems to have implied on the plaintiff the proof of the affirmative.

(b) *Cohen v. Watson*, 3 Tyr. 238; but, *semble*, it would be otherwise if the defendant admitted his first receipt of the writ at a time too late to appear and denied previous knowledge.

served on the defendant's brother who resided with the defendant, and that the brother sent it back by the post to the plaintiff's attorney with a letter stating the fact, and also that the brother had no conversation with the defendant, the Court nevertheless refused to interfere, as it was not sworn on the part of the defendant that the copy did not reach the defendant's hands or come to his possession, or was not shown to him by his brother. (b)

The 31st general rule of Hil. T. 2 W. 4, 1832, orders that "any attorney who *undertakes to appear* shall enter an appearance accordingly," and if he afterwards refuse to perform his undertaking, the Court will grant an attachment against him or strike him off the roll, (d) and this it is said notwithstanding he was imposed upon by the sheriff's officer at the time when he gave the undertaking. (e) According to some authorities the undertaking must be express and *in writing*, and *signed* by the attorney, or the Court will not enforce it by attachment. (f) However, no precise form of words is essential, and even if an attorney subscribe process or accept a warrant or declaration, with intent to induce the plaintiff or his attorney to suppose he will appear, the Court will compel him to do so. (g) The first of the subscribed forms of undertaking is usually indorsed on the writ; (h) but that secondly suggested may be preferable for a defendant, as it would clearly enable him to take advantage of any irregularity notwithstanding the undertaking. It is a usual courtesy, at least when it is not intended to arrest an intended defendant, for the plaintiff's attorney to request the party to name his attorney, who will undertake for him to enter an

Of an attorney's undertaking to appear on behalf of the defendant and enforcing the same. (c)

(b) *Phillips v. Ensell*, 4 Tyr. 814.

(c) *Ante*, 240.

(d) R. Mich. T. 1654, s. 10; *Mould v. Roberts*, 4 Dowl. & R. 719; *Anon.* 6 Mod. 42; *Lorimer v. Hollister*, 2 Stra. 693; *Kilbey v. Weybergh*, 12 Mod. 251; as to serviceable process, 1 Sellon, 93; Tidd, 9 ed. 241; and see *Rogers v. Nevill*, 1 Term R. 422; and *Sedgworth v. Spicer*, 4 East, 569, as to bailable process, *ante*, 240.

(e) *Lorimer v. Hollister*, 2 Strange, 693; 1 Sel. Pr. 93, *sed quære*.

(f) *Lorimer v. Hollister*, 2 Stra. 693; Loft, 192; *Stratton v. Burgis*, 1 Stra. 114; *Power v. Jones*, *id.* 445; in Sellon, 94, a *quære* is added whether the Court on motion would not enforce a *parol* undertaking.

(g) R. M. A. D. 1654, s. 10, 1 Lil. Pr. reg. 102.

(h) "We undertake to appear for the within named defendant (or defendants, or for E. F. one of the within named defendants) in due time."

J. and W.  
22d Feb. 1835."

Or if to be qualified, then thus:—

"I undertake that an appearance shall be entered for the within named defendant in eight days from this date inclusive, without prejudice nevertheless to the defendant's right to avail himself of any irregularity or imperfection in the writ or indorsement, or copy or service. Dated this — day of —, A. D. 1835.

E. F.  
Attorney for defendant."

Form of an attorney's undertaking to appear indorsed on writ of summons.

The like with a reservation of all objections, &c.

CHAP. VI.  
PROCEEDINGS  
ON SUMMONS,  
&c.

appearance, and to obtain such undertaking so as to prevent any personal annoyance; but when it is probable that the defendant will not authorize an attorney to appear for him and will avoid process, it would be incautious to give him any such intimation; and if the defendant's attorney be in a dangerous state of health the safest course is to serve the defendant personally, because if the attorney should die before actual appearance, a difficulty or delay might ensue. A *general* unqualified undertaking to appear, would waive all irregularities in process and service, and therefore when it is not intended to waive the same, some qualification should be introduced in the undertaking, as, "i. e. without prejudice to the right of the defendant to take advantage of any irregularity in the process or copy or service thereof;" (i) but then probably the plaintiff's attorney would insist on personal service. The undertaking must also be performed substantially and in a proper manner, and therefore, if the defendant be an *infant*, the appearance must be by guardian, and if an action against husband and wife for both. (k)

SECT. II.—PROCEEDINGS BY A DEFENDANT ON SERVICE OF  
SUMMONS.

1. Of demanding inspection of the principal writ of summons.

1st. When a defendant has been served with a supposed copy of process, he may and ought immediately, or within a reasonable time afterwards, to require the production of the parchment writ, so as to examine it with the alleged copy, in order to ascertain whether they sufficiently correspond, (l) though it should seem that before any proceeding on account of a supposed irregularity, the defendant's attorney might at any time require an inspection of the original writ, or he might search and examine the copy served with the original *præcipe* filed at the office of the *signer* of the writs; and this may be important before any summons or motion to set aside the process or the service, or both, as the summons or affidavit or rule nisi should be framed accordingly, and refer to the writ or even the *præcipe*, as well as the copy served, when any objection may be thereby fortified. (m)

(i) See second form in note (h), *ante*, 273.

(k) *Stratton v. Burgis*, 1 Stra. 114; *Power v. Jones*, *id.* 445; 1 Sellen Fr. 93; *see post*.

(l) *Westley v. Jones*, 5 Moore, 162,

*ante*, 250.

(m) It may be fortified or prejudiced by referring to the *præcipe*; in *Coppen v. Potter*, 10 Bing. 445, the *præcipe* removed the objections.

2. We have seen that when an attorney's name has been indorsed on *any* writ serviceable or bailable, as having issued the same as attorney for the plaintiff, the defendant may on service, or arrest, require the attorney to state whether the process was issued with his authority; and if he answer in the affirmative, then he may by a judge's order be compelled to state the profession and residence of the plaintiff, and if he answer in the negative, the proceedings may be stayed; and in the case of an arrest, the bail bond cancelled, &c. (n)

CHAP. VI.  
PROCEEDINGS  
ON SUMMONS,  
&c.

2. Demanding of plaintiff's attorney whether he had authority to issue the writ, &c.

3. The 47th general rule Hil. T. 2 W. 4, 1832, now enables a defendant by leave of a judge "to obtain particulars of the plaintiff's demand *before appearance*, and without the production of any affidavit," (o) in order that immediately a defendant has been served with process he may in all cases ascertain and satisfy the claim before further expenses have been incurred; but as the proceedings to obtain particulars in general do not take place until after the plaintiff has declared, and the plaintiff must in some actions deliver such particulars with the declaration, we will postpone the full consideration of that subject to a subsequent page.

3. Of obtaining the particulars of plaintiff's demand.

4. If it be discovered that the writ itself is irregular, then in actions, when a tender is admissible, it is advisable, before informing the plaintiff or his attorney of the objection to the writ, to make a legal and sufficient tender of a sum sufficient to cover the debt; (p) but if the writ be sufficient and only the copy or service irregular, then the action having been sufficiently *commenced* a tender could not be pleaded, and the defendant should offer to pay the debt and the costs of the writ only, and if rejected should obtain a summons and order for staying the proceedings on such payment. (q)

4. Tender of the debt without costs.

5. If any irregularity in the writ or copy or service of the latter be discovered, then *forthwith*, and at least before the expiration of the four days allowed for paying the debt and costs, without incurring further costs, the defendant should decide whether he will take advantage of the error, and take out a summons or move the Court accordingly. The rule 33 of Hil. T. 1832,

5. Discovery of irregularities in writ or copy or service and time of taking advantage thereof. (r)

(n) *Ante*, 251, notes and forms.

(o) See previous practice, Jervis's Rules, 54, note (w).

(p) As to the requisites of a tender, see vol. i. 506, 507; *Finch v. Brook*, 1 Bing. New C. 257, 258.

(q) See the older cases as to the effect

of an offer of the debt and costs legally incurred, *Zeevin v. Cowell*, 2 Taunt. 203; *Roberts v. Lambert*, id. 283, S. P.; *Imp. K. B.* 166; and see *Elliston v. Robinson*, 2 Crom. & M. 343; 2 Dowl. 241, S. C.; *post*.

(r) See fully *ante*, 237.

CHAP. VI.  
PROCEEDINGS  
ON SUMMONS,  
&c.

made before the 2 W. 4, c. 39, orders that "no application to set aside process or proceedings for irregularity shall be allowed unless made *within a reasonable time*, nor if the party applying has taken a fresh step after the knowledge of the irregularity." And this rule seems only an express declaration or recognition of what was the clear and undoubted ancient and established practice of the Court of King's Bench and Exchequer, but which differed in some respects in the Common Pleas, where sometimes effect was given to motions for irregularity at a later stage in a cause than the other Courts.<sup>(s)</sup> It should seem that the application, whether by summons in vacation or term, or by motion to the Court in term, *must* be made *within eight days after the service of the writ inclusive of that day*, or, in other words, before the expiration of the time for the defendant's entering his appearance and before the defendant appears, which would waive all right to object,<sup>(t)</sup> because after that time has elapsed the plaintiff may have incurred expense in preparing the affidavit of service of the writ, and entering an appearance for the defendant, and filing his declaration. Indeed, in an action for a *debt* the application by summons or motion should properly be made within the four days allowed for payment of the indorsed claim, and with a stay of proceedings, if it can be obtained, until the application has been disposed of, so that if the result should be unfavourable the defendant may still offer, within the four days or perhaps an extended time, to pay the indorsed claim. If, however, a defendant can establish to the satisfaction of the Court or a judge, that he *never in fact had intimation of the process* until a subsequent proceeding on the part of the plaintiff, then it would suffice to object *promptly* after knowledge of the latter.<sup>(u)</sup>

Reason for not  
objecting to ir-  
regularity in  
mesne process.

But before any attempt to take advantage of any irregularity, it should be remembered that if taken, the plaintiff might immediately abandon the serviceable process, and commence a fresh action by *capias*, and arrest the defendant, and shew him no subsequent indulgence.<sup>(v)</sup>

How to be taken  
advantage of.

We have in the preceding chapter made some observations

(s) *Jervis's Rules*, 51, note (k); *Wetherall v. Hawes*, Barnes, 269; Imp. C. P. 164; *Fox v. Money*, 1 Bos. & Pul. 250. Before the above rule it was held in the *Common Pleas* that although a mistake in process was aided by the defendant's appearing, it was not so when the plaintiff entered an appearance for him, *Westall v. Finch*, Barnes, 406; and that irregularity in service of process might be complained of

at any time before interlocutory judgment, though not after, *Wetherhall v. Hawes*, Prac. Reg. 355; Imp. C. P. 164.

(t) Appearance in ecclesiastical Courts waives irregularities, *Prankard v. Deacre*, 1 Hagg. R. 183; *Hamerton v. Hamerton*, id. 23; *Wyllie v. Mott*, id. 33.

(u) *Semble*.

(v) *Ante*, 254, note (d), (e).



on the time and manner of objecting to irregularities in process, or the copy or service. Before the 2 W. 4, c. 39, if a party, having been served with a supposed *copy* of process, but in which there was a variance or irregularity, it was considered to be necessary, in support of his rule to set aside the proceeding or any part thereof, *to produce the copy of the writ actually served*, and to swear to the service thereof, and also that he never had been served with any other; (x) and now, although such production in Court may not be absolutely requisite, yet if the copy be not produced, or positively sworn to have been destroyed, or to be in the possession of the plaintiff or his attorney, the application of the defendant may be prejudiced. (y) When the irregularity objected to is in the principal writ of summons itself, or in its indorsements, and not merely in the copy served, as in omitting the insertion of the day when issued, (z) then the motion should be *to set aside the writ* itself, and not merely the service thereof; and when the defect is merely in the *supposed copy* served, then the rule nisi should be to set aside the copy; (z) and if the writ and the copy be regular, and the objection be only to the *mode*, or *manner*, or *time*, or *place* of the *service* of the copy, then the summons or rule nisi should be only to set aside the *service*; (a) and a mistake either way in the terms of the rule nisi or summons might cause the same to be discharged, though probably without costs, if the proceedings were really defective. (a) But if a rule be sufficiently comprehensive, although too large, it may be made absolute in part. (a) In moving to set aside any proceedings for irregularity, care therefore must be observed so to frame the rule nisi as at all events to *include* that particular irregularity that will certainly be established. When a defendant has been served with a copy of a writ that appears to deviate from the prescribed form, then it should be ascertained before moving, whether the writ also is alike defective; for if it be, then, as the *copy* corresponds with the original, it is

(z) *Chanklin v. J'Anson*, Barnes, 298. 1 Ken. 374; 1 Sellon, 102; Imp. C. P. 164; 1 Tidd, 161, note (g), 169, (u); *Perrott v. Heale*, 3 Wils. 58; but see *Walker v. Hawkey*, 5 Taunt. 83-4.

(y) See observations of Tindal, C. J., in *Coppin v. Potter*, 10 Bing. 445.

(z) *Hesker v. Jarmaine*, 3 Tyr. 381; 1 Dowl. 654, S. C.

(a) *Id. ibid.* In this case the rule nisi was to set aside "The service of a writ of summons," on the ground that the same omitted the *teste*, but it appeared that

the defect was only in the *copy* served; and Bayley, B., said, "You might have moved to set aside the writ and service, and if it had then been objected to such rule that you had asked too much, if the writ was right the Court would then have set aside what appeared to be irregular; but here you have improperly moved to set aside the *service*, though your affidavit states no objection to the *service*, but to the writ itself, and therefore the rule must be discharged, though without costs."

CHAP. VI.  
PROCEEDINGS  
ON SUMMONS,  
&c.

considered that the rule ought not to be framed merely to set aside the *service* of the copy, but also to set aside the *writ itself*; for there must be some irregularity in *the service* to warrant a motion to set aside the *service* only; and per Bayley, B., "If you move to set aside the writ and service, or the writ or service, and the *writ* turns out to be right, the rule would not be discharged, but will be made absolute as to so much as is irregular." (b) But in another case, where the rule nisi asked too much, the Court, in making only a part absolute, refused to allow costs, because if the rule had been confined to the objectionable proceeding, perhaps the opponent would not have incurred the expense of shewing cause, which he was obliged to do in order to prevent his opponent from obtaining too much. Upon the whole, therefore, the most prudent course is to draw up the rule to set aside only that part of the proceeding which is clearly objectionable.

The affidavit in support of motion to set aside proceedings, &c.

It has been observed that an affidavit to obtain and support a summons or rule nisi for setting aside the *service* of process in a *wrong county*, must not only state that the place of service is more than 200 yards distant from the county into which the process issued, but also *that it is not surrounded by that county*. (c) An affidavit to support a motion to set aside the supposed service of process, on the ground that there had not been *any service whatever*, must deny not only that the defendant was served with process, and that *no writ* or process came to his knowledge or possession, but also the like as to any *copy* of any writ or process, or the Court will not interfere; (d) and it was recently decided on a motion to set aside a declaration and all subsequent proceedings, on the ground that the defendant had not been served with process, that it was not sufficient for the defendant to swear that he had not been personally served with any copy of the process, and that the writ was served by mistake on his brother, who resided in the same house, and who returned the copy on the same day to the plaintiff's attorney; but that he must state further that the copy of the writ served *did not come to his possession*

---

(b) See previous note. *Sed quare*, ought it not to be considered that a defendant has a right to suppose that the original writ corresponds with the copy served, and ought he not therefore to be allowed in such case to move to set aside the *writ* as well as the copy, or at least having had reasonable ground for supposing that the

writ corresponds with the supposed copy, ought he ever to pay costs because it turns out that the writ did not correspond?

(c) Dowl. stat. 2 W. 4, c. 39, notes, page 144.

(d) *Coken v. Watson*, 3 Tyr. 238; *Phillips v. Ensell*, 1 Cr. M. & R. 374.

*or knowledge.* (e) The other requisites of an affidavit of this nature will be governed by the rules affecting affidavits in general, which will be considered in the chapter on motions. The forms in the note may assist. (f)

CHAP. VI.  
PROCEEDINGS  
ON SUMMONS,  
&c.

When personal service has been sworn to on the part of the plaintiff, and when on a motion to set aside the proceedings on the ground that there was *in fact no personal service*, if on the conflicting affidavits on each side it appear doubtful whether there was such service, the Court will not interfere, but will discharge the defendant's rule for setting aside the proceedings with costs, because in making a motion of that nature the rule is, that the defendant must rely on the strength of his own affi-

Hearing rule and making same absolute, or discharging same, and on what terms.

(e) *Phillips v. Ensell*, 1 Cr. M. & R. 374; and see *Rhodes v. Innes*, 5 Moore & Payne, 153; 7 Bing. 369, 8 C.

(f) In the Court of King's Bench (or "Common Pleas," or "Exchequer.")

Between {  
A. B. plaintiff,  
and  
C. D. defendant.

C. D. of ———, being the person against whom this deponent is now informed, and verily believes the above named A. B. hath issued a writ of summons, and hath entered an appearance in this action, and hath also filed his declaration thereupon, maketh oath and saith that [he hath never been personally served with any writ of summons or copy of a writ of summons, at the suit of the said A. B., either in the county of ———, or within two hundred yards distant from that county, or in any county surrounded by that county, or within two hundred yards distant from such county,\* or elsewhere, nor hath he ever before the ——— day of ——— instant, when he was for the first time served with a notice that a declaration had been filed in this cause, had or received, or seen or been told, or heard of any writ or process, or copy of any writ or process, having been issued against him at the suit of the said A. B., nor had he before that day any knowledge, or notice, or intimation whatever, that any writ or process had been issued against him at the suit of the said A. B.]

Affidavit on which to set aside the pretended service of a copy of summons.

First, denying the service of any writ or copy.

On the ——— day of ——— instant, he was served by a person, whom this deponent is informed and verily believes was and is a clerk to the plaintiff's attorney in this action, with the paper hereunto annexed, marked A., as and for a copy of a writ of summons, duly issued out of this Honourable Court, and which this deponent is informed and advised, and verily believes was at the time of such service and ever since hath been and still is defective and irregular in several respects, existing and apparent therein and therefrom before and at the time of such service, that is to say, &c. (state the objections, especially if they consist in a variance from the original writ): and this deponent further saith, that he hath not ever been served with any writ of summons, or any copy or supposed copy of a writ of summons, at the suit of the said A. B. other than and except the said paper, which this deponent is advised and believes, and submits to this Honourable Court, was and is defective and irregular as aforesaid.

The like, shewing the service of an insufficient copy of process.

After stating the exact place of service proceed thus, "and this deponent further saith that the said place, where he was so served as aforesaid, was not within two hundred yards of the border of the said county of ———, or upon the confines thereof, but upwards of ——— miles from the border of the said county, nor was the place where he was so served within or part or parcel of any county surrounded by the said county of ———, but was and is in the county of ———, and neither before nor at the time of the said service was there any doubt or dispute as to the boundary of the said county of ———, as respected the place where this defendant was so served,

Affidavit object- ing that the ser- vice was not in proper county, &c.

\* 2 W. 4, c. 39, s. 20.

CHAP. VI.  
PROCEEDINGS  
ON SUMMONS,  
&c.

davits; (g) consequently, the affidavits in support of the application must be as explicit and positive as truth will admit.

The Courts, on making a rule absolute in part or whole, usually do so "*on terms*;" as where the objection in a bailable action is to the writ, they will discharge the defendant out of custody, and set aside the bail-bond; but on the terms that the defendant *shall enter a common appearance*, thereby enabling the plaintiff to proceed in the action although he has lost the security of bail; (h) and on motions in bailable actions it is usual for the defendant to offer such terms in his rule nisi, whereby, if accepted, he would avoid the risk of a second arrest. It seems, however, that where there is an *omission* in a writ of some matter that ought to have been inserted, according to 2 W. 4, c. 39, and constituting an omission declared by rule 10 of Mich. T. 1832, to be an *irregularity*, the defendant has an *unqualified* right to have the writ and service set aside; and it does not appear that there is any principle upon which the Court can so qualify that right by requiring the defendant to enter a common appearance; indeed if they had, then in serviceable process, however irregular, the plaintiff, by obtaining such appearance, would gain his principal object, and the use of the application to set aside proceedings would be entirely defeated, unless perhaps by the defendant's attorney obtaining costs, obviously of no benefit to the defendant himself. Supposing, however, that qualification of the rule should be objected to by the defendant, then the Court would probably refuse costs in cases when they have a discretionary jurisdiction over the same. (i) When the proceeding has been against *good faith*, we have seen that the Court, as of course, award costs against the party guilty of the breach. (k) It seems also questionable whether the Courts will assume the jurisdiction of imposing the terms that the defendant shall not bring any action for what has been done under the irregular writ, except as an alternative of giving or refusing the costs of the application.

6. Payment of  
the indorsed  
debt and costs.

6. If the defendant, upon service of the writ for a debt, cannot discover any irregularity, or if he resolve to waive it and pay the debt indorsed with the costs, he must do so *within four days* after he has been served, *exclusive of that day*, (l) though

(g) *Morris v. Coles*, 2 Dowl. 79; 6 Legal Observer, 315; Tidd's Supp. 1833, 75.

(h) As in *Rice v. Huxley*, 2 Dowl. 232; and *Nicol v. Boyn*, 10 Bing. 339.

(i) *Ante*, 75.

(k) *Ante*, 76.

(l) *Sembla*, Reg. Gen. Hil. T. 2 W. 4, reg. 8, *ante*, 110.

by the express terms the rule Hil. T. 2 W. 4, rule 11, and Mich. T. 3 W. 4, rule 5, 1832, he may after such payment have the costs taxed, and the excess, if any, refunded; and if more than a sixth be taxed off, the plaintiff's attorney is to pay the costs of taxation.

CHAP. VI.  
PROCEEDINGS  
ON SUMMONS,  
&c.

7. If a sum larger than the debt really due be indorsed, or there be no indorsement, the prudent course will be for the defendant or his attorney, in the presence of a witness, or of two, for fear of the death of one, to tender the real amount and the costs, and if not accepted, to take out a summons why on payment of such real debt and costs the proceedings should not be stayed, or the defendant be at liberty to pay into Court such admitted sum and costs of the writ only; (l) but such summons, to avoid the costs of the draft of declaration, should be returnable within the first six days. (l) If such offer be made but not accepted, and still more, if such summons be obtained, although the judge cannot make an order whilst the plaintiff insists there is a larger sum due, yet it has been held in the Common Pleas (m) that where the offer has been made and refused, the Court will permit the defendant to pay the debt into Court, with the costs of the action up to the time of his offer only; and if the plaintiff take the money out of Court, he will be compelled to pay the costs of the application, and all costs in the action subsequent to the offer. (m) In the King's Bench it was decided that in such a case if an offer of payment has been made before declaration, and the defendant after declaration paid money into Court in the usual course, and the plaintiff thereupon proceeded to take the same out of Court, then was the proper time for the defendant's attorney to apply to the Court, on affidavit of the facts, to limit the taxation of costs to those only of the writ. (n) If the action be in trover or detinue for specific articles of continuing equal value, as a deed, &c. an early offer to deliver up the articles, with costs to the time of such offer, and a sufficient sum for any supposed damages for the detention, might possibly be attended with similar advantage as respects costs subsequent to the offer, (o) especially in those cases of personal actions for

7. Consequence of an offer to pay a sufficient sum and costs to the time of offer, if not accepted.

(l) *Elliston v. Robinson*, 3 Crom. & M. 343; 2 Dowl. 241, S. C.; and see *ante*, 212 to 216; Bagl. Pr. Ch. 85, §11.

(m) *Zeuvin v. Cowell*, 2 Taunt. 103; *Roberts v. Lambert*, *id.* 283, S. P.; Tidd, 9th edit. 623, *ante*, 215.

(n) K. B. MS., Comyn for plaintiff, Chitty for defendant; *James v. Raggett*,

1 Chitty's R. 471; 2 Bar. & Ald. 776, S. C.; 6 Moore, 430; 3 Brod. & B. 168, S. C.; *Chapman v. Drunning*, 1 Chit. 278.

(o) *Earle v. Holderness*, 4 Bing. 462; 1 Moore & P. 254, S. C.; Tidd, 9th ed. 544, 545. But see *Philippis v. Hayward*, 1 Harr. & Woll. 108; 4 Bing. 462.

CHAP. VI.  
PROCEEDINGS  
ON SUMMONS,  
&c.

*damages* in which the defendant is now at liberty to pay money into Court upon a judge's order. (p)

8. Time within which the defendant to appear after service.

8. The form of writ of summons prescribed in schedule of 2 W. 4, c. 39, No. 1, commands the defendant "*that within eight days* after the service of this writ on you, *inclusive* of "the day of such service, you do cause an appearance to be "entered, &c.;" and the 16th section enacts that all proceedings as are mentioned in any writ, notice, or warning issued under that act, shall and may be taken in default of defendant's appearance, or putting in special bail, as the case may be. The day of the service, however late in the evening, is in this instance to be *included* in calculating the eight days, although the rule Hil. T. 1832, Rule VIII. orders that in general the prescribed number of days shall be reckoned *exclusively* of the *first day* and *inclusively* of the last, unless the latter fall on a Sunday, Christmas Day, Good Friday, or a day appointed for a public fast or thanksgiving. The eight days' time for appearance are therefore to be reckoned *inclusively* of the first and last day, unless in the excepted cases.

9. The mode or form of entering an appearance by the defendant, or by his attorney, in King's Bench, Common Pleas, and Exchequer.

9. The 2nd section of 2 W. 4, c. 39, enacts, "that the *mode* of appearance to every writ of summons, or under the authority of that act, shall be by delivering a *memorandum in writing according to* the form contained in the schedule, such memorandum to be delivered to such officer as the Court out of which such process issued should direct, and to be *dated on the delivery thereof*. Three forms of appearance are prescribed in schedule No. 2, and to the following effect. One of these forms is to be adopted according to the facts of the case, as *first*, where a single defendant appears in person; *secondly*, where an attorney appears for a single defendant, or for all the defendants; and *lastly*, where an attorney for the *plaintiff* enters an appearance according to the statute 12 G. 1, c. 29, so that when one of several defendants appears separately, or where an attorney appears only for one of several defendants, a different form must be framed. We have seen that the schedule 2 W. 4, c. 39, No. 2, has prescribed three forms; the *first*, for an appearance by the defendant *in person*; *secondly*, an appearance for him by his attorney; and *thirdly*, an appearance entered by the *plaintiff* or *his attorney* for the defendant. Each of these is printed or lithographed on a

small piece of parchment of about five inches broad and four deep, with blank spaces for the insertion of the name of the Court, Christian and surnames of the plaintiff and defendant, name of the attorney who enters the appearance, and statement for whom he appears; and lastly, a blank in which the day when the appearance is entered is to be inserted.

CHAP. VI.  
PROCEEDINGS  
ON SUMMONS,  
&c.

A., plaintiff, against C. D. { The defendant C. D. ap-  
Entered the — day of —, A.D. 1835. { pears in person.

Forms of enter-  
ing an appear-  
ance as pre-  
scribed by  
2 W. 4, c. 39,  
schedule No. 2.

Or,

A., plaintiff, against C. D. & others. { E. F., attorney for C. D.,  
Entered the — day of —, A.D. 1835. { appears for him.

Or,

A., plaintiff, against C. D. & others. { G. H., attorney for the  
Entered the — day of —, A.D. 1835. { plaintiff, appears for the  
defendant C. D. accord-  
ing to the statute.

It will be observed that when the appearance for a *defendant* has been entered by and in the name of *his* attorney, whose residence or place of business must have previously been entered in a public book, the plaintiff may, by resorting to such book, ascertain where and to whom to deliver the subsequent declaration and other proceeding, unless there should be several attorneys of the same name, in which case it might be necessary to apply to each to know which of them was authorized by the defendant, a trouble and inconvenience that might readily have been avoided if the form prescribed by the statute had required *the attorney's residence to be stated in the appearance*. But the form prescribed by the statute and schedule of an appearance by the *defendant himself*, without stating his residence, or where he will receive papers, is in that respect too general. (q) It will be obvious that when a defendant appears *in person*, and does not by his appearance designate any residence, *he ought to be required* to state where subsequent proceedings in the cause are to be left for him, for at present plaintiffs incur much difficulty; and even the declaration cannot

(q) See the difficulties that have arisen in serving declarations in consequence of plaintiff's ignorance of defendant's abode, and which might be avoided by requiring that defendant's appearance should em-

body a statement of his residence or place where the declaration and other proceedings may be left for him, Tidd, 9th edit. 457.

CHAP. VI.  
PROCEEDINGS  
ON SUMMONS,  
&c.

be stuck up in the public office, when the residence of the defendant is unknown, without leave of the *Court* previously obtained, (r) the delay and trouble in obtaining which ought to be dispensed with when once the defendant has been actually served with process. However, the motion for such leave is absolute in *the first instance*; thereby evincing that as it is to be granted of course, no motion ought to be required. (s) Where the defendant had left his last place of residence before the service of the declaration, and which service was consequently irregular, the Court refused to declare it sufficient nunc pro tunc. (t)

In the *Exchequer* there was in force, before the 2 W. 4, c. 39, an *express* rule that on every appearance to be entered by the sworn or side clerks as officers of the office of pleas, they should cause to be put the name and *address of the attorney* at whose instance, and the day on which the same should be entered, and that such appearance should be entered by the defendant's name, by the said sworn clerks, in proper books, having an *alphabetical index book of reference* entered by the plaintiff's name, to be provided by the clerk of the pleas for each term, and which books should be open to the inspection of the said attorneys, admitted as mentioned in a foregoing rule of that term, and their clerks, without fee or reward. (u) And by another rule of the same term, "if the whole number of defendants, where there were several, should appear by the same attorney at the same time, the names of all the defendants should be inserted in one appearance. (x) But it seems that such rules were virtually annulled by the 2 W. 4, c. 39, s. 2, thus requiring a different and less explicit form of appearance to be adopted, and as given in the schedule No. 2. (y)

(r) R. G. Hil. T. 2 W. 4, r. 43, *Jervis's Rules*, 55. Why should not leave of a judge by order be deemed sufficient?

(s) *Bridger v. Austin*, 1 Dowl. 272.

(t) *Throughton v. Cramer*, 9 Legal Observer, 172.

(u) Rule Mich. T. 1830; 1 Tyr. Rep. 159. And see *Dax's Prac.* 35; *Price's Prac.* 199.

(x) *Id. ibid.*; 1 Tyr. R. 158. That in all cases where a defendant shall have appeared in any action in the said office of pleas, and in cases where the plaintiff has entered an appearance therein according to the statute, and the defend-

ant shall, by an attorney of this Court, have given notice in writing to the attorney for the plaintiff, or his agent, of his being authorized to act as attorney for such defendant, all proceedings, notices, and summons, rules and orders, which, according to the practice of this Court, were heretofore delivered by the sworn or side clerks of the other party, plaintiff or defendant, shall be delivered to or served upon the attorney or attorneys of the other party, plaintiff or defendant, and that all notices, &c. shall be so served or delivered before nine o'clock in the evening.

(y) It might be advisable to authorize the use of the following forms, but until they have been sanctioned by the legislature, any practitioner might hesitate in deviating



It has been supposed that to serviceable process jointly issued against several defendants, they should enter a *joint* appearance and not appear separately; but it was held that if they do appear separately, that will not enable the plaintiff to declare separately. (2) When one of several joint defendants apprehends collusion between the other defendants and the plaintiff, or for some other reason wishes to defend separately, he should employ a different attorney and appear and plead and defend separately in every stage throughout the suit.

In the Exchequer it has been held, that appearances in person in a suit in the *King's Remembrancer's Office* may be recorded in Court without a fee to a clerk in Court; and Bayley, B. observed, though the ordinary course is to enter an appearance in the office by the agency of a clerk in Court, I have no doubt that an appearance in person in Court may be recorded; for every person has a right to appear in person according to process, without being compelled to employ an attorney to enter his appearance. (a) That decision, however, cannot affect the right of the respective officers to receive the fees prescribed by the general rule of Mich. T. 3 W. 4. (b)

In general a plea before appearance, even to a declaration *de bene esse*, or any other step, excepting the obtaining particulars of demand, or a summons or motion to set aside the

What plea or act of defendant before his appearance is a nullity or otherwise.

from the exact forms, *ante*, 283, as imperatively prescribed by 2 W. 4, c. 39, s. 2, and schedule No. 2, however insufficient those forms may be found.

In the K. B. [or C. P. or Exchequer].  
A. B., Plaintiff, } The defendant C. D., residing at No. —, in — street, in  
against } the parish of —, in the county of —, housekeeper (or  
C. D. & E. F., Defts. } lodger, &c.) and the defendant E. F., residing at, &c. [like  
description,] on this — day of —, A. D. —, appear in person to a writ of summons on promises, tested the — day of —, A. D. —, and all regular notices and documents left for them at those places will be forwarded to them and accepted by them.  
Dated and entered this — day of —, A. D. 1835.

Proposed new form of appearance in person.

If the defendant should prefer not to state his residence, then his appearance might omit the statement thereof, but merely state *where all proceedings are to be left or served for him*.

The like, not stating the residence of the defendant.

A. B., Plaintiff, } Y. Z., of No. —, in — street, London, as attorney for the  
against } defendants, (or "as agent for G. H., attorney for the defendants," on this — day of —, A. D. —, appears for the  
C. D. & E. F., Defts. } said defendants respectively, to a writ of summons on promises, tested the — day of —, A. D. 1835.  
Dated and entered this — day of —, A. D. 1835.

Proposed new form of appearance by an attorney or agent for two defendants.

(s) *Ante*, 185; *Pepper v. Whalley*, 1 1 Tyrw. 280.  
Bingh. N. C. 71. (b) *Ante*, 160.  
(a) *The Attorney-General v. Carpenter*,

CHAP. VI.  
PROCEEDINGS  
ON SUMMONS,  
&c.

writ or copy, or service, would be premature. But it has been decided that a plea before appearance, being within the number of days allowed for pleading, is not such an irregularity as would entitle the plaintiff to sign judgment before the ordinary time of pleading has expired. (c)

Practical proceedings in entering an appearance for the defendant himself.

If the appearance is to be entered by or on the behalf of the defendant himself, the practice is to purchase at a stationers a *memorandum*, with all the unvarying parts printed or lithographed, on a small *square piece of parchment*, and in the first of the above forms leaving blanks for the insertion of all parts varying in each particular case. (d) The instrument is to be accurately intituled in the proper Court, as thus:—"In the King's Bench;" and the names and date are to be inserted according to the facts. The 2 W. 4, c. 39, s. 2, in terms requires that the memorandum be "*dated on the day of the delivery thereof*," i. e. the delivery to the proper officer of each Court.

Former proceedings as to filing warrant to defend.

Whilst the stamp duty on memoranda of warrants to sue or defend was in force under the 5 G. 3, c. 80, it was absolutely necessary that the same should be duly filed; (e) and it has been supposed that although the 5 G. 4, c. 41, repeals the duty, still the memorandum ought to be filed. (f) But the better opinion seems to be that such filing is no longer necessary. (g) It was the practice to prepare a *memorandum or minute of the attorney's warrant to defend* in the subscribed form, (h) and the same, (i) together with the above *memorandum of appearance* thus filled up, (if the appearance is to be entered in K. B.) was formerly taken to the *Appearance Office*, King's Bench Walk, Temple, No. —, and delivered to the clerk of the common bails there, and who entered the same in a

Offices in which to enter appearances.

(c) *Nolleken v. Severner*, 2 Tyr. Rep. 304.

(e) 1 Sellon Pr. 19.

(f) Price's Pr. 54.

(d) For the forms of common appearance before the uniformity of process act, see 1 Sellon Pr. 92.

(g) Tidd, 96; but see *ante*, 117, note (i), and 9 Legal Obs. 22, 23.

(h) In the Court of —.

Minute of warrant to defend formerly filed.

Middlesex to wit. J. K. is retained to defend by C. D. as his attorney, at the suit of A. B.

J. K., Defendant's Attorney.

Entered or filed of record, this — day of —, in the — year of the reign of O. P. [officer's name.]

[If by an agent, add by L. M. his agent.]

Entered or filed, &c. [same as above].

(i) See the former practice 1 Sellon, 92; and see *ante*, 117, that at least in C. P. the officer may still insist on the

filing of the warrant to defend before he permits any entry or proceeding.

public book kept there. If in C. P. the appearance was entered with the filacer of the county in which the residence of the defendant in the writ was described to be, and he filed such memorandum, and who entered the appearance in the appearance book there. If in the Exchequer, the parchment memorandum was taken to the office of the Exchequer of Pleas, at No. 9, in Lincoln's Inn Old Square, and there delivered to the filacer or his clerk, to be filed; and also an entry thereof was there made in a book of appearances. (k) And although the memorandum of the warrant to defend is discontinued, the same practice continues as to the document, and office, and mode of entering an appearance for the defendant.

The general rule 2, of Mich. T. 3 W. 4, fixes that the *same fees* shall be paid in each Court at the time of delivery of the memorandum of appearance to the proper officer, viz. 1s, if only one defendant, and for every additional defendant 4d. Great care must be observed in correctly inserting in such memorandum the *name of the parties*, and also in entering the appearance with the *proper officer*; for otherwise the appearance might be treated as a nullity.

The fees on appearance.

The *consequences* of a defendant neglecting to cause an appearance to be entered for himself either by his attorney or in person, are principally two. *First*, by an express general rule, unless the defendant appear in person or by attorney or guardian, it shall *not be necessary to serve him with notice of taxing costs* in any subsequent state of the cause, (l) an exception probably introduced on the ground that a defendant, thus regardless of the process of the Court, is not entitled to a notice which would afford him an opportunity of eloigning his goods. (m) *Secondly*, if the defendant do not appear, or should appear without stating his residence, then by leave of the Court notice of a declaration may be stuck up in the office, if the defendant's residence be unknown. (n)

The consequences of non-appearance.

The appearance should correspond with the writ of summons in the *names* and *number* of the parties; and if there should be a *material variance*, it may be treated as no appearance and a nullity. (o) But if a defendant has been misnamed in the pro-

The appearance must correspond with the process.

(k) Price's Gen. Prac. 69; Bagley's Cham. Pr. 86, n. (j).

(l) Reg. Gen. Hil. T. 4 W. 4, s. 18; Chitty's Concise View, &c. 63.

(m) See observations in Jervis's Rules,

92, note (g).

(n) G. R. Hil. T. 2 W. 4, r. 49; ante, 284.

(o) 1 Arch. K. B. 4 ed. 527.

CHAP. VI.  
PROCEEDINGS  
ON SUMMONS,  
&c.

cess, he may in the memorandum of his appearance describe himself correctly thus:—"E. D. served with a writ of summons in this action by the name of C. D.," or "E. D. sued as C. D.;" (*p*) and thereupon the plaintiff may declare against the defendant as "E. D. served with process in this suit by the name of C. D." (*p*) And if the defendant appear in the very name in which he was sued, then, however erroneous, the plaintiff may declare against him, and proceed by that name to judgment and execution, and take him or his goods by the wrong name. (*q*)

Appearance for  
an infant.

If the defendant, or one of several defendants, be an *infant*, as he is supposed not to have sufficient discretion to select an attorney, or to direct the care of his defence, his appearance must be by *guardian*, (*r*) and who must be regularly appointed on petition, and by the order of a judge, to appear and defend as such guardian; (*s*) and it is the duty of a plaintiff's attorney to *enforce* such form of appearance, for an infant's appearance by *attorney* might afterwards be assigned as error; (*t*) and it seems that if an infant appear by attorney, and he upon request refuse to appear by guardian, the plaintiff's attorney may and ought to apply to the Court or a judge to order the appearance to be set aside, and that the defendant appear by guardian; (*u*) but such application may be made at any time before judgment. (*x*)

Proceedings to  
enable plaintiff  
to enter an

The 12 G. 1, c. 29, and 5 G. 2, c. 27, (to which the 2 W. 4, c. 39, s. 1 and 16, refers,) provide that if the defendant do not

(*p*) *Doe v. Butcher*, 3 T. R. 611; *R. v. Roper*, 6 Maule & Sel. 327, 339; *Hole v. Finch*, 2 Wils. 393.

(*q*) *Id. ibid.*; and *Crawford v. Satchwell*, 2 Strange, 1218.

(*r*) *Frescobaldi v. Kynaston*, 2 Stra. 784; Co. Lit 135 b.

(*s*) See T. Chitty's Forms, 626.

(*t*) *Shipman v. Stevens*, 2 Wils. Rep. 50; 2 Arch. K. B. 3rd edit. 676.

(*u*) *Hindmarsh v. Chandler*, 7 Taunt. 48; 1 Moore, 250; *Boys v. Edmeads*, 2 Chitty's Rep. 22; *Shipman v. Stevens*, 2 Wils. 40.

(*x*) *Shipman v. Stevens*, 2 Wils. 50; *Kerry v. Cade*, Barnes, 413.

The form of appearance by a *guardian* may, since the 2 W. 4, c. 59, sect. 2, be thus:—

Form of ap-  
pearance by a  
guardian for an  
infant.

In the King's Bench,  
Common Pleas,  
Exchequer.

Y. Z., of —, as guardian of and for the said defendant, and O. P., of, &c. as attorney for the said Y. Z., appear for the said defendant to a writ of summons in this action, tested the — day of —, A.D. 1835.

{ A. B., plaintiff,  
against  
{ C. D., defendant.  
Y. Z.  
O. P.

Entered this — day of —, A.D. 1835.

duly appear, then the plaintiff may upon *affidavit* made and *filed* in the proper Court of the *personal service* of the process, *enter an appearance for the defendant*, and proceed the same as if the defendant himself had appeared.

CHAP. VI.  
PROCEEDINGS  
ON SUMMONS,  
&c.

appearance for  
the defendant  
*see stat. i. c.*  
pursuant to the  
statute 12 G. 1,  
c. 29.  
The necessary  
affidavit of ser-  
vice of process.

The 3rd rule of Mich. T. 3 W. 4, A.D. 1832, we have seen, orders that the plaintiff shall not be at liberty to enter an appearance for the defendant unless the person who served the writ of summons shall have, within three days after such service, *indorsed* on such writ the day of *the week and month of such service*; and the same rule requires that every *affidavit* upon which such an appearance shall be entered, shall *mention the day* on which the indorsement was made. (y) The affidavit must also state the name or nature of the process served, as "a copy of a *writ of summons*," &c. and if it should be described only "as a writ of *mesne process*," the affidavit would be insufficient. (z) But in an action against husband and wife, if the husband alone has been served with a copy of process, the plaintiff may enter an appearance as well for the wife as for him. (a) The statute 12 G. 1, c. 29, in terms merely requires an affidavit of the personal service of a copy of the process, without requiring any oath that the writ or service was *regular*; but it will be seen from examination of the next form, that the deponent *usually swears* that the writ has been *regularly* issued, but perhaps that term need not be introduced. Subscribed is the usual form of such affidavit of *personal service*, which is adopted when it is supposed that the writ and copy, and manner of service, have in every *respect been regular*. (b) But when it is known or suspected that there has

(y) See rule, *ante*, 160, note (n).

(z) *Lakin v. Dewall*, 1 Sellon's Prac. 98.

(a) *Collins v. Shapland and wife*, Barnes, 412; *Buncombe v. Love and wife*, *id.* 406; Prac. Reg. 351; 1 Sel. 91.

(b) See the forms before the 2 W. 4, c. 39; 1 Sellon, 98; Tidd's Forms; and see the more recent forms in Tidd's Third Supplement, 1832, page 61; Atherton on Personal Actions, Appendix; Price's Gen. Prac. 73; T. Chitty's Forms, 341; Chitty, senior's, Summary, 315 b.

The following form is that now *constantly* used in all the Courts in *ordinary cases*, and is to be purchased, either printed or lithographed, at the principal law stationers.

In the Court of King's Bench,  
Common Pleas,  
Exchequer of Pleas.

Between { A. B., plaintiff, The usual form  
and of affidavit  
C. D., defendant. made in the

G. H., of —, clerk to E. F., gentleman, attorney for the above-named plaintiff, maketh oath and saith that he this deponent did, on the — day of —, instant, [or last past,] *personally serve* the above-named defendant with a *true copy* of a writ of *personal service* of a *regular writ* of summons, which appeared to this deponent to have been *regularly* issued out of this of summons. Honourable Court against the said defendant at the suit of the said plaintiff, and bear-

CHAP. VI.  
PROCEEDINGS  
ON SUMMONS,  
&c.

been any insufficiency or irregularity either in the terms of the writ or the copy, or in the service, that would render it incorrect to swear in such terms to the *regularity* of the writ, then it would obviously be improper to swear in such usual form; and the best course would be to *annex a copy* of the copy actually served, and to verify such copy, but omit the usual words "to have been *regularly issued*;" and the affidavit might be as subscribed, (b) but always strictly according to the facts. At all all events a *personal service* of a named document must be sworn to under 12 G. 1, c. 29, and it is questionable whether the Court would admit of any material deviation from the *ordinary form*. (c)

ing date the — day of —, A.D. 1835.\* And this deponent further saith, that he did, on the — day of —, instant, [or last,] being within three days at least after such service of the said writ, indorse on the said writ the *true day* of the week and month, and the year of the said service, pursuant to the statute in such case made and provided.

Sworn, &c.

N. O.

A separate affidavit of an ineffectual search for the defendant's appearance, where the affidavit of the service has been sworn in the country, and the search is necessarily by another deponent in London.

In the King's Bench,  
Common Pleas,  
Exchequer of Pleas.

Between { A. B., plaintiff,  
and  
C. D., defendant.

G. H., of —, clerk to E. F., gentleman, agent for the attorney of the above-named plaintiff, maketh oath and saith that he did on the — day of —, instant, [or last,] duly search in the book kept for entering appearances in the King's Bench office [in King's Bench, or in Common Pleas, "by the filacer of the county of —;" or in the Exchequer of Pleas, "in the office of pleas of this Honourable Court;"] for the purpose of ascertaining if any appearance had been entered for the defendant in this cause. And this deponent saith that no appearance hath been entered for the said defendant, as appears by the said book.

Sworn, &c.

G. H.

Form of affidavit of personal service, where it is supposed there has been some defect or irregularity in the process copy or service.

(b) —, of —, maketh oath and saith that he did on, &c. *personally serve* the above-named defendant with a *true copy* of a writ of summons, and another *true copy* whereof is hereunto annexed, and which said writ appeared to this deponent to have been *issued* [omitting the word *regularly*] out of this Honourable Court against the said defendant, at the suit, &c. [then proceed the same in other respects as above.]

(c) See the case of *Thompson v. Phenev*, before Patteson, J., and his judgment in Dowling's Statutes, 142, 143, in notes; where that excellent judge stated that a practice had crept in that the party seeking to enter a common appearance brought *any kind of affidavit*, which stated that the defendant had been served *personally*, and then set forth the particular mode of ser-

vice, which did not amount to personal service at all; that that course of proceeding was exceedingly improper, and he had given directions that it should be discontinued for the future. It is, however, still the practice to receive affidavits of *personal service*, without positively swearing to *regularity*.

\* The above form, *constantly used*, omits any statement of the memorandum or indorsements, or of any further statement of the *mode* of service; but some of the printed modern precedents here add the following words: "To which said writ and copy a memorandum was subscribed, and due indorsements were made thereon pursuant to the statute and rules of Court in that case made and provided, by his

this deponent's then delivering to the said defendant *personally a true copy* of the *same writ of summons* and memorandum subscribed, and of the several due indorsements made thereon pursuant to the statute and the rules of Court in such case made and provided;" and then conclude with the statement of the indorsement of the time of service as above.

It is not absolutely necessary to swear any affidavit of service until after the time for the defendant's appearance has expired, nor would the expense of preparing such affidavit be allowed if the defendant should tender the indorsed debt and costs before the expiration of the four days allowed for that purpose, or indeed if the defendant should appear before the plaintiff has entered an appearance *sec stat.*; so that in general the affidavit of service is not prepared until after the time for the defendant's appearance has expired. But it may, nevertheless, expedite proceedings when the service has been in the country, if the affidavit be sworn and forwarded to London immediately after the indorsement of the time of service has been made on the writ. The affidavit of service must not be sworn before the attorney for the plaintiff or his clerk. (d)

It will be observed that the statute 12 G. 1, c. 29, requires an affidavit of *personal* service, and such affidavit cannot be dispensed with; (e) and the practice of admitting *any deviation* from the *substance* of that affidavit has been recently condemned by Mr. Justice Patteson. (f) But as the statute prescribes *no express form*, and merely requires an oath of *personal service of the process*, and does not, at least in terms, require any oath that the process was in every respect *regular and sufficient*, it may suffice to swear to the name and description of the writ, and to verify an annexed copy, and swear to the service of a true copy corresponding with that annexed, thereby avoiding the *usual oath*, that such form was *in all respects regular* as above. But any affidavit substantially and materially deviating from the *usual form*, would probably not be received or acted upon at the office, and therefore it should seem that the person, before serving a copy of a writ, should examine the writ with the copy, and know enough of the law and practice to render it *morally proper* for him to swear to the regularity of the writ and indorsements. In the note is suggested a form in case the writ or copy served have been irregular in some small respect. (g)

(d) Rule 3, Hil. T. 2 W. 4; 1 Dowl. 184; Tidd, 242.

(f) In *Thompson v. Phenev*, stated in 2 Dowl. Stat. 2 W. 4, c. 39, notes, page

(e) *Pigeon v. Bruce*, 2 Moore, 462; 142, 143; ante, 290, note (c).  
8 Taunt. 410; S. C. Tidd, 241.

(g) In the King's Bench,  
Common Pleas,  
Exchequer of Pleas.

Y. Z., clerk to E. F., of —, gentleman, attorney for the above-named plaintiff,  
maketh oath and saith that he did on —, the — day of —, instant, [or last,]

Between { A. B., plaintiff, Suggested form  
and of affidavit of  
C. D., defendant, the personal  
service of a  
copy of a writ

CHAP. VI.  
PROCEEDINGS  
ON SUMMONS,  
&c.

Before whom  
affidavit of ser-  
vice may or  
may not be  
sworn, and of  
enforcing  
the swearing to  
such affidavit.

By the third Gen. Reg. Hil. T. 2 W. 4, no affidavit of the service of process shall be deemed sufficient, if *sworn before the plaintiff's own attorney or his clerk, (h)* and by 6 Gen. Reg. Hil. T. 2 W. 4, where an agent in town, or an attorney in the country, is the attorney on the record, an affidavit sworn before the attorney in the country shall not be received, and an affidavit sworn before an attorney's clerk shall not be received in cases where it would not be receivable if sworn before the attorney himself, but this rule shall not extend to affidavits to hold to bail. If the copy of the writ were served by a sheriff's officer, or any other person, the Court upon application would *compel him* to make affidavit of service; (i) the same as they will compel an attesting witness to swear to the execution of a warrant of attorney. (k)

How to enter  
appearance for  
the defendant  
by the plaintiff.

At common law, there was no mode of enforcing an actual appearance by the defendant, and it was a maxim, that until he had actually appeared, no judgment in the action could be given against him in his absence, and we have seen that it has been recently decided that a *custom* in an inferior Court to *give judgment* in default of appearance is illegal and void, so that

of summons,  
where the de-  
ponent cannot  
properly swear  
to the regularity  
of the writ or  
copy. §

personally serve Mr. C. D., the above named defendant, with a *true copy* of a writ of summons, \* which appeared to this deponent to have been issued out of and under the seal of this Honourable Court, at the suit of the above-named plaintiff, against the above-named defendant, and dated the — day of —, A.D. 1835, and to which said copy a memorandum was subscribed, and indorsements were made thereon to the best of this deponent's knowledge, judgment, and belief, pursuant to the statute and the rules of Court in that case made and provided, and a copy of which said original writ of summons, and of the said copy so served on the said C. D., and of all memoranda and indorsements thereon at the time of such service, is hereunto annexed, marked A. save and except as may appear in, by, or from such copy, on examination of the same. And this deponent further saith, that he did on the — day of —, last, [or instant,] being within three days at least after such service of the said copy of the said writ, indorse on such writ the day of the week and month, and year † of such service, being the day and year first aforesaid. ‡

Sworn at, &c.

Y. Z.

(h) See previous rules and practice, *Jervis's Rules*, 42.

(i) *R. v. Rudge*, 1 Bla. R. 432.

(k) *Clark v. Elwick*, 1 Stra. 1.

\* The kind of writ that was served must it is said be described, and where it was merely termed a writ of mesne process, the Court set aside the proceedings even after judgment, 1 Sellow's Prac. 98. But *semble*, that the swearing to *personal* service of a copy of a copy annexed would suffice, and be preferable in case of doubt as to regularity; *sed quare*, if such last-mentioned affidavit would now be received. See Dowl. Stat. 2 W. 4, c. 39,

s. 1, note (b), page 142, 143.

† As to the year, see Price's G. P. 72.

‡ The affidavit of this indorsement is required by stat. 2 W. 4, c. 39, and rule Mich. T. 3 W. 4, s. 3. Of course there must also be an affidavit of the ineffectual search for the defendant's entry of his appearance, as *ante*, 290.

§ This is founded on 5 G. 2, c. 27, and the form is from Wordsworth's Rules, 142.



it is only in the superior Courts by modern *express enactment*, that a mode has been devised of giving judgment in the action against an obstinate defendant in default of his appearance, and that only in the single case where the defendant has been *personally served* with the process, or where his goods have been taken under a *distringas*. (*l*) In part to remedy this evil, the 9 & 10 W. 3, c. 25, s. 33, (still in force but obsolete in practice,) authorizes the Court to give judgment to the plaintiff for a penalty of 5*l.*, with immediate execution in case the defendant does not appear; (*m*) and as the Court, upon affidavit and motion, would award execution for such penalty, the proceeding was useful, especially when the debt was small. (*n*) But still the plaintiff *could not proceed further in the action*. To remedy this defect, the 12 G. 1, c. 29, s. 1, enacts, that in case the defendant do not duly appear, it shall be lawful for the plaintiff, upon affidavit being made and filed in the proper Court of the *personal* service of such process as aforesaid, which affidavit shall be filed gratis, to enter a common appearance, or file common bail for the defendant, and to proceed thereon as if such defendant had entered his appearance or filed common bail; (*n*) and we have just seen that the form of an appearance so to be entered by the plaintiff is prescribed by 2 W. 4, c. 39, schedule No. 2. (*o*) Where, by mistake, the plaintiff entered an appearance for the defendant by a *wrong name*, the Court, upon motion, ordered the filacer to amend the appearance, the defendant's name being correct in the writ; (*p*) and where the defendant had got possession of the writ of summons, it was considered that the plaintiff might enter an appearance for the defendant without any indorsement of the claim for debt and costs, and the Court compelled the defendant to pay the costs. (*q*)

Consequences of mistake in entry of appearance sec. stat.

The statutes are silent as to the *time* to be allowed to the plaintiff to enter such appearance, and according to a recent decision there is a difference between the practice of the Courts of K. B. and C. P. and that of the Exchequer. In the former, the plaintiff must enter the appearance as of the term in which

Time within which such appearance according to statute may be entered.

(*l*) *Williams v. Lord Bagot*, 3 Bar. & Crea. 787.

(*m*) *Chitty's Col. Stat.* 50; *White v. Holland*, 2 Str. 737; *Gilb. K. B.* 369; *Anonymous*, 5 Mod. 592; 1 Clerk's Inst. 57; 1 Sellon's Prac.

(*n*) And see 43 G. 3, c. 46, s. 2; 51 G. 3, c. 124; 7 & 8 G. 4, c. 4, s. 130;

7 & 8 G. 4, c. 71; and *Chitty's Col. Stat.* 31, 32.

(*o*) *Ante*, 283.

(*p*) *Whetson v. Packman*, 3 Wils. 49; *Goodright v. Wright*, 1 Stra. 33; *Stratton v. Burgis*, *id.* 114; *Power v. Jones*, *id.* 445.

(*q*) *Brooks v. Edridge*, 2 Dowl. 647.



precisely as if the defendant had himself entered his appearance, although in a different form. (y)

If, after the defendant has entered his appearance in due time, the plaintiff's attorney should inadvertently overlook the same in his search, and file an appearance sec. stat. and give notice of declaration to the defendant, the defendant must object to that irregularity in due time after such notice, or a judgment signed against him would not afterwards be set aside. (z)

The plaintiff must enter the appearance for the defendant by the *same name* stated in the process, and if a misnomer be discovered, still the plaintiff should enter the appearance in the wrong name, the same as in the writ, and declare against him by the same name; and as the defendant cannot, since the 3 & 4 W. 4, c. 42, s. 11, plead his misnomer in abatement, the only inconvenience would be a summons under that section, compelling the plaintiff to state the proper name in the declaration, and to pay the costs of the summons and order. It would be irregular for the plaintiff to enter the defendant's appearance in his correct name; (a) and it has been considered that the plaintiff cannot, after appearing for the defendant in the name in the process, declare against the defendant by his right name; (b) but since the above enactment that point may perhaps be doubtful. (c)

We have seen that there is a sensible distinction in practice between cases where the defendant, in due respect to the process of the Courts, has himself appeared, and a case where he has neglected to appear, and has put the plaintiff to the additional trouble and expense of making an affidavit of the personal service of process, and entering an appearance for the defendant, viz., that in the latter case the defendant having evinced

CHAP. VI.  
PROCEEDINGS  
ON SUMMONS,  
&c.

An appearance entered by plaintiff for defendant sec. stat. must exactly correspond with process in names, &c. or consequences.

(y) See 2 W. 4, c. 39, s. 2.

(z) *Rutty v. Auber*, 3 Tyr. 591. An appearance was entered by the defendant in due time on 10 Jan.; but not being found in the appearance book, on search by the plaintiff's attorney, he entered a common appearance for him on the 21st, and proceeded to file his declaration, and gave notice of that step to the defendant on the 26th. The plaintiff signed judgment on 4th February, and levied execution thereon on the 19th. The defendant's attorney then said, that he had entered an appearance for the defendant, and it was decided, that though that entry of appearance made the demand of plea

necessary, yet, as the plaintiff's attorney was suffered to remain in ignorance of it, after he had committed the first irregularity consequent on that ignorance, viz. in giving notice of declaration filed on 26 January, the judgment must stand.

(a) *Doe v. Butcher*, 3 Term R. 611; *Greenlade v. Rothers*, 2 New Rep. 132; *Dring v. Dickenson*, 11 East, 223.

(b) *Id. ibid.*; and *Delaney v. Cannon*, 10 East, 328; *Mestaer v. Heris*, 3 M. & Sel. 45, *sed quare*.

(c) *Semble*, for why may not the plaintiff anticipate and prevent the very ground of complaint to which the 3 & 4 W. 4, c. 11, relates?

CHAP. VI.  
PROCEEDINGS  
ON SUMMONS,  
&c.

no respect towards the process of the Courts is not entitled to any notice of the intention to tax costs, which would only afford him an opportunity of removing his goods to avoid process. (d)

Of declaring on  
a writ of sum-  
mons.

Although the practice appertaining to declarations will be considered in a subsequent chapter, yet it may here be proper to notice, that since the uniformity of process act, 2 W. 4, c. 39, s. 3, extends the right of the plaintiff to enter an appearance for the defendant as well to writs of *distringas* as to serviceable process, it has been observed, that it is *unnecessary* for a plaintiff to declare *de bene esse* or conditionally upon a mere serviceable *writ of summons*, and therefore that mode or time of declaring is now confined to *bailable* process by *capias* or *detainer*; (e) and, indeed, it would not only be *unnecessary*, but *irregular*, to declare *de bene esse* on a writ of summons, (f) for this technical reason, viz. that that mode of declaration was, by the terms of the rule permitting it, *confined* to process *against the person*, whether *bailable* or not; (g) and that a writ of summons or *distringas* under the 2 W. 4, c. 39, is not to be considered process against the *person*, the former being merely a *summons*, and not commanding the sheriff to take the *body* of the defendant, and the latter being obviously only a proceeding against the defendant's *goods*. When a *capias* has been issued against several defendants, and one of them has not been arrested, but only served with a copy of the process, as he may be under the 5th section of 2 W. 4, c. 39, then there is an express rule authorizing a declaration *de bene esse* against the defendant thus served. (h)

The *form* of commencing a declaration as it is affected by the process to which the appearance has been entered, when that process has been a *writ of summons*, has been prescribed by the gen. rule, Mich. T. 3 W. 4, r. 1, and after the title of the Court, and statement of the day of filing or delivering the

(d) *Ante*, 287.

(e) Tidd's Supp. 1832, on the uniformity of process act, page 39, Tidd, Supp. 1833, p. 123.

(f) So argued in *Fish v. Palmer*, 2 Dowl. 461; 1 Arch. C. P. [68]; Jervis's Rules, 30, n. (u), but not decided. In 1 Arch. C. P. [68], it is stated that it would be *irregular*, and see Jervis's Rules, 30, n. (u); and see the question fully discussed as to any possible right to declare *de bene esse* on a writ of summons or *distringas* in Atherton on Personal Actions, 94, 98, 102, and *infra* next note;

see *quære* the principle, for a serviceable *latitat* was in effect as much a *summons* as the present writ of summons, and certainly a plaintiff might always have declared *de bene esse* on such *latitat*.

(g) See rule Trin. T. 22 G. 3; R. M. 10 G. 2, Tidd, 9 ed. 419; Atherton, Personal Actions, 94 and 98 and 102, very distinct on this point; 1 Arch. K. B. 4 ed. 215, 217; 1 Arch. C. P. [68]; but see Tidd, 9 ed. 454 to 456.

(h) R. M. 3 W. 4, r. 11; *Wendover v. Cooper*, 10 Bar. & Cres. 614.

declaration, is thus, [*Venue*]. "A. B. by E. F. his attorney, [or in his own proper person] complains of C. D. who has been *summoned* to answer the said A. B., &c ;(i)" and in all other respects the proceedings in the action are the same, whatever may have been the form of process.

CHAP. VI.  
PROCEEDINGS  
ON SUMMONS,  
&c.

---



---

(i) The rule of Mich. T. 3 W. 4, in giving the form, stops at the, &c. thus leaving it uncertain whether it was intended that the *form of action* mentioned

in the writ should be here inserted in the *declaration*. It is usually inserted. See the chapter on declarations, *post*.

---

## CHAPTER VII.

## OF THE WRIT OF DISTRINGAS AND PROCEEDINGS THEREON.

1. How regulated by 2 W. 4, c. 39, s. 3, and Schedule No. 3 . . . .	298	5. Form and requisites of distringas and indorsements thereon . . . . .	310
2. When proper to be adopted . . . .	309	6. Proceedings thereon . . . . .	312
1. When to enable a plaintiff to enter an appearance for the defendant . . . . .	301	Sheriff's warrant to officer . . . .	<i>ib.</i>
2. When issued to proceed to outlawry . . . . .	<i>ib.</i>	7. Defendant's own appearance to distringas . . . . .	314
3. The practice in the first case . . .	<i>ib.</i>	8. Sheriff's return of levy, or of personal service, or nulla bona and non est inventus . . . . .	<i>ib.</i>
1. Requisite diligence in endeavouring to serve summons . . . .	302	9. When plaintiff may enter appearance <i>without leave</i> . . . . .	315
2. Search for defendant's appearance to summons and requisite affidavit on which to move for distringas . . . . .	305	10. Motion for leave to enter appearance for defendant . . . .	317
Supplementary affidavit admissible . . . . .	308	Plaintiff's entering appearance thereupon . . . . .	319
3. Proceeding thereon . . . . .	309	Declaring upon a distringas . .	321
1. Motion for writ . . . . .	<i>ib.</i>	4. The practice in nonbailable cases in proceeding to outlawry, <i>post</i> , Chap. X.	
2. Rule for writ . . . . .	<i>ib.</i>		
4. Præcipe for writ . . . . .	310		

CHAP. VII.  
PROCEEDINGS  
ON  
DISTRINGAS.

1. How regulated by 2 W. 4, c. 39, s. 3, and schedule No. 3.

A writ of *distringas* we have seen is one of the *secondary* writs of mesne process, issued only in *furtherance* of the same object as a writ of summons, viz., to *enforce the defendant's appearance* in cases where a plaintiff has not been able to serve him *personally* with a copy of a writ of summons, after *three* several attempts to do so, and it must always be preceded by a *writ of summons* and bona fide endeavours to serve the same, and it is never preceded by a writ of *capias*. But when a writ of distringas has been obtained, then, although by the *terms* of such writ itself the sheriff is only commanded to *distrain the defendant's goods*, yet he is by the enactment in 2 W. 4, c. 39, s. 3, also required to *serve the defendant* with a copy of the writ, with the subscribed notice to appear, if the sheriff or his officer *can meet* with the defendant, and if not, he is then to leave such copy at the place where he makes the distress. (a) So that in effect a distringas has in all cases a *double operation*, viz., not only to *serve* the defendant with notice to appear, but also to induce or *enforce* his observance, by seizing and detain-

(a) 2 W. 4, c. 39, s. 3.

ing his goods; and if the sheriff should thereupon either distrain upon the defendant's goods, or serve him personally with a copy of the distringas, then, according to the terms of the notice at the foot of the distringas, and the enactment in the 16th section, (viz., that all notified proceedings may be had according to the notice,) it follows that in either of those cases, if the defendant do not himself appear, the plaintiff may, *as of course*, upon a proper affidavit of the facts, enter an appearance for the defendant *sec. statute* without obtaining the leave of the Court or a judge for that purpose. (b) But if the sheriff can neither distrain nor serve the defendant personally, and he return in the conjunctive *nulla bona and non est inventus*, then the plaintiff must apply to the Court for leave to *enter an appearance* for the defendant and proceed in the action, or for leave to proceed to *outlawry*. It will be observed that the form of the writ of distringas, as prescribed in the schedule of 2 W. 4, c. 39, No. 3, may give the defendant notice either that the plaintiff will proceed to enter an appearance for him or proceed to outlawry; but the writ must not be framed in the alternative; and the plaintiff, before applying for the writ of distringas, must, according to the facts of the case, make and declare to the Court or judge which course of proceeding he will adopt, and the writ must be confined to that limited object. (c)

In all cases there must have been a *writ of summons* before a writ of *distringas* can be issued; for the 3d section of 2 W. 4, c. 39, provides, that when it shall appear by *affidavit* to the satisfaction of the Court in term, or a judge in vacation, that the defendant has not been personally served with a *writ of summons*, and has not appeared, and cannot be compelled so to do, without *some more efficacious process*, then the Court or a judge may under a writ of *distringas* to be issued, directed to the sheriff of the county wherein the dwelling-house or place of abode of the defendant is situate, or to the sheriff of any other county, or to any other officer to be named by such Court or judge, in order to compel the appearance of the defendant. The same section directs that the writ and notice shall be in the forms prescribed in the schedule No. 3; and shall be tested on the day of issuing, and shall be returnable in term at least fifteen days after its teste, and that a copy shall

(b) *Johnson v. Smalley*, 1 Bowl. 596, 555, *post*, 315, 316.

(c) *Fraser v. Case*, 9 Bing. 464.

CHAP. VII.  
PROCEEDINGS  
ON  
DISTRINGAS.

be *served* on the defendant, if he can be met with, or if *not*, shall be *left* at the place where such distringas shall be *executed*. A true copy of such writ and notice is also required to be delivered with the writ itself to the sheriff or other officer, in order that he may deliver the same to the defendant. It is then enacted that if such writ shall be returned in the conjunctive, *non est inventus and nulla bona*, and the party suing out such writ shall not intend to proceed to outlawry or waiver, and the *defendant shall not appear* at or within eight days *inclusive* (d) after the return, and it shall be made appear *by affidavit that due and proper means have been taken to serve and execute such writ*, (i. e. to serve a copy on the defendant and to distrain his goods,) *the Court or a judge may authorize the plaintiff to enter an appearance for the defendant and proceed thereon to judgment and execution.* (e)

2. The case in which a distringas is proper to enforce an appearance.

2. The *use and propriety* of applying for a writ of *distringas* varies according to circumstances. If a party, having a residence or any home or tangible personal property that can be distrained, and being himself in *England*, has evaded the personal service of a writ of summons, then a writ of *distringas to compel an appearance* is the proper *secondary* process, and if the sheriff can neither serve him personally with a copy of such *distringas* in the manner prescribed, nor distrain upon his personal property, then if on a return of both those facts, i. e. *non est inventus and nulla bona*, and if the defendant do not appear within eight days, the plaintiff may, *by leave of the Court or a judge*, enter an appearance for him, according to the statute 12 G. 1, c. 29. (f) So even in cases where the defendant is abroad, yet if he carry on trade or keep an establishment in this country, the Court or a judge may order a *distringas* to issue to compel his appearance, though not to outlaw him. (g)

The cases in which that writ is proper to found proceedings to outlawry.

If the defendant *cannot be found in England*, under any circumstances, or it can be sworn that he is *staying abroad*, whether for delay or not, or if it cannot be ascertained after due

(d) The eight days for defendant's appearance are to be calculated from the *last*, usually the third attempt to serve him inclusive of that day. *Brian v. Stretton*, 1 Dowl. 642.

(e) Observations have been made on some inaccuracies in this act, and in the forms prescribed, which it may be useful for students to examine. See Price's Gen. Pr. 37 to 66. Certainly it is singular that

in the body of the writ the sheriff is not required to serve the defendant personally, nor is the defendant required to appear, but the principal authority is confined to making distress.

(f) Price's Gen. Pr. 51, 52.

(g) *Hornby v. Bowling*, 11 Moore, 369; *Gurney v. Hardenborough*, 1 Taunt. 487; *Fraser v. Case*, 9 Bing. 464.



inquiry *whether he is in England or not*, or whether he have *any distrainable property* here; then also (though upon a *differently framed affidavit*) the issuing a distringas will be proper; (*h*) but in the latter case the writ must be applied for *professedly*, in order afterwards to proceed to outlawry, under the *5th section* of the act, and the plaintiff will not in that case be enabled to enter an appearance according to the statute. (*i*) And counsel, on moving the Court, or an attorney on applying to a judge in vacation for a writ of distringas, must declare his election for what purpose it is to be issued, i. e. whether for the purpose of the plaintiff's entering an appearance for the defendant according to the statute, or in order to outlaw the defendant. (*k*) It seems to have been the intention of the legislature not to allow a *distress* upon a party's goods, unless it be shewn that after all reasonable endeavours he could not be *personally served* with process; nor to allow *outlawry*, unless it appear that the defendant could *neither be served nor distrained upon*, so as to endeavour to enforce an appearance by less prejudicial means than outlawry. (*l*) But since the 2 W. 4, c. 39, if a defendant or one of several defendants cannot be personally served, nor has any goods, he may be proceeded against *to outlawry*, whether or not he be in the kingdom, (*m*) although before that act it was held that an outlawry was void (that is *voidable* on terms) if the defendant had previously left the kingdom. (*n*)

3. The proceedings to obtain a distringas principally vary according to circumstances *in four different cases*; 1st, when a defendant has a known residence in England, either at his house or lodgings, and is supposed to be occasionally there and his goods can there be found; 2dly, where he has such general known residence but is *out of the kingdom*; 3dly, where the defendant has *not any known residence* but is supposed to be in England; 4thly, when the defendant has neither residence nor goods but is out of the kingdom.

3. The practice in obtaining a distringas first to enable plaintiff to enter an appearance for defendant. (*o*)

(*h*) *Moon v. Thynne*, 3 Dowl. 153.

(*i*) *Morgan v. Williams*, Price's Gen. Pr. 53, in notes.

(*k*) *Fraser v. Case*, 9 Bing. 464; Price's Gen. Pr. 58.

(*l*) Price's Gen. Pr. 52, 53, 56.

(*m*) 2 W. 4, c. 39, s. 5.

(*n*) *Bryan v. Wagstaff*, 5 Bar. & Cres. post, 314.

(*o*) It is to be kept in view that much of the old practice of the Court of Exchequer on proceedings upon a *venire*, as to the requisites of the proceedings and

of the affidavit in order to ground a motion for a distringas after a writ of *venire*, now applies to the new process by writ of summons, *Johnson v. Rouse*, 3 Tyr. 161; 1 Crom. & M. 26; Wordsworth's Rules, 74, note (*f*); and the Court used to require an affidavit almost irresistibly shewing that defendant kept out of the way to avoid service of the *venire* when that process was in force, *Pitt v. Elred*, 1 Tyr. 128; *Winstanley v. Edye*, id. 276; *Godkin v. Redgate*, id. 287.

CHAP. VII.  
PROCEEDINGS  
ON  
DISTINGAS.

1st case, Where defendant has a known residence in England and is supposed to be occasionally there.

The requisite endeavours to serve the defendant personally with the writ of summons.

The *first* is the most usual state of facts, and then the proceedings will be as follows: it will be observed, that in order to induce the Court or a judge to order the issuing a writ of *distingas* the statute 2 W. 4, c. 39, s. 3, renders it indispensable that a writ of summons in due form and with all proper indorsements shall have been *first* issued, and that it shall appear by *affidavit* to the satisfaction of the Court or a judge that the defendant *has not been nor can be personally served with a copy* of such writ, shewing with particularity the several attempts that have been made to effect such service; so that at all events a writ of summons must be *first* issued, and *diligent enquiries and attempts duly made to serve the same personally on the defendant*. It seems, however, that the attempts to serve a summons, in order to found a writ of *distingas*, may be different to those usually adopted when it is expected that a personal service may be effected. In the former case we have seen that even *delusive* or deceptive means may be properly adopted so as to entice the defendant to a meeting and then *personally* to serve him with a writ of summons; (o) but when it has been ascertained that there is no prospect of effecting or being able to deliver a copy of the writ of summons to the defendant in person, then, in order to avoid loss of time by ineffectual devices to obtain such meeting, it is advisable, even in the *first instance*, to act *explicitly*, and to deliver at the defendant's residence, to his wife or other member of his family or servant there, who would, under ordinary circumstances, be most likely to forward the communication to the defendant, a full statement of the particular object, and desire personally to serve the defendant, (and this even with a copy of the process on the first attempt, though not absolutely necessary to be left till the *last call*,) in order afterwards to shew to the Court that the defendant probably has received intimation through such relative of the object in view and that he *wilfully* avoids personal service, and therefore by his own conduct renders *more efficacious process essential*, as contemplated by the 8th section of the act.

The proper proceedings to be adopted, as settled by decisions, and to be collected from the usual forms of affidavit (one of which is subscribed), in order to *satisfy* the Court or a judge that due diligence has been ineffectually used, is for the plaintiff's attorney or one of his most intelligent clerks, or some other well informed practitioner, to make at least *three* (q)

(o) *Ants*, 270, note (r).  
(p) *Post*, 307, note (o).

(q) *Fisher v. Goodwin*, 3 *Crom. & J.* 94.

*separate calls at the defendant's residence.* The 2 W. 4, c. 39, is certainly silent as to the requisite number of calls, but that number has been adopted with analogy to the previous proceedings on a *venire* when that number of attempts was considered requisite, (q) and such calls must be distinctly stated in the affidavit, (r) and be either at the defendant's house or his lodgings and not merely at the office of his employer when he is a clerk, (s) and at hours when on each call it is most probable he will be met with there, and the party calling should on each occasion have in his possession the original writ and an exact copy ready immediately to produce and shew to the defendant, and it has been recommended that each call should be made on *separate days*, though it seems that all the calls may under circumstances be made on the same day; as where the affidavit establishes that the defendant purposely keeps out of the way. (t) But the *three calls* may be made by *different persons*. On each call application should be made to see the wife, relative, or most confidential clerk or servant, being an inmate, of the defendant, and *residing there* with him; and the party should produce the writ and copy on each occasion, (u) and also request to see the defendant; and he should fully communicate to such wife or other person the particulars of the writ, and distinctly state that the object of the call is to serve the defendant personally with a copy of the writ at the suit of the plaintiff or plaintiffs, naming them; (x) and it has even been said that on the *first* call a copy of the writ should be left, but according to the most recent decisions it suffices to leave such copy on the *last*, being usually the third call. (y) At the *first* call full inquiries should be made of the wife or other inmate, when it is most likely that on the same or the next or very early day afterwards, the defendant will be at home, or where else; and an appointment should be made to meet him accordingly; (z) and such appointment should be punctually kept; (x) and on this *second call* the like formal proceedings should take place, and another

(q) Wordsworth's Rules, 74, note (f); and see *Thomas v. Thomas*, 2 Moore & S. 730; *Johnson v. Rouse*, 1 Cromp. & M. 26.

(r) *Bower v. Auden*, 2 Crom. & Jerv. 45.

(s) *Thomas v. Thomas*, 2 Moore & S. 730.

(t) *White v. Western*, 2 Dowl. 431, 457; 7 Legal Ob. 701; 9 Legal Ob. 197.

(u) See observations of Bayley, B., in *Street v. Ld. Alvanley*, 1 Dowl. 638; *Anon. id.* 513; *Hill v. Mould*, 3 Tyr. 162;

2 Dowl. 10; and an anonymous case, Price Gen. Pr. 76, 77, in notes.

(x) *Johnson v. Rouse*, 1 Crom. & M. 26; 1 Dowl. 641; Wordsworth's Rules, 75.

(y) Post, 304, note (a).

(z) *Id. ibid.*; *Johnson v. Disney*, 3 Dowl. 400; *Wills v. Bowman*, *id.* 413; *Coet v. Wills*, 5 Legal Ob. 144; *Johnson v. Rouse*, 1 Cro. & M. 26; 3 Tyr. 161; 1 Dowl. 641, S. C.; *Atkins v. Lowther*, 5 Legal Ob. 144; *Simpson v. Ld. Graves*, 2 Dowl. 10; 6 Legal. Ob. 45, S. C.

CHAP. VII  
PROCEEDINGS  
ON  
DISTINGAS.

appointment at the most probable time of meeting the defendant should be made; and such appointment also should be punctually kept.

On the *last of the three calls* the like inquiry to see the wife or other inmate of the defendant, and also to see him, should be made, and the purpose of the call should be again fully stated, and an exact *copy* of the writ of summons and indorsements must then be delivered to the wife or servant or other inmate at the defendant's residence, with a request that the same may be immediately delivered to the defendant or forwarded to him by the earliest safe conveyance. (a) The least omission or mistake in the copy left, if altering *the sense*, would render the proceeding irregular; but not an omission of a letter or a variance which did not alter the sense nor could mislead the defendant. (b) The answers given on each occasion must be carefully minuted down and fully stated in a subsequent affidavit. (c)

It might also be advisable on the *first* occasion to address to and leave for the defendant a *civil letter*, stating the object of the call, with an assurance that the process is notailable, but that it will be necessary to effect personal service, and that the defendant will incur increased expense and annoyance by proceedings to outlaw him or a seizure of his goods, unless he permit personal service and do appear. (d) It is always essential that the three several attempts to serve the writ of summons should be made by an intelligent clerk well acquainted with the requisite practice; but it is not necessary that each of the three calls should be made by the same person. (e) However, it may save trouble and the necessity for several affidavits, if the whole proceeding be conducted by one person. As the proceedings must be made with a bona fide view to serve the defendant personally if possible, they will necessarily vary according to circumstances, and although in general there should be *three* distinct applications, yet it has been held that *one only*, coupled with other circumstances, and satisfying the Court by affidavit that the defendant *purposely* keeps out of the way to

(a) *Hill v. Mould*, 3 Tyr. 162; 1 Crom. & M. 617; 2 Dowl. 11, S. C.; *Street v. Albanley*, 1 Crom. & M. 27; *Balgay v. Gardner*, 2 Dowl. 52; *Turner v. Smith*, 1 Moore & P. 557; but in *Fraser v. Case*, 9 Bing. 464, the Court did not observe on the omission in the affidavit of that statement; and see *Smith v. Macdonald*, 1 Dowl. 688.

(b) *Ante*, 231; *Tyser v. Bryan*, 2 Dowl. 640; *Hodgkinson v. Hodgkinson*, *id.* 536; *ante*, 229 to 233, 261.

(c) *Pagden v. Kelly*, 1 Legal Ob.; Tidd's Sup. 79; Wordsworth's Rules, 75. (d) See Price's Gen. Pr. 48, 49, and affidavit in appendix of forms.

(e) *Smith v. Good*, 2 Dowl. 398.

avoid process, may suffice to induce the Court to order a *distringas*. (f)

CHAP. VII.  
PROCEEDINGS  
ON  
DISTRINGAS.

After such three unsuccessful attempts to serve the writ of summons, the plaintiff's attorney must wait at least *eight days* from the time of the *last* call when a copy of the writ was left, before he can proceed further, or move for a *distringas*. (g) On or after the *ninth day* the plaintiff's attorney ought very carefully to *search* at the proper office of the Court for the entry of the defendant's appearance. After an unsuccessful search for the defendant's appearance, an *affidavit* is to be prepared and sworn, stating such search, and that no appearance has been entered by or for the defendant in the named proper office. When the attempts to serve the summons have been made at a distance in the country, the *affidavit of such attempts* is usually made separately from that of the search for the appearance, which is usually prepared and sworn in London.

2. Search for defendant's appearance, and requisite *affidavit* on which to apply for a writ of *distringas*.

As the statute directs that the Court or a judge "shall be *satisfied that more efficacious process is necessary*" before they order a *distringas*, the judges require a *very full affidavit*, stating in general the proceedings before suggested, viz. that the deponent having with him a copy of a writ of summons *regularly* issued, (or in a case where the regularity of the writ or copy is doubted, annexing and verifying the same,) (h) attended at the *residence* of the defendant, shewing whether it was his house or lodgings, and its precise situation, (i) and then shewing that the deponent saw some inmate, and stated his object, and the answer and appointment for calling again, and that two other similar calls were made, stating what passed, and that on the last call a copy of the writ was left for the defendant, with directions to forward the same to him; and lastly, the deponent must not merely swear to his *belief* that the defendant keeps out of the way, but must shew the *very causes or grounds* of such belief, in order that the Court or judge may ascertain their *sufficiency*; and on that account the affidavit should *shew that the defend-*

The requisite affidavit.

(f) *White v. Western*, 2 Dowl. 431; 7 Legal Ob. 701, S. C.; Price's Gen. Pr. 48; referring to a case decided in Exchequer in Nov. 1832, and *Anon.* 1 Price's notes of Points Prac. Ex.; see also *Thomas v. Elder*, Price's Gen. Pr. 49; but see Tidd's Sup. A. D. 1833, p. 78, 79, as to the necessity for three calls.

(g) *Brian v. Stretton*, 1 Crompt. & M. 74; 3 Tyr. 163, S. C.; Tidd's Supp. 1833, p. 78; 9 Legal Observer, 197.

(h) See suggested form, *ante*, 291, note (g).

(i) *Pitt v. Elred*, 1 Crompt. & Jer. 147; *Bourser v. Austin*, 2 *id.* 45; *Scarborough v. Evans*, 2 Dowl. 9.

CHAP. VII.  
PROCEEDINGS  
ON  
DISTRINGAS.

*ant was at home or in the neighbourhood* at the time of the first call, or between that time and the last call, or very soon after, so that most probably he heard of the applications before the last day, or before the day on which he should appear.(j) The affidavit then states, that the deponent in due time and when, in pursuance of the rule of Court, indorsed the time of leaving the writ at the defendant's residence; and if the same deponent has searched the office for the defendant's appearance, the affidavit concludes with a statement of the time of the ineffectual search.(k)

It has been supposed to be necessary to set forth the *tenor* of the writ of *summons* in the very words,(l) but those decisions were before the 2 W. 4, c. 39; and although some forms still set forth, or even annex a copy of the writ, others do not, but merely state that the writ of *summons* and copy *were regular*; the same as in the long established form of an affidavit of *actual service* of a writ of *summons*.(m)

Suggested form  
of affidavit to  
obtain a *distringas*.

The *forms* of affidavits in order to *obtain a distringas*, and thereupon afterwards to enable the plaintiff to enter an appearance for the defendant as given in the books, vary considerably.(n) The subscribed form is suggested as most comprehen-

(j) *Turner v. Smith*, 1 Moore & Payne, 557; *Hornby v. Bowling*, 11 Moore, 371; *Johnson v. Rouse*, 1 Crompt. & Mee. 26; 1 Dowl. 641, 720; 3 Tyr. 161; *Anonymous*, 1 Dowl. 513, 641; *Price v. Bower*, 2 Dowl. 1, 7, 9, 10, 225; and see cases *Price's Gen. Prac.* 76 to 79, in note. In *Scarborough v. Evans*, 2 Dowl. 9, the Court said, "your affidavit is insufficient in not stating that you have endeavoured to serve the defendant at his present place of abode; you do not negative a knowledge of any other place of abode, nor do you state that you cannot find him. You ought to state the grounds for believing that he cannot be found."

(k) See *Tidd's Supp.* 1833, p. 78 to 80, and see *Wordsworth's Rules*, 75, a statement of the proceedings to obtain a writ of *distringas*.

(l) *Hill v. Wilkison*, 4 Taunt. 619; *Hannon v. Dietrichsen*, 5 Taunt. 853.

(m) Mr. Atherton, in his work on *Personal Actions*, Appendix, xxxviii. n. (c), and xli. n. (d), observes, that "the

annexation of the writ is unnecessary; and that as the writ itself might afterwards be required for other purposes, e.g. to be entered of record in case the statute of limitations should be pleaded, it might be injudicious." Supposing, however, that there is any known informality in the writ of *summons*, or the issuing thereof, or in the copy or service, then as a deponent might not with propriety be able to swear, as usual, that the writ of *summons* appeared to him to have been regularly issued, then it might be preferable to annex a copy, and then state the several endeavours personally to serve the defendant; and see suggestions, ante, 291, 2, in a case where it is doubtful whether the writ of *summons* was regular.

(n) See forms, *Tidd's Supp.* 1833, p. 265; *Price's Gen. Pr.* 44, and other forms there referred to; *T. Chitty's Forms*, 343; *Atherton's Personal Actions*, xxxviii.; *Wordsworth*, 142; *Mansell*, 35.

sive, and probably sufficiently complying with the terms of the statute, and the rules and decisions thereon.(o)

CHAP. VII.  
PROCEEDINGS  
ON  
DISTINGAS.

(o) In the King's Bench [Common Pleas, or Exchequer of Pleas.]

Between { A. B. plaintiff,  
and  
C. D. defendant.

2. General form  
of affidavit to  
obtain distrin-  
gas.

G. H. of — in the county of —, clerk to E. F. of the same place, attorney for the above named plaintiff, maketh oath and saith, that he, this deponent, as such clerk, and by the direction of the said E. F. did on the — day of — instant [or last past] attend at the dwelling house and residence of the above named defendant, situate and being No. — in — street, in the parish of —, in the county of —, for the purpose of serving the said defendant with a true copy of a writ of summons, and of the memorandum and indorsements thereon, and whereby the said defendant was commanded within eight days inclusive, after the service of the said writ on him, to cause an appearance to be entered for him in this Honourable Court in an action on promises [or “of debt,” &c. *as the case may be*], at the suit of the said plaintiff; and in which writ was contained a notice to the said defendant, that in default of his so doing, the said A. B. might cause an appearance to be entered for him, and proceed thereon to judgment and execution; and which writ of summons appeared to this deponent to have been regularly issued out of and under the seal of this Honourable Court against the said defendant, at the suit of the said plaintiff, on the — day of — instant [or “last past,” *being the teste day of the writ*];\* and which said writ and copy were then and at all times hereinafter mentioned in the possession of this deponent ready to be immediately produced and shewn to the said defendant. And this deponent further saith, that he was, when he so attended as aforesaid, informed by a person in the said dwelling-house of the said defendant, who represented himself [or herself] to be and whom this deponent verily believes then was the son [or wife, daughter, servant, &c. *according to the fact*] of the said defendant; that [here state what passed, which may be as follows:] the said defendant was not then at home in his said dwelling-house, and that he [or she] the said son [or wife, &c. *as before*] could not inform this deponent where he might then meet with the said defendant. And thereupon this deponent then informed the said son [or wife, &c. *as before*] that he had so called to serve the said defendant with a copy of a writ of summons at the suit of the said plaintiff, naming him, and that he this deponent would attend at the said dwelling-house for that purpose again on — next, [some day soon after the first call] at — of the clock in the fore [or after] noon, [if the fact be so add], at which time and place the said son [or wife, &c. *as before*] informed this deponent that he [or she] believed that the said defendant might be met with. And this deponent further saith, that he did accordingly attend at the said dwelling-house of the said defendant at — of the clock in the fore [or after] noon of the said —, and then saw the said son [or wife, &c. *as before*, or if another person, “a person in the said dwelling-house who represented himself [or himself] to be and whom this deponent verily believes then to have been the wife [or son, &c. *as before*] of the said defendant”]; and that on the said last mentioned occasion the said son [or wife, &c. *as before*] informed this deponent that the said defendant was not then in his said dwelling-house, and that he [or she] could not tell this deponent where the said defendant might then be met with [according to the fact, stating the substance of the answers given to the deponent's inquiries]; whereupon this deponent informed the said son [or wife, &c.] that he this deponent would again attend at the said dwelling-house of the said defendant on — then next [some day soon after the second call] for the purpose of seeing the said defendant, and serving him with a copy of the said writ of summons. And this deponent further saith, that he did accordingly attend at the said dwelling-house of the said defendant on the said — then next for the purpose of seeing the said defendant, and was then informed by the said son [or wife, &c. or a person there who represented herself [or himself] to be and whom this deponent believes then to have been the servant [or wife, &c. *as before*] of the said defendant; that the said defendant was not then in his said dwelling-house, and he [or she] the said son [or wife, &c. *as before*] could not inform this deponent where he the said defendant might then be met with [according to the fact, stating the substance of

First call with  
a copy.

Second call.

Third call.

\* This is a full form, but *seem* that the writ of summons might be described more generally, as in the form of affidavit of the service of a copy of a writ of summons, ante, 289; and when there is

doubt as to regularity, then it would be proper to annex and verify a copy, and avoid swearing to the regularity ante, 291, 2.

CHAP. VII.  
PROCEEDINGS  
ON  
DISTRINGAS.

A supplementary affidavit of attempt to serve a summons is admissible.

In case the Court should consider the affidavit insufficient, a *supplementary affidavit* may be made, and the application renewed.<sup>(p)</sup> It seems that the Court require less particularity in an affidavit in order to obtain a distringas antecedent, and with a view of proceeding to *outlawry*, than in an affidavit to enable the plaintiff to enter an *appearance for the defendant*.<sup>(q)</sup> But when a distringas has in the latter case been ordered, perhaps inadvertently, on an insufficient affidavit, the Court will not afterwards merely on that account set aside such writ of distringas against the goods.<sup>(r)</sup>

3. Proceedings thereon.

After the expiration of eight days from the last *ineffectual*

Delivery and leaving a copy of writ.

Production and shewing of the original writ.

Request to deliver copy to defendant.

Inability to serve a copy personally.

Belief that defendant was at home, and why.

Defendant seen going in and out of his residence. Indorsement of day of leaving writ.

Search for appearance.

*what transpired.*] Whereupon he this deponent delivered to and left with the said son [or wife, &c.] at and in the said dwelling-house of the said defendant a true copy of the said writ of summons, and of the memorandum and indorsements so subscribed and made thereon as aforesaid. And this deponent at the same time there shewed to the said son [or wife, &c. as before] the said original writ of summons with the said memorandum and indorsements thereon, and desired the said son [or wife, &c. as before] to give or forward the said copy to the said defendant as soon as possible, and which the said wife [or son, &c.] then promised this deponent to do on the same day, saying, &c. [state what if any thing was said]. And this deponent further saith, that notwithstanding the aforesaid and other attempts and endeavours for that purpose, he hath not been able to serve the said defendant personally with a copy of the said writ of summons; and he verily believes that the said defendant did at and after the several times aforesaid purposely keep out of the way to avoid being personally served with the said copy, and that at each and every of the said three mentioned times when this deponent did so attend as aforesaid, the said defendant was at home at and in his said residence and dwelling-house, and at his request was denied to this deponent on purpose to avoid personal service of the said writ of summons and the said copy thereof; and this deponent's grounds and reasons for so believing are, that he this deponent was informed by N. O. a neighbour of the said defendant, (and which information he this deponent verily believes to be true), that he well knew the person of the said defendant, and that he had seen the said defendant at a window of his said house and residence a short time on the said three days and times when this deponent attended and called at the said dwelling-house as aforesaid, as well just before as just after he so attended and called. And this deponent further saith, that he verily believes for the reasons aforesaid and others, that the said defendant cannot be compelled to appear in this action without some more efficacious process; and this deponent is informed and verily believes that the said defendant hath goods in his said dwelling-house which can and may be lawfully seized and taken and distrained under and by virtue of a writ of distringas of this Honourable Court, if a judge thereof will authorize the issuing thereof. And this deponent lastly saith, that he hath been informed by several persons and he verily believes that the said defendant hath been frequently seen in the neighbourhood of and going into and from his said dwelling-house between the said first and last attendance of this deponent there. And this deponent further saith, that he did on, &c. being within three days from and after he so left the said copy of the said writ as aforesaid at and in the said dwelling-house and residence of the said defendant, indorse on the said writ of summons the said day of the week and month and the year of the said service thereof.\* And that he did on, &c. [as recently as possible before making the affidavit] duly search in the proper office for an appearance by the said defendant in this action, but that the said defendant had not at that time appeared therein or thereto.

G. H.

Sworn, &c. [not before plaintiff's attorney or his clerk.]

N.B.—When the summons has been attempted to be served in the country, a separate affidavit of the search and no appearance having been entered, must in general be made.

(p) *Giles v. Burroughs*, Price's Notes, Crom. & M. 720; *Jones v. Price*, 2 Points Prac. 77; Price's Gen. Prac. 46. Dowl. 42.

(q) *Hewitt v. Mellon*, 3 Tyr. 822; (r) *Smith v. Macdonald*, 1 Dowl. 686.

\* As to indorsing the year, see Price's Gen. Pr. 73; and ante, 243.



CHAP. VII.  
PROCEEDINGS  
ON  
DISTRINGAS.

*application at the defendant's residence, inclusive of the day when such attempt was made, (s) search should, as before directed, be made at the proper office for an entry of the defendant's appearance not only in the appearance book there, but inquiry should be made whether a memorandum of the appearance has not been left in the office, but inadvertently not as yet entered by the clerk, as sometimes has occurred, and when in consequence of no such further inquiry, the defendant's appearance has been overlooked, and the plaintiff's attorney has irregularly entered an appearance for the defendant. If on search no appearance has been entered by the defendant, the before-mentioned affidavit may then be made.*

In term, this affidavit, with a brief thereof, and reference to applicable decisions, in case of any peculiarity in the attempted service, is then to be delivered to counsel, indorsed with instructions thus, "*To move for a distringas to compel the defendant's appearance;*" and the Court require the plaintiff's counsel to declare (t) *his election* either to move for a distringas for *that* purpose, or in order to proceed to outlawry, and the Court will not grant a rule in the alternative; (u) and it should seem that in such case the *notice at the foot of the distringas* should state the *intention to proceed to outlawry*, instead of an intention to enter an appearance for the defendant, and cannot be framed in the alternative; (x) and it has been suggested that, in proper cases for outlawry, it may be advisable that even the *affidavit* should state the intention so to proceed. (y) If the Court consider the affidavit satisfactory, and sufficient to authorize them to issue a distringas, so as to empower the plaintiff to enter an appearance for the defendant, then they grant a rule, which is absolute in the first instance. (s) In *vacation*, the practice is to lay

Motion for writ.

Rule for writ.

(s) *Brian v. Stretton*, 1 Crom. & M. 74; 3 Tyr. 163; 1 Dowl. 642, S. C.; 1 Arch. K. B. 4th edit. 550. *Eight days* at least must elapse from the day when the person last called with and left a copy of the writ of summons, before a distringas can be applied for, *id. ibid.*; and see *Thomas v. Elder*, 1 Tyr. 496, decided upon the ancient writ of *venire*.

(t) *Fraser v. Case*, 9 Bing. 464; Price's Gen. Prac. 58.

(u) *Fraser v. Case*, 9 Bing. 464; 2

Moore & Scott, 720, S. C.; 1 Dowl. 725. Indeed the affidavit to compel an appearance materially differs from that to proceed to outlawry, Price's Gen. Prac. 58; and Atherton on Personal Actions, 61, 62, 139, 140.

(x) Atherton on Personal Actions, 140, cites *Fraser v. Case*, 9 Bing. 464, as deciding that the notice at the foot of the distringas must not be in the alternative.

(y) Atherton on Personal Actions, 61, 62, 139, 140; see Chap. XI. *post*,

(s) In the King's Bench, [or Common Pleas, or Exchequer of Pleas.]

—, the — day of —, in — Term, in the — year of the reign of King William the Fourth.

Rule for a distringas.

B. } Upon reading the affidavit of G. H., it is ordered that a writ of distringas  
against } do issue, directed to the sheriff of —, to compel an appearance by or on  
D. } the behalf of the defendant, pursuant to the act of parliament in that case  
made and provided.

On the motion of Mr. —.

By the Court.

CHAP. VII.  
PROCEEDINGS  
ON  
DISTRINGAS.

the affidavit before a judge at his chambers, and if he be satisfied, he will then make his *order*.

4. *Præcipe* for  
distringas.

4. *Præcipe* for writ.—It has been stated that where such rule or order has been obtained, a *præcipe* for the writ of distringas should be prepared for and left at the proper office in which such writ is to be signed, (a) and the form of such *præcipe* has been given. (b) But in another work it is said that such *præcipe* is not necessary, even in the Exchequer, although we have seen that in that Court, a *præcipe* is in general required for most writs, and the reason assigned is, that the distringas is issued by a *rule or order*, which must be delivered to the officer of the Court, and supplies the use of any *præcipe*. (c) However, the safest course is in all cases to make out a proper *præcipe*, containing the substance of the writ to be issued under the authority of the rule or order.

5. The form  
and requisites  
of the writ of  
distringas, and  
notice at foot,  
and indorse-  
ments there-  
on. (d)

5. *The form and requisites of the writ of distringas, and notice at the foot*, are prescribed by 2 W. 4, c. 39, s. 3; and by schedule No. 3, (d) the 12th section of that statute, as regards the *teste* in the name of the chief justice, and the *indorsement* of the name and place of abode of the *plaintiff's attorney*, or of the *plaintiff's residence*, when he sues in person, extends to *all writs*, and consequently includes a *distringas*. (e) The General Rule of Mich. T. 3 W. 4, r. 8, expressly provides, that in every writ of distringas issued under the authority of that act, a *non omittas* clause may be introduced by the plaintiff without the payment of any additional fee on that account.

We have seen that the writ must be *tested* of the day when it is *issued*, whether in term or vacation, but must be *returnable*

Judge's order  
for rule for a  
distringas in  
vacation.

B. } Upon reading the affidavit of G. H., and upon hearing the attornies or  
agents on both sides, I do order that the secondaries [or ———] do  
D. } draw up a rule that a writ of distringas do issue, directed to the sheriff of  
——, to compel an appearance by or on behalf of the defendant, pursuant to the act of  
parliament in that case made and provided.

Dated the ——— day of ———, 1835.

Judge's signature.

(a) 1 Chitty's Arch. 4th edit. 531.

(b) T. Chitty's Forms, 344, as thus:—

County of ———. Writ of distringas for A. B. against C. D., returnable on ———, in an action on promises [or as the form of action is to be, and of course the same as in the summons.]

Y. Z.

Attorney. ——— of ———, A.D. 1835.

(c) Price's Gen. Prac. 58.

(d) See forms, ante, 154, in note.

(e) Ante, 208; and Wordsworth's Rules, 76, note (a).

in term, (f) and have at least *fifteen days* between the teste and return day, exclusive of the former; (g) and if made returnable on one of the now very few dies non, it would be void. (h) It must be properly *directed* to the sheriff of the county in which is situate the defendant's principal residence, and where he may have distrainable goods; but it may be directed to the sheriff of any other county, when so authorized by the Court or a judge; as where it has been sworn that the defendant has distrainable property in such other county. (i) The *form of action* must be accurately described, and be the same as in the previous writ of summons. (k)

It must be kept in view, that before issuing a writ of *distringas* it must be determined for what object it shall be issued, i. e. whether with intent to enable the plaintiff to enter an appearance for the defendant, or to outlaw the defendant, and on applying to the Court or a judge, the option must be declared; and although the conclusion of the notice to be subscribed at the foot of the *distringas*, as prescribed by the statute, is in the *alternative*, yet the writ when issued must not be in the *alternative*, but confined in *the present case* to a notification that the plaintiff "will cause an appearance for the defendant, and proceed thereon to judgment and execution;" (l) when if it is intended to outlaw the defendant, notice at the foot of the *distringas*, in lieu of those words, concludes thus, "will cause proceedings to be taken to outlaw you." (m)

If there should be any *material omission* or variance in the writ or copy served, the same would constitute an *irregularity* to be objected to in due time, viz. within eight days, the same as in case of a defective writ of summons or copy; and we have seen that no amendment could be allowed unless in cases where the statute of limitations would otherwise bar the remedy. (n) The writ is to be *signed* and *sealed* by the same officers, and at the same offices, and in like manner as a writ of summons and other writs, with this exception, that the rule or order for the writ is to be produced to and *left* with the signer of the writs. The writ and notice is to be in the form prescribed in the sche-

(f) It has been objected that the requiring this writ to be *returnable in term* occasions unnecessary delay, Price's Gen. Prac. 38, in notes; 92, 93. But probably that requisition was imposed in order that the defendant might have an opportunity of applying for relief to the Court in Banc.

(g) *Ante*, 150.

(h) *Kensworthy v. Peppiat*, 4 Bar. &

Ald. 288.

(i) 2 W. 4, c. 39, s. 3.

(k) See description of forms of action; *ante*, 194 to 199.

(l) *Ante*, 154, in notes; and *Fraser v. Case*, 9 Bing. 464; Atherton on Personal Actions, 140.

(m) *Id. ibid.*

(n) *Ante*, 234 to 236

CHAP. VII.  
PROCEEDINGS  
ON  
DISTRINGAS.

dule of 2 W. 4, c. 39, and as stated in a preceding page ; (o) and the 12th section of the act requires the *indorsement* of the name and place of abode of the plaintiff's attorney, and if there be also an agent in certain cases, or if the plaintiff sue in person then with a more precise statement of his name and place of abode, (p) and if the action be for a *debt*, the amount of the plaintiff's claim for debt and costs must also be indorsed, in pursuance of the 5th rule of Mich. T. 3 W. 4. (q) It will be observed that this writ does not in terms, as might have been desirable, direct the sheriff to serve the defendant personally with a copy of the writ if he be found in his bailiwick, or even direct the sheriff to leave a copy of the writ at the place where the distress may be taken, but those directions are only found in the third section of the statute. (r) It should seem, however, that if a copy of the writ be actually served personally, or if a distress be made, the plaintiff might in default of appearance enter an appearance for the defendant even without leave. (s)

Writs of distringas into counties palatine.

The forms of writs of distringas, with the notice at the foot, to be issued into the counties palatine of Lancaster and Durham, are prescribed by the General Rule Mich. T. 3 W. 4, Reg. II., and differ only in the *commencement* from the other usual writ of distringas in other counties. The forms there given are silent as to any indorsement. But the enactment in 2 W. 4, c. 39, s. 12, requiring the indorsement of the name and place of abode of the attorney and agent, &c. of the plaintiff, or the indorsement of the particulars of his own residence when he sues in person, clearly extends to all writs issued by the authority of that act, and certainly so to writs of distringas and *capias* into a county palatine. The rule Mich. T. 3 W. 4, referring to that of Hil. T. 2 W. 4, and requiring in actions for a *debt* an indorsement of the amount of the claim for debt and costs, also extends to a writ into a county palatine.

6. *Proceedings on writ of distringas and how to be executed.* (t)

6. *Proceedings on Writ of Distringas.*—The 3d section of 2 W. 4, c. 39, thus expressly enacts, “ which writ of distringas “ and notice, or a copy thereof, shall be *served* on such defendant, *if he can be met with*, or if not, shall be *left* at the “ place where such distringas shall be *executed* (i. e. where “ the goods of the defendant shall be distrained.”) Hence it

(o) *Ante*, 154, in note.

(p) *Ante*, 152, in note; and *ante*, 208.

(q) *Ante*, 160; and *ante*, 212.

(r) *Ante*, 150, in note.

(s) *Johnson v. Smdaley*, 1 Dowl. 526, 555, *post*, 315; and *Atherton on Personal Actions*, 58, Appendix, xlii.

(t) *Tidd's Supp.* 1833, p. 85.

is clear that bona fide attempts to *serve* this writ on the defendant and to distrain his goods, should be made, and it would be irregular to instruct the sheriff not to make such attempts or to return such writ non est inventus or nulla bona, at least without leave of a judge. (u) The proper practice is upon obtaining the writ of distringas to make at least one copy, to indorse the name of the plaintiff's attorney and agent as before advised, (v) and in actions for a *debt* to make the proper indorsement of the plaintiff's claim for debt and costs on the copy, in order that (x) the same may be delivered with the writ to the sheriff, and whose officer is to endeavour to deliver the copy to the defendant in person, or otherwise to leave the same at his said supposed residence, where also his goods are distrained. The writ itself and copy are to be taken to the proper sheriff's office, and a warrant thereon obtained, directed in general to the sheriff's officer, whom the plaintiff's attorney desires to employ. The fee to be paid is 1s. for every warrant in Middlesex, London, Surrey, Sussex and Kent, but 2s. 6d. in every other county; or an officer will obtain the warrant for the plaintiff's attorney. The form of the warrant is as in the note. (y)

The officer is thereupon to endeavour to *serve* the copy on the defendant *personally*, (x) and if he cannot, he is then to *leave* the copy at the defendant's residence, and he is also to *distrain* (that is *seize*) goods of the defendant of the value of forty shillings or thereabouts, if he can by due inquiry find any within his bailiwick, as a mode of inducing the defendant

(u) See *post*, Chap. XI. as to leave of a judge in proceedings to outlawry that the sheriff may speedily return non est inventus.  
(v) *Ante*, §09.  
(x) *Ante*, §12.

(y) To L. M. and N. O., my bailiffs.

"Essex to wit. Distrain C. D., by his goods and chattels for the sum of forty shillings in my bailiwick, so that he appear in the Court of \_\_\_\_\_, at Westminster, on \_\_\_\_\_ the \_\_\_\_\_ day of \_\_\_\_\_, A. D. \_\_\_\_\_, to answer A. B. of a plea of trespass on the case [or as the form of action may be] [and serve the said C. D. personally with a copy of the writ of distringas and notice and indorsements, if he be found in my bailiwick, and if not, leave such copy at the residence or place, where you shall or may so distrain the goods of the said C. D.\*] Dated this \_\_\_\_\_ day of \_\_\_\_\_, 1835."

Sheriff's warrant to his officer on a distringas.

E. F. of \_\_\_\_\_, attorney for said A. B.  
Levy forty shillings.

Y. Z., Esquire, Sheriff.

(z) 2 W. 4, c. 39, s. 3, *ante*, 150, in note.

\* I have considered it advisable to add to the usual form these words within the brackets.

CHAP. VII.  
PROCEEDINGS  
ON  
DISTRINGAS.

to appear. (a) The service of or leaving the writ, and the distress, may be made on any day, not being a *dies non*, on or before the return day, and at any hour of the day or night, but within the proper boundary of the county, with the exception of a county within another county. (b) An *outer* door must not be broken to make the distress, although if peaceable entry has been obtained at the outer door, then an inner door may be broken. If all the goods of the defendant to be found be not equal to the value of 40s., then the taking them is a sufficient distress according to the act. (c)

7. The defendant or his attorney entering his appearance to a writ of *distringas*.

7. *Defendant's appearance*.—Whenever the defendant has been personally served with a copy of the writ of *distringas*, or his goods have been distrained, and a copy of that writ, with the subscribed notice, has been left at the place where such distress was made, in pursuance of the 3d section of 2 W. 4, c. 39, then it is incumbent on the defendant, under that act, and in obedience to the notice in the schedule No. 3, (d) to cause his appearance to be entered in the proper office of the Court, and in the same form as prescribed in the 2d section of the act, (e) *within eight days after the return day* named in the writ of *distringas*, *inclusive* of such return day, and which, we have seen, must be in one of the four terms, and sometimes occasioning a delay in a plaintiff's proceedings, contrary to the declared general object of the uniformity of process act, 2 W. 4, c. 39. (f)

8. Proceedings in case of an actual levy and personal service of a writ of *distringas*, or either of them, in case the defendant himself does not enter his appearance.

8. *Proceedings on Sheriff's Return, &c.*—It will be observed that the 2 W. 4, c. 39, s. 3, is silent as to the proceedings to be taken in case the defendant has been *actually served* in person with a copy of the writ of *distringas*, and his goods *shall have been actually seized*, or in case either of those proceedings has taken place, and only provides how the Court or a judge may interfere when the sheriff has returned in the conjunctive “non est inventus and nulla bona.” But although the statute is thus silent, it has been decided that if the sheriff has *actually distrained* on the defendant's goods, and left on the same premises a copy of the writ of *distringas* with the notice at

(a) Tidd's Supp. 1833, p. 85; see a form of affidavit that officer did not distrain, because plaintiff did not inform him of any goods, Atherton on Personal Actions, Appendix, xlii.

(b) 2 W. 4, c. 39, s. 20, ante, 153. In a case where there is a county surrounding another county, a special direction may be introduced in a *distringas*,

the same as in a *capias*, post, 342, note (3), and which seems authorized, if not required, by the concluding words of section 20.

(c) *Jones v. Dyer*, 2 Dowl. 445.

(d) *Ante*, 150 and 154, in notes.

(e) *Ante*, 154, in notes, and see forms, ante, 283, 4.

(f) Price's Gen. Prac. 92, 93.

the foot, for the defendant, and do not appear, then the plaintiff, upon the sheriff's return of that fact, and upon an affidavit of the fact, and that the *defendant himself* has not caused an appearance to be entered, may as of course enter an appearance for the defendant, according to the statute, *without any application for or leave of the Court or a judge.*(g) This proceeding is impliedly authorized by the terms of the notice at the foot of the distringas in the schedule No. 3, and by the 16th section of the act.(h) It would seem also that if the defendant were *personally served* with a copy of the writ, although no distress has been made, an appearance might also be entered for him by the plaintiff.(i) But it is clear that if there has neither been a distress nor personal service, then the plaintiff cannot either enter an appearance or proceed to outlawry *without express leave of the Court or a judge*, upon an application for that purpose, founded upon an affidavit, shewing the endeavours to distrain and to serve the defendant as presently stated.

9. *Of plaintiff's entering appearance without leave.*—It follows a fortiori that if the sheriff's officer has *actually served* on the defendant a copy of the writ of distringas, and also *executed* the writ by *distraining* his goods to the value of forty shillings, or even of less value, if all that can be found, (k) then after searching, on or after the ninth day inclusive of the return day of the distringas, (which we have seen must be on a day certain in term,) at the proper office, to ascertain whether the defendant has entered his appearance, and ascertaining that he has not, the sheriff's return to the writ of distringas must be obtained, stating, when the facts will authorize, that he has distrained and served the writ on the defendant, as in the subscribed form, (l) or at least stating *one* of those facts, and

9. Proceedings when the sheriff has served and also executed a writ of distringas and of a plaintiff entering an appearance for the defendant thereupon, without leave of the Court or a judge.

(g) *Johnson v. Smealey*, 1 Dowl. 526, 555; and see Wordsworth's Rules, 77 a; see forms of affidavit, *id.* 125, 126; and see Atherton on Personal Actions, 58, and *id.* Appendix, xli. and xlii.

(h) *Per Parke, J., id. ibid.*

(i) *Semble*, and see Atherton on Personal Actions, 58; and see forms of affidavits, where the defendant has been *personally served*, but no distress made, *id.* Appendix, No. 5, p. xlii.

(k) *Ante*, 314, note (c).

(l) The within named C. D. is distrained by R. S. and T. U., by distraining upon his goods of the value of 40s.; and I further certify and return that at the time of the execution (i. e. distress) of this writ, I caused a true copy of the said writ and of the written notice at the foot thereof, and of the indorsements thereon, to be personally served on the said C. D., apprising him of the cause of the said distress, and that in default of his appearing to this writ, within eight days inclusive after the return thereof, being the ——— day of ———, the within named A. B. would cause an appearance to be entered for him, and proceed thereon to judgment and execution."

The answer of Y. Z., Sheriff.

Return that he has executed a writ of distringas by seizing goods and serving copy on defendant in person.

CHAP. VII.  
PROCEEDINGS  
ON  
DISTRINGAS.

having obtained such return from the sheriff, the sheriff's officer is thereupon to make an *affidavit* of such service and execution of the writ of distringas in the subscribed form, (m) and then such affidavit is to be *filed* with the proper officer, (in the King's Bench the clerk of the common bail,) and at the same time the plaintiff's attorney may enter an appearance *for the defendant even without the leave of or application* to the Court or judge; (n) when if there has been a distress, but no *personal* service of a copy of the writ, and a copy has been merely left at the place of distress, then the affidavit will be in the next form. (o) But when a copy of the writ has been *personally* served, but there has not been any actual distress, then the form of affidavit would be as subscribed in the next page.

*Affidavit that the defendant's goods have been taken under a distringas, and himself been personally served with a copy of the writ of distringas.*

(m) In the King's Bench [or Common Pleas, or Exchequer of Pleas.]

Between { A. B. plaintiff,  
and  
C. D. defendant.

E. F. of \_\_\_\_\_, officer to the sheriff of the county of \_\_\_\_\_, maketh oath and saith, that he this deponent did on the \_\_\_\_\_ day of \_\_\_\_\_ instant [or last] by virtue of a warrant granted to this deponent by the sheriff of the said county, upon a writ of distringas, which appeared to this deponent to have been *regularly* [if that be doubtful omit that word] issued out of and under the seal of this Honourable Court, against the said defendant at the suit of the said plaintiff, directed to the sheriff of the county of \_\_\_\_\_, bearing teste the \_\_\_\_\_ day of \_\_\_\_\_ last, and returnable on \_\_\_\_\_ the \_\_\_\_\_ day of \_\_\_\_\_ last [or instant or next] execute the said writ of distringas, by distraining upon the goods and chattels of the said defendant in his dwelling-house, situate at \_\_\_\_\_ in the said county, for the sum of forty shillings, in order to compel his appearance in the said Court of \_\_\_\_\_, to answer the said plaintiff in a plea of trespass on the case [or "on promises" or "debt" as the case may be\*]; and this deponent further saith, that he did at the time of the said execution of the said writ of distringas *personally serve* the said defendant with a true copy of the said writ of distringas, and of the notice subscribed thereto, and indorsements made thereon, by delivering such copy to the said defendant in person.

E. F.

Sworn, &c.

(n) *Johnson v. Smealey*, 1 Dowl. 526; Price's Gen. P. 42; Arch. C. P. [27.]

*Affidavit of a distress upon the goods, and having left a copy of writ at defendant's residence.*

(o) [The same as in the last form to the asterisk\*, and then as follows.] And this deponent further saith, that at the said time and place of his so executing the said writ of distringas, he inquired and sought for the said defendant, but was informed by a person there, who represented himself [or herself] to be, and whom this deponent verily believes to have been the son [or wife, &c. according to the fact] of the said defendant, that he the said defendant was not then at his said dwelling-house [or other place as the case be] whereupon he this deponent delivered to and left with the said son [or wife, &c. as before] at the said place of execution of the said writ of distringas a true copy of the said writ of distringas, and of the notice subscribed thereto, and indorsements made thereon, and this deponent then and there informed the said son [or wife, &c.] of the said defendant of the true intent and meaning of such distringas and notice and levy as aforesaid, and requested him [or her] immediately to deliver or forward the same to the said defendant, and which the said son [or wife, &c.] then promised to do.

Signed.

Sworn, &c.



10. *Cases where leave of the Court or a judge is essential.*— If the writ of distringas can *neither be served on the defendant, nor his goods taken as a distress*, then the sheriff's *correct return in the conjunctive of non est inventus and nulla bona*, or rather "*nihil*," must be obtained, and which may be in the subscribed form; (*p*) after which the Court in term must be moved, or a judge in *vacation* applied to on a summons and *proper affidavit*, the form of which is subscribed, (*q*)

CHAP. VII.  
PROCEEDINGS  
ON  
DISTRINGAS.

10. Proceedings on sheriff's return of non est inventus and nulla bona, and to obtain leave of Court or judge to enter an appearance for the defendant *sec. stat.*

In the King's Bench.

Between, &c. [as before.]

O. P. of ——— in the county of ——— officer to the sheriff of the said county, maketh oath and saith, that he this deponent did on the ——— day of ——— instant, personally serve the above named defendant with a true copy of the writ of distringas, and of the notice subscribed thereto, and indorsements made thereon, which writ of distringas was directed to the said sheriff, and returnable on ———, and appeared to this deponent to have been regularly issued out of and under the seal of this Honourable Court, against the said defendant, at the suit of the said plaintiff, on the ——— day of ——— [tests day of the writ]; and this deponent further saith, that previously to the said service of the said true copy of the said writ of distringas as aforesaid, the said sheriff had granted to this deponent, and this deponent held at the time of such service a warrant upon the said writ of distringas, authorizing and requiring this deponent, as such officer as aforesaid, to distrain upon the goods and chattels of the said defendant for the sum of forty shillings, in order to compel an appearance in the said Court to answer the said plaintiff in a plea of debt [or as the case may be]; but that neither the said plaintiff before, nor the said defendant at the time of the said service, informed this deponent, nor did he this deponent know where any goods or chattels of the said defendant might be found or distrained upon within the said county, although he this deponent at the time of the said service requested the said defendant to point out to this deponent where he might meet with any such goods or chattels, and he this deponent was unable to execute the said warrant, by making any distress upon the goods or chattels of the said defendant.

Signed,

Sworn, &c.

(*p*) "The within named C. D. hath nothing in my bailiwick by which he can be distrained, nor is he found in the same."

The answer of Y. Z. sheriff.

Form of sheriff's return of *nulla bona* and *non est inventus*.

(*q*) In the King's Bench [or Common Pleas, &c.]

Between { A. B. plaintiff,  
and  
C. D. defendant.

G. H. of, &c. maketh oath and saith, that a writ of distringas having been issued against the above named defendant on the 26th January last, in pursuance of a rule of this Honourable Court [or the order of Mr. Justice ———] directed to the sheriff of ——— a warrant was granted thereupon by the sheriff of the said county to this deponent, who in pursuance thereof attended three several times on several days before the return day of the said writ at the dwelling-house [or lodgings] of the said defendant, sits at, &c. for the purpose of executing the said writ and warrant, he this deponent on each occasion having the said writ and a true copy thereof in his possession ready to shew the former, and deliver the latter to the said defendant; and that the said defendant was on each of those occasions denied to this deponent, although this deponent is informed and verily believes that he was then at home at his said dwelling-house [or lodgings]. And this deponent further saith, that on the 13th April, the return day of the said writ of distringas, he finding it impossible to execute the said writ or warrant, delivered unto and left with L. M. who keeps and this deponent verily believes is the occupier and housekeeper of the house in which the said defendant's lodgings and residence are so situate as aforesaid, and who is his landlord, a copy of the said writ of distringas and notice thereto subscribed and annexed, requiring the said defendant's appearance within eight days inclusive after the return day of the said writ. And

Affidavit of ineffectual attempts to serve and execute a writ of distringas.

CHAP. VII.  
PROCEEDINGS  
ON  
DISTRINGAS.

stating in substance that *all due means* (viz. at least *three ineffectual attempts*) to serve the *distringas* have been taken (shewing the particulars of such attempts,) and that the defendant has no goods at his residence, nor, as it is believed, after diligent inquiries, elsewhere, (*q*)) for leave to enter an appearance for the defendant; (*r*) and thereupon the Court or a judge will in general make a rule (*s*) or order (*t*) allowing the

this deponent further saith, that he was unable to distrain for the sum of 40s. according to the tenor of the said writ, because the lodgings of the defendant then were and still are ready-furnished, and the said L. M., who keeps and has the principal possession of the said house, having informed this deponent that the said defendant had nothing there on which this deponent could legally distrain, and which information this deponent verily believes to be true. And this deponent hath made all possible inquiries as well of the said L. M. as elsewhere whether the said defendant hath any goods or chattels or property elsewhere which could or might be taken or distrained under the said writ of *distringas*, but this deponent hath not been nor is he able to ascertain whether the said defendant hath any such goods, and this deponent verily believes he hath none. And this deponent further saith, that he verily believes that the said copy of the said writ of *distringas* so left as aforesaid hath reached and come to the full notice and knowledge of the said defendant, the said L. M. having stated to this deponent that all papers left for the defendant had been and would continue to be forwarded to him, and which information this deponent verily believes to be true, but declined to say where he was; and this deponent verily believes that the said defendant hath been and is well aware of the said proceedings in this cause, and that he hath kept out of the way purposely to avoid them or the service or execution thereof. And this deponent further saith, that the said Sheriff of Middlesex having been ruled to return the said writ of *distringas*, hath duly returned the same that the said defendant is not found within his bailiwick, and that he hath not any goods within the said sheriff's bailiwick by which he could be distrained. And this deponent further saith, that he did search the appearance-book in the Exchequer Office on the 29th April last, and that the said defendant had not caused to be entered any appearance to the said writ of *distringas*. And this deponent further saith, that since the issuing of the said writ of *distringas* an offer has been made to the said plaintiff to pay him 5s. in the pound in full of his debt in question, and which offer this deponent is informed and verily believes hath been and was made by the authority and at the request of the said defendant. And this deponent further saith, that a clerk to an attorney, who this deponent also verily believes acted by and with the authority of the said defendant, hath obtained copies of the writ of summons and *distringas* in this cause from the plaintiff's attorney, but refused to sign any undertaking to appear or to state whether or not he was authorized by the said defendant. And this deponent further saith, that all proper means have been used to serve and execute the said writ of *distringas* and warrant thereon.

Sworn, &c.

G. H.

N.B.—Parts of this affidavit are suggested by the case of *Cornish v. King*, 3 Tyr. 575. I have ventured to suggest some additions.

(*q*) *Cornish v. King*, 2 Dowl. 18; *Scarborough v. Evans*, 2 Dowl. 9.

(*r*) *Tring v. Gooding*, 2 Dowl. 162.

(*s*) See 2 W. 4, c. 39, s. 3; *Scarborough v. Evans*, 2 Dowl. 9; *Cornish v. King*, *id.* 18; 3 Tyr. Rep. 575, S. C.; *Bulgey v. Gardner*, 2 Dowl. 52.

In the King's Bench [or Common Pleas, or Exchequer of Pleas].

A. B. } Upon reading the affidavit of E. F. and G. H. it is ordered, that the plain-  
v. } tiff be at liberty to enter an appearance for the defendant in this action ac-  
C. D. } cording to the statute in that case made and provided, and to proceed thereon  
to judgment and execution.\* Upon the motion of Mr. —.

By the Court.

(*t*) B. } Upon reading the affidavit of E. F. and G. H. I do order that [ &c.  
v. } proceed as in the preceding form to the \*, and then conclude thus: ] Dated  
D. } the — day of — A.D. 1835.

[Judge's or baron's signature.]

Rule of Court  
authorizing  
plaintiff to enter  
an appearance  
for the defend-  
ant upon a dis-  
tringas returned  
nulla bona and  
non est inven-  
tus.

Judge's order to  
the like effect.

CHAP. VII.  
PROCEEDINGS  
ON  
DISTINGAS.

plaintiff "to enter an appearance for the defendant, and to proceed to judgment and execution."<sup>(u)</sup> And although the sheriff has *returned non est inventus* and *nulla bona*, yet an *affidavit* stating the particular endeavour to execute the *distringas* cannot be dispensed with, although it be sworn that the officer has since died, for the Court cannot act upon hearsay evidence of the mode of service.<sup>(x)</sup>

Plaintiff's entering appearance thereupon.

The rule or order for the plaintiff's entering the appearance is thereupon to be taken to the proper office for *entering appearances*, with a memorandum on parchment, filled up as in the ordinary case of an appearance entered by the plaintiff for the defendant,<sup>(y)</sup> and there left; after which the plaintiff may proceed in the action by declaring absolutely the same as if the defendant himself had duly appeared, and on a separate motion a rule may be obtained that leaving a notice of declaration at the lodging or last place of abode may be deemed good service.<sup>(z)</sup> If any of the defendant's goods have been taken under the *distringas*, they are not to be sold, but to be taken care of, and returned to the defendant after such appearance, on reasonable request.<sup>(a)</sup> It will be observed that the legislature and the Courts have thus interposed great checks upon a plaintiff, and enforced the utmost protection to defendants, requiring in effect at least six *bonâ fide* endeavours to serve the defendant with process, or an actual distress of his goods after three previous attempts to serve him personally, before a plaintiff can enter an appearance for a defendant, and proceed to judgment and execution.

Proceedings where a defendant resided in furnished lodgings.

Where a *distringas* has been returned *non est inventus* and *nulla bona*, and the defendant's residence was a *furnished lodging*, an affidavit of the attempts to execute the warrant issued on the *distringas* should be made, and that the copy of the *distringas* and warrant issued thereon was left at the lodgings, and that *diligent inquiries have been made whether the defendant had goods there or elsewhere*, and that none can be discovered, and the plaintiff may thereupon be suffered to enter an appearance for the defendant, and proceed to judgment and

(u) Price's Gen. Pr. 42; *Johnson v. Smeley*, 1 Dowl. 526; and Tidd's Suppl. 1833, p. 86.

(z) *Ante*, Chap. V. 245; *Daniels v. Farity*, 3 Dowl. 26; 9 Legal Observer, 221, B. C.

(y) *Ante*, 294.

(z) *Cornish v. King*, 3 Tyr. 576; and see Rule H. T. 1832, r. 49.

(a) *Smith v. Macdonald*, 1 Dowl. 688; *sed quare*, see case 1 Chitty's Arch. 535, 4th ed.

CHAP. VII.  
PROCEEDINGS  
ON  
DISTRINGAS.

execution under 2 W. 4, c. 39, s. 3. (b) But it cannot be made part of the above rule that service of notice of declaration at the defendant's last known place of residence, and sticking up a declaration in the office, shall be deemed good service, (b) for there must be a distinct rule for that purpose. (b)

Second case,  
Where defend-  
ant has a known  
residence in  
England, and  
goods, but is  
out of the king-  
dom. (c)

In the *second* case before alluded to, that of the defendant having a known residence in England, but being known or supposed to be out of the kingdom, if it be sworn that the defendant has gone or stays abroad *to avoid his creditors*, and has left servants at his house, (d) the Court, in one case, allowed the plaintiff to issue a distringas, the affidavit having the usual requisites, and the service of a previous summons having been effected by leaving the copy thereof at the defendant's residence on the third call. (e)

Third case,  
Where defend-  
ant has no  
known resi-  
dence, but is  
supposed to be  
in England. (h)

In the *third* case before noticed, i. e. when the residence of the defendant in England is unknown, still endeavours must be made to serve him personally with a writ of summons, before a distringas can be obtained, (f) and facts must be sworn to, to induce the Court to believe that the defendant is in England, but keeps out of the way to avoid the service of process. (f) It has been observed, (g) that *when the defendant is abroad*, a distringas may be obtained on a proper affidavit, either to compel his appearance, (h) or for the purpose of proceeding to outlawry; (i) but where the defendant is not abroad, a distringas for the purpose of outlawry will not it seems be granted, (i) and where there is reason to believe that he is abroad, a distringas to compel an appearance, it is said, will not be allowed. (i) One state of circumstances or the other must be made out; (i) and where it was not clear on the face of the affidavit whether the defendant was in this country or abroad, the Court put the plaintiff to make his election as to the purpose, for which he

(b) *Cornish v. King*, 3 Tyr. Rep. 575; and see *Tring v. Gooding*, 2 Dowl. 162. See the forms of affidavit given in 3 Tyr. 575, except the necessary allegations that due inquiries after goods of the defendant had been made; and see form, *ante*, 317, note (q), 318.

(c) See enumeration of the four cases, *ante*, 301.

(d) And *semble* also goods that might be taken under a distringas.

(e) *Moone v. Thynne*, 3 Dowl. 153; and see *Hornby v. Bowling*, 11 Moore, 369; *Fraser v. Case*, 9 Bing. 464, *ante*, 300, note (g).

(f) *Anonymous*, 1 Dowl. 555; Tidd, Supp. 1833, page 80; and see *Moone v. Thynne*, 3 Dowl. 153.

(g) Tidd's Supplement, 1833, p. 80; and see 9 Legal Obs. 8.

(h) i. e. *semble* an affidavit that he has goods to be taken under a distringas, *Moone v. Thynne*, 3 Dowl. 153.

(i) *Fraser v. Case*, 9 Bing. 464; 2 Moore & S. 720; 1 Dowl. 725, S. C.; Tidd, Supp. 1833, p. 80; *semble*, Wordsworth's Rules, 76, in notes; but *semble*, a distringas with that object would not be refused, if it be shewn defendant has goods; *Moone v. Thynne*, 3 Dowl. 153.

sought to obtain a distringas. (k) The *affidavit* must also state, when the defendant is abroad, not only that he went thither for the purpose of avoiding the demands of his creditors, but also satisfy the Court or a judge by a statement of the circumstances that he keeps out of the way to avoid being served. (l) In a very recent case, where an affidavit to ground a motion to enter an appearance stated that the defendant was a clerk in the *Victualling Office*, and that the plaintiff was not able to discover the defendant's residence, and that due diligence had been used to execute the distringas, but did not state that any inquiries had been made at the *Admiralty*; the Court held that due and proper means to serve the distringas did not sufficiently appear to have been used, and refused leave for plaintiff to enter an appearance for the defendant. (m)

In a *fourth* case, when the defendant has no known residence or place of abode, or of business, nor goods to be distrained upon, and it can be sworn that he is abroad *with intent to delay* his creditors, then (but not otherwise) (o) a writ of summons may be issued, and an affidavit of the diligent endeavours to execute it, and of the other facts, and an application made to the Court or a judge for a rule or order that a distringas shall issue, in order that after a due return of *nulla bona* and *non est inventus* proceedings to *outlawry* may be issued. (o) The affidavit, in that case, is differently framed to that when the plaintiff is at liberty to proceed so as to be enabled to *enter an appearance* for the defendant, and the counsel for the plaintiff should be differently instructed. (o) We will presently consider the proceedings to *outlawry* as well on serviceable asailable proceedings. (p)

*Fourth, Proceedings in nonailable cases to outlaw the defendant, or one of several defendants, where he has no known residence nor goods, but is out of the kingdom. (n)*

When the plaintiff proceeds by distringas, he cannot in any case, *declare* before the defendant *himself*, or the plaintiff for him, has entered an appearance, and since the uniformity of process act, 2 W. 4, c.39, a declaration cannot be delivered *de bene esse* or *conditionally* nor *absolutely* before actual appear-

*Declaring after a distringas must be absolutely, and not de bene esse.*

(k) See last note.

(l) Tidd's Supp. 1833, p. 80, and cites *Simpson v. Lord Graves*, 6 Legal Observer, 43.

(m) *Sanderson v. Bowen*, 2 Crom. & M. 515.

(n) See enumeration of the four cases ante, 301.

(o) 2 W. 4, c. 39, s. 35; *Fraser v.*

*Cute*, 9 Bing. 464; 2 Moore & S. 720; *Simpson v. Lord Greaves*, 2 Dowl. 10; and *Morgan v. Williams*, Price, G. P. 53, note \*, where Bayley, B. said, "If, when the writ of summons was left, the defendant was out of the kingdom, it is then a case for *outlawry*; and see 1 Price, G. P. 51, 52; and see *id.* p. 38.

(p) See post, Chap. XI.

CHAP. VII.  
PROCEEDINGS  
ON  
DISTINGAS.

---

ance, (q) that mode of declaring being now confined to *bailable* cases where the proceeding has been by *capias*. The *commencement* of a declaration, where the appearance has been upon a *distingas*, is the same as where the appearance has been to a writ of summons, (r) and all the other proceedings are the same without any distinction as regards the previous writ.

---

(q) *Fish v. Palmer*, 2 Dowl. 460, *ante*, 396, as to declaring on a writ of summons, and the same reason against declaring *de bene esse* equally here applies; and see

*Atherton's Personal Actions*, 96 to 101.

(r) See form *Reg. Gen. Mich. T. 3 W. 4*.

---

## CHAPTER VIII.

OF THE WRIT OF CAPIAS—CONSIDERATION OF ARRESTS—PRIVILEGES THEREFROM—RESTRAINTS UPON THE SAME—AFFIDAVIT TO HOLD TO BAIL, AND JUDGE'S ORDERS PERMITTING AN ARREST—PRÆCIPE FOR WRIT OF CAPIAS—WRIT OF CAPIAS ITSELF—SHERIFF'S WARRANT—ARREST, AND PROCEEDINGS THEREON TO PERFECTING BAIL ABOVE, AND CONSEQUENCES OF NEGLECT AS REGARDS ACTIONS ON BAIL BONDS AND PROCEEDINGS AGAINST SHERIFF.

1. Introductory observations on law of arrests .....	323	6. Practice in issuing a capias, and signing thereof .....	347
Reason for arresting .....	326	7. Of sealing the capias .....	ib.
Reasons against arresting ....	327	8. Directions not to arrest one of several defendants .....	348
2. Imprudent to arrest if evidence of debt be doubtful .....	328	9. Of concurrent and continued writs of capias, and of alias and pluries writs .....	ib.
3. The privileges from arrest ....	329	10. When more than one affidavit of debt or copy to be filed ..	349
1. Absolute and general ....	ib.	11. Of obtaining warrant to arrest	350
2. Temporary or qualified ....	330	12. Form and requisites of warrant	351
4. Requisite affidavit of cause of action .....	331	13. Delivery of warrant and writ and copies to officer .....	352
Enactments and rules .....	ib.	14. Of arrests, analytical table of points relating to, and subsequent proceedings .....	353
Affidavit not considered commencement of action .....	332	15. Extortion on arrests .....	359
Form and requisites of affidavit	ib.	16. Duty of officer to search, &c. ..	360
Cause of action, how to be stated	334	17. Proper conduct of defendant on arrest .....	361
Before whom to be sworn ....	338	18. The several legal modes of obtaining release .....	362
The jurat .....	339	19. Of the bail-bond .....	363
The usual form of affidavit on a bill of exchange and for other debts .....	ib.	20. Of deposit of debt and 10l. ....	366
Defects in affidavit, when to be objected to .....	340	21. Payment into Court of same and further 10l. ....	367
Of filing the affidavit .....	341	22. Attorney's undertaking .....	ib.
5. The writ of capias, form, and requisites .....	ib.	23. Change of officer .....	368
A full form of writ, with notes	342	24. Irregularities, proceedings relating to .....	ib.
Practice in filling up blanks ..	343	Other proceedings to perfecting bail above, &c. (a)	
Indorsements on writ .....	344		
Requisites of concurrent and continued writ .....	345		
Indorsement of day of issuing not requisite .....	346		
The præcipe thereof .....	ib.		

*First, Introductory Observations upon Arrests.*—The right to arrest a debtor for a sum of 20*l.* or upwards and the requisite affidavit of debt have not been materially altered by the uniformity of process act, 2 W. 4, c. 39, or any other very recent act or rule, (excepting the 7th, 8th, and 9th rules of Hil. T. 2 W. 4, hereafter noticed,) and the same with its incidents have been so ably and scientifically examined by Mr.

CHAP. VIII.  
PROCEEDINGS  
ON CAPIAS.

Introductory observations on the law of arrest, and further reasons for and against arresting a debtor.

(a) As to the other proceedings, see ante, Table of Contents of Chapter VIII. fully.

CHAP. VIII.  
PROCEEDINGS  
ON  
CAPIAS.

Tidd, that it would be vain, and indeed redundant to attempt here to enlarge on this part of the practice. (a) Perhaps, however, a concise collection of the principles, enactments, and rules, incorporating the most recent alterations and decisions, may be acceptable to students and practitioners. (b)

The law of *arrest*, in civil actions, has greatly varied at different periods of history. Anciently, no person could be arrested excepting for a *crime*, or a *trespass vi et armis contra pacem domini regis*, (c) and not for any *mere debt*. An arrest was permitted in the former case, because it was considered that such a wrong doer was, in some respects, a criminal, liable as well to make compensation to the party injured, as to pay a fine to the king for the breach of his peace, and consequent injury or bad example to society, and therefore it was supposed that he would probably escape or elude justice, unless *his forthcoming were secured*; but in the latter case of a *debt*, no such presumption was indulged, and it was considered that when a creditor had voluntarily given credit to his debtor, he ought not to be allowed suddenly to withdraw that credit and confidence; besides, as there was no legal presumption of the existence of a debt until it had been established by a verdict, there was no reason in favour of imprisonment on mesne process, and a mere *ex parte* assertion of the creditor. That immunity from arrest, or rather *limit* to the writ of *capias*, was first broken in upon by the statute Marlebridge, (d) which allowed a *capias* to *arrest the person* in actions of *account*, although no breach of the peace was even suggested; and the 25 Ed. 3, stat. 5, c. 17, first gave a *capias* in actions of *debt* and *detinue*; and the 19 Hen. 7, c. 9, authorized that process in *actions on the case*, which included actions of *assumpsit*. (e) In practice, therefore, notwithstanding other constitutional principles in favour of liberty, until a party had been condemned by his peers, (*i. e.* at least until after *verdict* and *judgment* in favour of the claim,) it had before the 12 G. 1, c. 29, become the *practice* for a plaintiff to arrest a defendant for any supposed cause of action for which a *capias* could issue, and even without the plaintiff's making any affidavit of the debt or damages amounting to any particular sum, and even without leave of the Court or a judge. That act imposed in modern time the first restraint on arrests, by expressly requiring an *affidavit* of a *cause of ac-*

(a) Tidd's Practice, vol. i. also T. Chitty's 4th edit. of Archbold's Prac. K. B.

(b) It is proposed also, in a chapter immediately following *this part* of the work, to take a practical view of the enactments, which, it is expected, will,

ere long, be introduced, altering, in some respects, the law of arrest.

(c) 3 Coke, 12.

(d) Of Marlebridge, 52 Hen. 3, c. 23; and of Westminster, 2, 13 Edw. 1, c. 11.

(e) 3 Bla. Com. 281; Tidd, 128.



tion, (it will be observed, not in terms a *debt*) amounting to 10*l.* or upwards, (afterwards increased by 7 & 8 G. 4, c. 71, to 20*l.*) and which is the still existing regulation. It enacted, that unless there be an affidavit of a *cause of action* to the amount of 10*l.* (now 20*l.*) the plaintiff shall not cause the defendant to be arrested, but shall *serve* him personally with a copy of the process, and it is now indispensable that an affidavit of the cause of action to the extent of 20*l.* or upwards be *filed before a bailable writ can be issued, i. e. signed* by the proper officer, and the affidavit must be *left* if not *filed* with him immediately before he signs the writ. (e)

It has been justly observed, that it is curious to remark the changes which the law of arrest has undergone at different periods. (f) Anciently, as no *capias* (g) lay, an arrest was not allowed *except* in actions *vi et armis*; (h) afterwards an arrest was introduced with the *capias* in *other actions*; (i) and now by the operation of the before-mentioned statutes, an arrest *cannot* be had in the action wherein alone it was formerly allowed. (k) With the exception of an *affidavit of the cause of action* being required by the statute of 12 G. 1, c. 29, there was no *express* limit to the claims for which an arrest might be made, and it was the practice for plaintiffs to hold to bail in *trover* and *detinue* for the sworn value of personal property detained or converted; (l) until a *rule for all the Courts* was made that no person should be held to special bail in an action of *trover* or *detinue*, without an order made for that purpose by the lord chief justice or one of the judges. (m) In all other actions, although the words of 12 G. 1, c. 29, are "*cause of action*," the rule is, that the plaintiff cannot of his own accord, even upon an affidavit, arrest the defendant, unless the claim be in the nature of a *debt*, because it would be unreasonable that a defendant should be arrested for what damages the plaintiff might *fancy* he had sustained and venture to swear to; (n) and where the damages are altogether uncertain, as in *assumpsit* or *covenant* to *indemnify*, or in actions for a *tort* or *trespass*, there

(e) *Hawkins v. Baskerville*, 2 Ken. Rep. 374.

(f) Tidd, 9th ed. 165; and see *id.* 128.

(g) So called, because when in Latin the writ commanded the sheriff, by that word, to *take* the defendant.

(h) *Ex contra pacem*. Originally in all actions of trespass there was a *capiatur pro fine* payable to the king, 3 Coke, 12.

(i) See Tidd, 128, and 3 Bla. Com. 281, as to where a *capias* to take the person might be issued under different statutes.

(k) i. e. an action of *trespass*; but still the defendant may be arrested in an action of trespass, as for a sea battery, upon a judge's order.

(l) *Bungley v. Titcombe*, 6 Mod. 14; *Le Writ v. Tolcher*, Barnes, 80; *Catlin v. Catlin*, 2 Stra. 1192; 1 Wils. 23, S. C.; *id.* 335; Sayer, 53; *Charter v. Jaques*, Cowp. 329.

(m) R. H. 48 Geo. 3, K. B., C. P., and Exchequer, 9 East, 325; 1 Taunt. 203; Man. Ex. Append. 225; 8 Price, 507; Tidd, 172.

(n) Tidd, 172.

CHAP. VIII.  
PROCEEDINGS  
ON  
CAPIAS.

cannot be an arrest without *an order of the Court*, or now in practice, *of a judge*, on an affidavit stating *very fully the circumstances*. (o) But as the statute 12 G. 1, c. 29, does not limit an arrest to actions for *debts*, a judge might make an order to hold to bail *in every description* of action, and for every *tort* if he should think fit, and it is usual to make an order to hold to bail in an action for a battery or imprisonment committed on board a ship, or abroad, when it is sworn that it is expected that the defendant will leave England, and thereby render it doubtful whether the plaintiff will ever be able to enforce payment of the *damages* that it may be expected will be recovered, unless he have the security of bail. (p)

(o) *Hadderweek v. Catmur*, Barnes, 61; *Russell v. Gately*, *id.* 76; *Le Writ v. Tolcher*, *id.* 79; *Whittingham v. Coghlan*, *id.* 80; *Reynoldson v. Blades*, *id.* 108; *Stapleton v. Baron de Stark*, *id.* 109; *Pr. Reg.* 63, 66; *Tidd*, 172.

(p) See cases, *Tidd*, 172 to 178. As to the foreign law of arrest, see *Code Nap.* and 4 *Pardessus*, 235; *De la Contrainte par Corps*. In some parts of the Continent, as at Frankfort-sur-Main, there may be an arrest upon an English judgment, or on a bill of exchange, &c.

Probably in this commercial country, where the giving credit may be essential, the law of arrest, as it stands, is not so objectionable as some have insisted, but only its abuse. It is a moral obligation of every individual to ascertain with certainty his ability to pay with punctuality before he contract a debt; and if he do not punctually perform his engagement, he has been guilty of deception that may be equivalent to actual fraud in its consequences to the creditor. It is therefore of importance to the creditor that he should be afforded a speedy and secure mode of enforcing payment, without which he might, perhaps, in his turn, be unable to perform his own engagements, and his own ruin might be the result, whilst the unprincipled debtor might be continuous in his career of extravagance. Debtors should be protected from unnecessarily harsh measures, and in practice an arrest should not be resorted to excepting when there is imperative necessity, and should never be adopted as a means of revenge. But on the other hand, the just interests of creditors ought not to be lost sight of, still less sacrificed, in favour of at least an incautious debtor.

We have already made some observations for and against proceeding by arrest, (*ante*, 137 to 140,) but the subject deserves further consideration.

Experience and observation establish that the majority of attorneys and solicitors, and all who are respectable, endeavour to moderate the desire of clients to

arrest a debtor. The following reasons for or against an arrest may be suggested to the client, and some have been already stated, (*ante*, 137 to 140). *First*, and principally, the security of the defendant being forthcoming at the determination of the suit so as to be compelled to pay the debt and costs, or render himself to prison, or his bail doing so for him, may be essential; for otherwise, just before execution, the defendant may remove his property and himself to a foreign country, and the plaintiff may lose his debt and the costs expended in endeavouring to recover it. *Secondly*, The probability of the defendant paying the debt and costs within the twenty-four hours allowed him before he can legally be taken to prison, so as to avoid exposure, and trouble to friends to become bail to the sheriff, with an increase of expense, when, if he were only served with process, he might from indolence or perverseness neglect to exert himself to discharge the debt. *Thirdly*, The chances of the defendant either not being able to procure bail above to justify, or of accident preventing them from attending in due time, or some flaw in the defendant's proceedings; in consequence of which, as technically termed, the *sheriff may be fixed*, and compelled to pay the debt and costs, or be attached. *Fourthly*, If bail above be perfected, perhaps on the trial it may turn out that one of them was a material witness for the defence, and that from want of having changed such bail in due time, the defendant will be deprived of his testimony, and on that account fail in perhaps an unjust or mere technical defence. *Fifthly*, The bail being responsible for the result, will probably watch the defence, and as they will be liable to pay the increased costs, or render the defendant, they will stimulate the defendant to settle the action, and assist him in so doing; or, *sixthly*, they may threaten to render the defendant, and to avoid which he will, if possible, raise and pay the money to avoid imprisonment.

Reasons in favour of arresting.

But there may be *practically very important reasons against* arrest; thus, *first*, that a plaintiff by swearing to a debt incurs the risk of an *immediate indictment for perjury*, supported by the evidence of the arrested defendant, and which, even if ultimately unsuccessful, would occasion great uneasiness of mind and anxiety amongst his friends during its pendency, and perhaps an injurious suspicion that the prosecution is well founded; and even though a claimant be positive that a named sum is due to him, yet it is unsafe to swear to the debt, unless he is in possession of *certain* evidence to prove it on the trial of an action at law. (*q*) *Secondly* is to be considered, the liability at common law to an *action for a malicious arrest* in case the full sum sworn to should not ultimately be proved to be due, in consequence of the failure in proof on the part of the plaintiff, or of the defendant proving a set-off, which the plaintiff had forgotten, reducing the balance below the sum sworn to; although it would seem that to sustain such action there should be not only evidence of the *want of probable cause* for the arrest, but also that it was malicious. (*r*) But it should seem that the question of malice is to be left to a jury, and that from the absence of probable cause the jury may infer malice. (*s*) *Thirdly*, the probability that if an *actual arrest* should be for a sum much larger than that *recovered* by verdict and judgment, the Court would, under the 43 G. 3, c. 46, disallow the plaintiff's costs, and award costs to the defendant. (*t*)

(*q*) *Ante*, 118; *Summers v. Grosvenor*, 4 Tyr. 222; *Griffith v. Pointon*, 2 Nev. & Man. 675, S. P.

(*r*) *Spence v. Jacob*, 1 M. & M. 280; 2 Stark. on Evid. 498, n. (*k*); and see distinction in *Dowlan v. Brett*, 10 B. & C. 118; and see case at Guildhall, October, 1825, 3 Bla. Com. 126, in note.

(*s*) *Austin v. Debenham*, 3 B. & C. 139; 4 id. 51; 2 Stark. Evid. 499, n. (*t*); *Cotton v. James*, 1 Barn. & Adol. 126; 3 Bla. Com. 126, in note.

(*t*) *Summers v. Grosvenor*, 4 Tyr. 222; *Rosse v. Rhodes*, 4 Tyr. 216. *Aliter*, if a smaller sum be paid into Court and taken out by plaintiff. As to necessity for *actual arrest* to entitle a defendant to costs, see *Bates v. Pilling*, 4 Tyr. 231. The 43 G. 3, c. 46, is now very liberally construed against arrests when a plaintiff does not recover so much as he swore to. It extends to claims reduced below the sum sworn to by an award, 2 Crompt. & Mee. 344; *Summers v. Grosvenor*, 4 Tyr. 222; *Griffith v. Pointon*, 2 Nev. & Man. 675. And it suffices to prove the want of *reasonable or probable cause* for the ar-

rest, and it is not necessary to prove *malice*. And although the plaintiff failed in establishing the sum sworn to on account of some legal objection, or from inability to prove the defendant's verbal promises to pay, and from receipts being unstamped, yet the case was held within the 43 G. 3, c. 46, *Dowlan v. Brett*, 10 B. & C. 117; *Erle v. Wynne*, 3 Tyr. 586. And if a buyer's claim is merely for *unliquidated damages*, as in case of a breach of warranty, and he nevertheless venture to swear to a debt as for money had and received, the arrest is considered to have been without *reasonable cause*, and he may be deprived of his costs, *Gompertz v. Denton*, 3 Tyr. 232. So if a vendor arrest for the full price of goods when half the price was to be paid by a bill at three months not expired, the case is within the act, *Day v. Picton*, 10 B. & C. 120; and so where the plaintiff had agreed to take back goods he had sold to the defendant, and which were of bad manufacture, and yet he arrested the defendant, he was compelled to pay costs, *Lenley v. Bates*, 2 Tyr. 725; 2 Crompt. & Jer. 659.

CHAP. VIII.  
PROCEEDINGS  
ON  
CAPIAS.

*Fourthly*, the defendant, and perhaps his relatives and friends, stimulated by the arrest to revenge, will probably endeavour to injure the plaintiff in his business, and otherwise will take advantage of every irregularity in his proceedings, to which if the defendant had been merely served with process, they would be ashamed of objecting. *Fifthly*, if the defendant be unable to pay *all* his creditors, he will probably prefer all others to the plaintiff, and just on the eve of execution for the debt and accumulated costs, will effectually assign his property to some favoured creditor, who had shewn him more lenity, and leave the plaintiff to lose the debt and costs. (u).

*Secondly*, When or not an arrest can be safely made as respects evidence of the debt.

*Secondly*, Before swearing to an affidavit of a *debt* as of course, or to an affidavit of a *cause of action* in order to obtain a judge's order, it is essential to ascertain whether the plaintiff who is to make the affidavit of debt has any *sufficient legal and admissible evidence* to prove such debt upon a trial, for otherwise it has been decided, that although the plaintiff may conscientiously believe, or even *positively know* that the debt justly exists, yet he ought not to arrest the defendant, for if he issue bailable process and do not succeed *in proving* the sum

Other reasons against arrest.

(u) *Holbird v. Anderson*, 5 Term Reports, 235. To the above legal and practical consequence, others of a *moral but occasionally important nature may be added*. Thus a defendant arrested and pressed by his creditor, may give way to morbid feelings, and rather die in prison than exert himself to discharge the debt. The plaintiff will have throughout the cause to encounter the positive injury to his own health, or at least his mental enjoyments, very frequently resulting from the indulgence of a revengeful spirit, and the reflection that he has torn a fellow-creature from his family, and deprived him of the means of supporting them, and sometimes perhaps separated him from a dying relative, or at least expedited his debtor's ruin, without any benefit to himself; and when by indulgence he might have received at least a part payment, and had the satisfaction of perceiving that his debtor had overcome his difficulties; besides the possibility of a change in his own circumstances, and of his having to pray indulgence even of his previous debtor, or his relatives or friends, and when he must expect retribution, and that indulgence will be shewn or withheld to him as he had evinced it to others.

It is much to be feared that most arrests are made in indulgence of a spirit of *revenge*, a motive as condemnable as it is

prejudicial to the individual influenced by it. Many instances have been known of creditors having threatened to arrest even a dying man, and even the actual arrest of a dead body, as in the instance of Dryden, stated by Dr. Johnson in his life, but which Lord Ellenborough declared to be an indictable offence, *Jones v. Asburnham*, 4 East's Rep. 435; and 1 Smith, 188. Speaking of an unfortunate debtor with a family of seven children, having in consequence of severe illness been sued for and taken in execution in a borough Court *for a debt of only eighteen shillings*, one of the editors of the first influential public journals in A.D. 1834, thus observed:—"Thus was a young man disgraced like a felon, his character blasted, all the worst passions engendered, familiarized with a prison, rendered desperate and exasperated against the laws of his country, irritated to the highest degree with society altogether for permitting the infliction of such severe punishment upon one of its members merely for becoming indebted in a few shillings whilst temporarily endeavouring to save a starving family, and all this occasioned by an honest man being out of employment for a short time, and owing without costs *only four shillings for bread*, which for the moment he was unable to pay."

sworn to to have been due, he may at least be subjected to costs under 43 G. 3, c. 46, s. 3.(v)

CHAP. VIII.  
PROCEEDINGS  
ON  
CAPIAS.

*Thirdly*, The next inquiry must be, whether the defendant has any *general* or qualified or *temporary privilege* from arrest that would render any affidavit useless. The privileges from arrest are either general and absolute, or limited and qualified as to time or place, and are expressly reserved and continued as before by 2 W. 4, c. 39, s. 19.(x)

*Thirdly*, Of the persons who may be arrested, and of the *privileges* from arrest.

Those of the former nature include the *King's immediate attendants and domestic servants*, such as one of the chaplains of the king, who, however numerous, cannot be arrested without leave of the Board of Green Cloth,(y) or a domestic herald of the king, if shewn to be in his actual service, but not otherwise,(z) and others who can shew that they are bound to attend the king when required; though the Courts are reluctant to discharge a defendant from an arrest at his instance, unless he shew that he has at least once *actually attended* the king, and *continues liable* to do so.(a) All the *Royal Family* and *Ambassadors* and their *servants* are also privileged.(b) So are *Peers*, whether English, Scotch,(c) or Irish, (c) although they have not any right to sit in the House of Lords.(c) *Peeresses*, and *Members of the House of Commons*,(d)

Absolute and general *privileges* from arrest.

(v) *Griffiths v. Pointon*, 2 Nev. & Man. 675; *Summers v. Grosvenor*, 4 Tyr. 222.

(x) Tidd, 190 to 216.

(y) *Prior v. Dryden*, Exchequer, 31st January, 1835.

(z) *Lestie v. Dimey*, 9 Legal Observer, 172.

(a) *Luntley v. Battine*, 2 Barn. & Ald. 234.

(b) But the alleged servant must be in the *actual service* and employ of the ambassador. A chorister *bond fide* hired and paid for singing in a Roman Catholic chapel of an ambassador may be privileged; but *quære* whether the goods of such party are privileged against a *distingas* or *fi. fa.* *Fisher v. Begres*, 3 Tyr. 184.

(c) See recent cases as to the privileges of *Irish peers*, *Coates v. Lord Hawarden*, 7 B. & C. 388, and of a Scotch peer, *Digby v. Earl of Stirling*, 8 Bing. 55; and as to the privileges of Scotch peers from arrest, although not one of the sixteen peers summoned to parliament, the following amusing case is in point. The Lord Mordington, who was a Scotch peer,

but not one of those who sat in parliament, being arrested, moved the Court of Common Pleas to be discharged, as being entitled by the act of the Union to all the privileges of a peer of Great Britain, except a seat in parliament, and prayed an attachment against the bailiff, upon which a rule was made to shew cause. And thereupon the bailiff made an *affidavit*, viz. what was considered an *exculpatory*, that when he arrested the said lord he was so mean in his apparel as having a worn out suit of clothes and a dirty shirt on, and but sixpence in his pocket; that he could not suppose him to be a peer of Great Britain, and, therefore, through inadvertency arrested him. The Court discharged the lord, and made the bailiff ask pardon, *Lord Mordington's case*, Fortescue, 165.

(d) And if a person who has been arrested become a member of parliament, the Court on motion pending the action will order an *exoneretur* to be entered on the bail-piece, *Phillip v. Wellesley*, 1 Dowl. 9.

CHAP. VIII.  
PROCEEDINGS  
ON  
CAPIAS.

the *Judges*, and even *Serjeants*, (e) and *Attornies* and *Solicitors* who have taken out their certificates, and practised within a year and in more than a single instance, (f) (excepting when sued by a *side clerk* of the Court of Exchequer.) (g) *Bankrupts* who have obtained their certificates without fraud; *Insolvent Debtors* duly discharged; *married women* who have not obtained credit by deceptive means, *corporations* and *hundredors*, and *executors* and *administrators*, when sued in their representative character, have also a *general privilege* from arrest.

Temporary and  
qualified privi-  
leges.

*Temporary or qualified privilege* from arrest extends to all persons, either *necessarily or of right*, attending any Court or forum of justice, whether as a party interested or as a witness, barrister, attorney or juror, and *eundo, mórando et redeundo*, i.e. *going to, staying at, or returning from the Court*, (h) or on a matter of arbitration referred to a *private arbitrator*; (i) and a party whilst proceeding to a Court to be present on the trial of his cause, (k) and a petitioning creditor returning from attending before the commissioners, though merely to watch the proceedings and offer himself as assignee, are thus privileged. (l) *Barristers* are not only privileged whilst going to or attending or returning from any Court on a particular day, but are so also throughout an entire circuit. (m)

But the *privilege* from arrest *eundo, mórando, et redeundo* is confined to *civil* proceedings, and a defendant who has been in custody on a *criminal charge* of *felony*, and has been acquitted and discharged, is not privileged from arrest on his return home; and the Court will not relieve him from such arrest, (n) unless it appear that his apprehension on the criminal charge was a contrivance by the plaintiff to get him into custody in the civil suit. (o)

As regards *attornies* their general privilege from arrest is preserved by 2 W. 4, c. 39, s. 19. (p) But it has been recently

(e) 1 Arch. K. B. 4th ed.  
(f) 1 Dowl. Rep. 208; 2 W. 4, c. 39, s. 19.

(g) *Stokes v. White*, 1 Crompt. M. & R. 223.

(h) *Rex v. Blake*, 2 Nev. & Man. 312. A party to a writ of error or appeal in the House of Lords may, on petition, obtain an antecedent protection against his arrest pending the hearing, see Palmer's Pr. 85.

(i) *Spence v. Stuart*, 3 East, 89; *Ran-*

*dall v. Gurney*, 3 Barn. & Ald. 252; 1 Chit. Rep. 679, S. C.

(k) *Pitt v. Evans*, 2 Dowl. 223.

(l) *Selby v. Hills*, 8 Bing. 166.

(m) *Hippesley's case*, 1 H. Bla. 636; *Lumley v. —*, 1 Crompt. & Mee. 579; 2 Dowl. 51, S. C.

(n) *Goodwin v. Lordon*, 1 Adol. & Ellis, 378; 3 Nev. & Man. 879.

(o) *Wells v. Gurney*, 8 B. & A. 220; *Barratt v. Price*, 1 Dowl. 725.

(p) *Ante*, 153.

decided that according to the rule in the Exchequer, there is no privilege against privilege, and that *Side Clerks of the Exchequer* are still entitled to arrest attorneys of the other Courts by *capias* of privilege; (r) but that privilege does not extend to attorneys of the other Courts, and therefore an attorney of the King's Bench cannot arrest an attorney of the Common Pleas, or vice versa. (s)

If a plaintiff or his attorney, knowing that a defendant is privileged from arrest, wilfully arrest him, a special action on the case may be supported, but not otherwise; (t) nor, as it seems, can in any case an action of *trespass* for arresting a privileged person be sustained; so that it is not prudent to risk an action for arresting a privileged person, unless clear evidence of the defendant's knowledge of the privilege, if not malice, can be adduced. (u)

The recent general rule, Hilary T. 2 W. 4, r. 7, prohibits a *second arrest* after non pros, nonsuit or discontinuance, without first obtaining a judge's order for the purpose. (x) But, as presently shown, a second arrest may be made, even upon the same affidavit and process, where the defendant has obtained his release by misrepresentation or fraud, or by giving a check that is not honoured. (y)

*Fourthly*, The 12 G. 1, c. 29, s. 2, requires an *affidavit* to be made and filed of a *cause of action* to the extent of 10*l.* or upwards, before the issuing of any bailable process, and which was increased by 7 & 8 G. 4, c. 71, to 20*l.* or upwards, and must by that statute and 43 G. 3, c. 46, be of an *original cause of action*, over and above costs, charges and expenses, and in the counties palatine to the extent of 50*l.* (z) The 12 G. 1, c. 29, s. 2, enacts, that *such affidavit* may be made before any judge or commissioner of the Court, out of which the process shall issue, authorized to take affidavits in such Court, or else before the *officer*, who shall issue such writ, or his deputy, and who is to have a fee of 1*s.* for such affidavit, and no more; section 2 enacts, that unless such affidavit of the plaintiff's cause of action be made, the plaintiff *shall not proceed to arrest the*

*Fourthly*, Of the requisite Affidavit to hold to bail.

Express requisites by statutes and rules.

(r) *Stoker v. White*, 1 Cr. M. & R. 223.

(s) See observations in *Stoker v. White*, 1 Cr. M. & R. 230.

(t) *Stoker v. White*, 1 Cr. M. & R. 223; 4 Tyr. 786.

(u) *Id. ibid.*; *Tarlton v. Fisher*, 2 Doug. 671.

(x) See the instances in which a second arrest may be ordered, *Anon.* 1 Dowl. 59; *Mellis v. Evans*, 1 Crompt. & J. 82; *Hamilton v. Pitt*, 7 Bing. 250; *Wilson v. Hamer*, 8 Bing. 54.

(y) *Cantellow v. Freeman*, 1 Crompt. & M. 536.

(z) 7 & 8 G. 4, c. 71.

CHAP. VIII.  
PROCEEDINGS  
ON  
CAPIAS.

*defendant.* It should seem, therefore, if there should be no affidavit whatever, an arrest *would be void*, and subject the plaintiff and his attorney to an action for false imprisonment, (a) and a small mistake, as maketh and saith, omitting "oath," or maketh oath and *said*, (instead of *saith*,) would be fatal. (b) But the consequences of a mere imperfection, constituting an irregularity, would, at least as regards the interference of the Court on motion, be aided by putting in bail above. (c) The general rule, Hilary term, 2 W. 4, r. 7, prohibits a *second arrest* after non pros, nonsuit or discontinuance, without the order of a judge; (d) and the 8th rule requires affidavits to hold to bail for money paid to the use of the defendant, or for work and labour done, to swear that the money was paid, and the work done *at the request of the defendant*; (e) and rule 9 orders that no *supplementary affidavit* shall be allowed to supply a deficiency in an affidavit to hold to bail. (f)

Affidavit not considered the commencement of action.

An affidavit to hold to bail is not considered as the commencement of the action, or as a proceeding therein; and therefore, although an action be discontinued, such termination of the suit will not affect the affidavit, but it may be again acted upon in support of a fresh action, and a new affidavit is not necessary. (g) For the same reason, as there is no action pending, such affidavit is not to be intituled in any cause as between the parties or otherwise, and it would be improper to describe the claimant or debtor as plaintiff or defendant. (h)

Title of affidavit not to be in a cause.

An affidavit to hold to bail is in general *intituled* in the Court in which it is to be used, as thus: "In the King's Bench," or "In the Common Pleas," or "In the Exchequer of Pleas." (i) The fourth rule of Court of Hilary term, 2 W. 4, directs that an affidavit sworn before a *judge* of any of the Courts of King's Bench, Common Pleas or Exchequer, shall be received *in the*

Form and requisites of such affidavit. (i)  
Title of Court, but not in any cause.

(a) *Olaver v. Price*, 3 Dowl. 261.  
(b) *Harwood v. —*, 1 Gale's Rep. Exch. 47.

(c) Per Bayley, J., *Dalton v. Barnes*, 1 Maule & S. 230; *D'Argent v. Vivant*, 1 East, 230; *Shawman v. Whalley*, 6 Taunt. 185; 5 Moore & S. 94; Tidd, 188.

(d) See Jervis's Rules, 4S, note (h), for the prior decisions.

(e) See prior decisions, Jervis's Rules, 44; and that a *preceding request* is necessary, see observations, *Exall v. Partridge*, 8 Term Rep. 310; and 1 Saunders' Rep. 264, note (1); see decisions in the King's Bench and Exchequer to the same effect before this rule, *Reeves v. Hucker*, 2 Tyr.

161; 2 Crom. & Jerv. 44, S. C.; *Marshall v. Davison*, 2 Tyr. 315; but the Court of Common Pleas held otherwise, *Reeves v. Hucker*, 2 Crom. & Jer. 44, and therefore the Rule of Hilary term, 2 W. 4, was promulgated.

(f) See Jervis's Rules, 44, note (j), and Tidd, 189.

(g) *Richards v. Stuart*, 10 Bing. 322; 3 Moore & S. 778; *Coppin v. Potter*, 10 Bing. 441.

(h) *Urquhart v. Dick*, 3 Dowl. 17; 9 Legal Obs. 222.

(i) See the general requisites of affidavits and exception, *post*, Chapter on Motions; and 1 Arch. K. B. 96.



*Court to which such judge belongs*, although not intituled of that Court; but not in *any other Court*, unless intituled of the Court in which it is to be used. (*k*) But that rule does not apply to an affidavit sworn before a *commissioner* of one of the Courts, if by the jurat it appear to have been sworn before such commissioner; even in Scotland, it need not be intituled of the Court. (*l*) The affidavit should not be intituled in *any cause*, because it is sworn *before* the inception of an action. (*m*)

CHAP. VIII.  
PROCEEDINGS  
ON  
CAPIAS.

In the King's Bench there was an express rule of Court, requiring the true place of abode and *addition* (i. e. rank, degree, profession, trade or occupation, &c.) of every person making any affidavit to be inserted therein; (*n*) but there was no such rule in the Common Pleas. (*o*) Now, however, the *general rule* for all the Courts of Hilary term, 2 W. 4, r. 5, expressly orders that "the *addition* of every person making an affidavit shall be inserted therein;" (*p*) and if the statement of the deponent's *present* residence or place of abode, or proper addition, should be omitted in an affidavit to hold to bail, the defendant arrested thereon would be discharged out of custody, or the bail bond cancelled, on the defendant's entering a common appearance. (*q*) The object of these rules was *the better to identify* the deponent, so that the proper party might afterwards be indicted in case of perjury; and the last general rule extends as well to affidavits in an advanced stage in the cause, as to affidavits to hold to bail. (*r*) But it has been decided that the residence of a deponent is properly stated "as clerk to S. A. and J. J. S. of Chiswell Street, in the county of Middlesex, Stable Keeper," without more particularly stating his own residence. (*s*) But there is no necessity to state the residence of the *defendant* when not a deponent, and if unnecessarily stated in the affidavit, a variance in the description of the residence in the capias will not be material. (*t*) It would be difficult to enumerate all the decisions on the older rules of Court relating to the consequence of insufficient state-

Deponent's  
abode, addition  
of rank, degree,  
profession, oc-  
cupation, trade,  
&c.

(*k*) See Jervis's Rules, 42, note (*e*).

(*l*) *Urquhart v. Dick*, 3 Dowl. 17; 9 Legal Obs. 222; and see *Bland v. Drake*, 1 Chitty's R. 163; *Howell v. Wilkins*, 7 Bar. & Cres. 783.

(*m*) R. T. 37 G. 3, 7 T. R. 454, in K. B., but formerly contra in C. P. Tidd, 174.

(*n*) Rule Mic. 15 Car. 2, reg. 1, K. B.; R. M. 37 G. 3, 7 Term R. 454; *Jarrett v. Dillon*, 1 East, 18, 330; 2 Bar. & Cres. 563; 4 Taunt. 154.

(*o*) 6 Taunt. 73; Tidd, 179.

(*p*) See Jervis's Rules, 43, note (*f*); and prior decisions still applicable, Tidd, 179.

(*q*) *Lawson v. Case*, 1 Crompt. & M. 481; *Jarrett v. Dillon*, 1 East, 18; 1 Arch. K. B. 96.

(*r*) *Lawson v. Case*, 1 Crom. & M. 481.

(*s*) *Alexander v. Milton*, 2 Tyr. 495; 2 Crom. & J. 424, S. C.

(*t*) *Buffle v. Jackson*, 2 Dowl. 505; *Welsh v. Longford*, id. 498.

CHAP. VIII.  
PROCEEDINGS  
ON  
CAPIAS.

Statement of  
the names of  
the parties.

Cause of action  
and requisite  
precision in  
statement there-  
of in affidavit.

The principle  
upon which  
great certainty  
and precision  
required in an  
affidavit.

ments of the addition of abode or degree, in affidavits to hold to bail, most of them have been collected in the best modern works. (u)

The *names* of the parties, especially of the defendant, must be accurately stated; but we have seen that the recent act, 3 & 4 W. 4, c. 42, s. 12, and rule 32, Hilary term, 2 W. 4, introduced exceptions, where the plaintiff had used due diligence to ascertain the correct name. (x)

The statutes 12 G. 1, c. 19, s. 2, and 43 G. 3, c. 46, s. 1, 7 & 8 G. 4, c. 71, s. 1, require the affidavit to show "an *original cause of action to the extent of 20l. or upwards*." The term "*original*" was introduced to prevent an arrest for a claim increased by *costs*. The words "*cause of action*" mean a *present right of action*, and as regards affidavits to hold to bail, import a *contract* or liability express or implied, and a *breach* of such contract, and is confined only to *debts* completely overdue, so as to exclude a claim *debitum* in presenti, but *solvendum* in futuro, unless a judge should think fit to make his *special order* to hold to bail, and which he sometimes will do, even for an *assault and battery*, especially when committed by a naval person, who is likely to leave the kingdom, and perhaps will long continue abroad. The affidavit must therefore be *certain* and *explicit*, and so *positive* as to a *subsisting* and *continuing* debt, that in case it be untrue, the party making it will be liable to an indictment for perjury; (y) and it must, in technical language, be certain to *every intent*, and cannot be supported by mere *inference* or *legal* deduction, or conclusion, (z) and should at least contain such averments, and certainty as would be essential on special demurrer to a declaration, or at least it should be as certain as a count in a declaration, and which indeed must afterwards conform. It has been well observed that the strictness required in affidavits to hold to bail is required not only to protect the liberty of the subject and guard *defendants* against the consequences of perjury, but also to guard those who make the affidavit against any *misconception of the law*, and that therefore the *leaning should always be to great strictness of construction, where one party is to be deprived of his liberty by the ex parte act of another*. (a)

(u) Tidd, 9th ed. 182 to 190; 1 Arch. K. B. 4th ed. 97 to 105.

(x) *Ante*, 165, 166. See the decisions and forms, 1 Arch. K. B. 97.

(y) Tidd, 182; *Tucker v. Francis*, 4 Bing. 142; *Bennett v. Dawson*, *id.* 609.

(z) *Smith v. Escudier*, 3 Tyr. 219.

(a) Per Lord Ellenborough, in *Taylor v. Forbes*, 10 East, 316; and see *Bradshaw v. Saddington*, 7 East, 95; and see observation of Vaughan, B., in *Townsend v. Burns*, 2 Crom. & J. 471; and see instances 1 Arch. K. B. 97.

Thus a person, who had of his own accord, and without request, paid money or performed work for the benefit of another, might fancy he was entitled to swear that the defendant was indebted to him, whereas the law declares that a person cannot so constitute himself creditor of another without his concurrence, and therefore the recent rule requires the deponent to swear that the money was paid or the work done *at the request* of the supposed debtor. (b) Indeed it would almost seem that disapprobation of arrests had induced the Court in some cases to require even greater distinctness, and particularly in an affidavit to hold to bail, than would be essential to subject the party to an indictment for perjury, which was at first the only general requisite; thus an affidavit to hold to bail the drawer of a bill, or indorser of a note, must state that the acceptor or maker had not paid the amount, (c) and an affidavit for money lent must shew that the loan was to the intended defendant, (d) and yet it is clear in both cases that, unless the defendant was *really indebted* at the time of so swearing, the deponent would be *indictable for perjury*, and if the acceptor or maker had already paid the debt, then it is scarcely possible to put a case in which the arrested party could still be indebted. So an affidavit to hold to bail on a bill or note should shew the date and time when it was payable, or expressly swear that it was payable on an antecedent day, for otherwise, on the doctrine of *debitum in presenti solvendum in futuro*, the affidavit that the defendant was indebted might be true, although the bill was not yet due. (e)

For debts acknowledged to be due by the defendant's *signature to a written instrument*, especially when he has authorized the circulation of a *negotiable* security, there is so strong an inference of the existence of a just debt, that even in many places on the continent (where arrest in general is not permitted) arrest is allowed upon such instruments, (f) and less strictness should then be required in the affidavit than in other cases. It is now clearly settled *not* to be necessary to state the *date* of a bill of exchange in an affidavit of debt, and it suffices to shew that the time of payment is now passed; (g) and if in an affidavit that an aggregate named sum is due upon a bill or note sworn to have been expressly payable with interest, and

(b) *Ante*, 332, note (e); and see *Gray v. Shepherd*, 9 Leg. Ob. 379, 380.

(c) *Smith v. Escudier*, 3 Tyr. 219.

(d) *Smith v. Stephens*.

(e) *Kirk v. Almond*, 2 Tyr. 316; 2 Crom. & J. 354, S. C.

(f) 4 *Pardessus*, 235; *De la Contrainte par Corps*, and in a late case so decided at Frankfort sur Main.

(g) *Shirley v. Jacobs*, 5 *Muore & Scott*, 67; 3 *Dowl.* 103, S. C.

CHAP. VIII.  
PROCEEDINGS  
ON  
CAPIAS.

as due for principal money and interest, the principal sum and date when the same became due be stated, from which interest can be computed, that will suffice; (*h*) but if the amount of the *principal money*, payable by the bill, be not stated, and yet the affidavit be for interest as well as principal, then, according to the recent decisions, the affidavit will be insufficient, (*i*) if it profess to arrest for interest, but not otherwise; (*k*) for unless by the *express* terms of the contract interest has been reserved, (and which in that case must be stated,) there cannot be an arrest for *interest*; for although under the 3 & 4 W. 4, c. 42, s. 28, the jury *may* give *interest* if they think fit, that is contingent and discretionary, and therefore unless reserved by *express contract*, interest is not a *certain debt*, for which the defendant can be arrested, (*l*) and therefore an affidavit of debt for money lent and interest thereon is bad; (*m*) and this is the reason why in one case it was held that an affidavit to arrest on a bill of exchange or promissory note must state the amount of the *principal* money thereby payable, because otherwise the sum might be made up of partly of principal and the residue of interest, when the former might not have been the subject of arrest, (*n*) and an affidavit to hold to bail for principal and interest, without distinguishing how much for each, was on that account holden insufficient. (*o*) Sometimes, therefore, the affidavit to hold to bail on a bill or note states the debt sworn to be "*principal money* due and payable by the bill or note;" but the safest course is to set forth the date and all the other particulars of the bill. However, an affidavit to hold to bail for 50*l*. "for money paid and expended for the defendant's use, and at his request and *for interest agreed* to be paid thereon, is sufficient, because that imports an *express contract* for interest; (*p*) and an affidavit that the defendant "is justly and truly indebted in 500*l*. for money lent by the plaintiff to the defendant, at his request, and *for interest due on the said sum of 500*l*.*, and for money had and received, &c." is sufficient. (*q*) If an affidavit state that defendant is indebted on a bill of ex-

(*h*) *Rogers v. Godbold*, 3 Dowl. 106; *Brook v. Coleman*, 1 Crompt. & M. 621; 3 Tyr. 592, S. C.; *Brown v. Jackson*, M. T. 1834, 9 Legal Ob. 108; but see *Lewis v. Gompertz*, 2 Tyr. 317; 2 Crom. & J. 352, S. C. *semble, contra*.

(*i*) *Id. ibid.*; *Westmacott v. Cook*, 2 Dowl. 519; but see *Pickman v. Collis*, 9 Leg. Ob. 332.

(*k*) *Westmacott v. Cook*, 2 Dowl. 519.

(*l*) *Id. ibid.*; *Cullum v. Leeson*, 2 Cr. & M. 406; 4 Tyr. 266, S. C.

(*m*) *Cullum v. Leeson*, 2 Cr. & M. 406; 4 Tyr. 266, S. C.

(*n*) *Id.*; *Brook v. Coleman*, 1 Cr. & M. 62; 3 Tyr. 592, S. C.; but see *Phillips v. Turner*, Mich. T. 1834, 9 Leg. Ob. 110.

(*o*) *Latraille v. Hoepfner*, 10 Bing. 334; *Maxmall v. Mathew*, *id.* 506.

(*p*) *Hutchinson v. Hargrave*, 1 Bing. N. C. 569.

(*q*) *Pickman v. Collis*, 1 Gale, Exch. Rep. 47.

change, payable at a day past, this suffices, without stating that the bill was not paid when due, or that it is still unpaid. (r) An affidavit to hold to bail an husband and wife, must shew that the goods were sold, or the cause of action accrued before the marriage; (s) and if at the suit of husband and wife, the affidavit must also shew that the debt accrued due before the marriage. (t) And an affidavit stating defendant to be indebted to plaintiff for goods sold by him and his *late* partner, without stating the *death* of the latter, is insufficient. (u)

CHAP. VIII.  
PROCEEDINGS  
ON  
CAPIAS.

If an affidavit to hold to bail for *several causes* of action should be defective as to one, it will be bad in toto, so as to entitle the defendant to be discharged out of custody; (v) and this rule prevails, although the affidavit swear to *separate* sums, and *separate* causes of debt, and all but one of them are correct. (x) Independently of the uniformity of process act and rules thereon, care must be observed that the affidavit is for the *same cause of action* as will accord with the *form of action* to be stated in the writ and declaration, or rather the writ and declaration should not vary from the affidavit, for otherwise in aailable action the bail will be discharged; and if the declaration should vary from the writ in the form of action, the former will, since the uniformity of process act, be set aside for irregularity. (y) But where the affidavit was for goods sold and money lent, and the declaration contained no count for goods sold, it was held no ground for applying to have an exoneretur entered on the bail piece. (z)

Of affidavits  
defective in  
stating cause  
of action.

Although *writs*, as we have observed, are usually on *parclement*, affidavits to hold to bail in all the Courts are written in words at length on *plain paper*, and without the least erasure, especially in the jurat, and are usually intituled in the proper Court; and to save time, the proper jurat is written before the

Practical pro-  
ceedings with  
respect to the  
affidavit of  
debt.

(r) *Phillips v. Turner*, 3 Dowl. 163, S. P. in *Covenant*; *Lambert v. Wray*, *id.* 169.

(s) *Morgan v. Davis*, 5 Moore & Scott, 93.

(t) *Wade v. Wade*, 4 Bing. 50. The statement of the *cause of action* must necessarily vary according to the facts of each case. Those usually occurring are stated in the works referred to in the note \*

(u) *Edgar v. Watt*, 1 Harrison R. 108.

(v) *Baker v. Wells*, 1 Crom. & M. 238; 3 Tyr. 182; *Kirk v. Almond*, 2 Tyr. 316; 2 Crom. & J. 354, S. C.

(x) *Id. ibid.*; *sed quere principle.*

(y) *Ante*, 194 to 199; *Scrivenor v. Wathing*, 1 Harrison Rep. 8.

(z) Per Littledale, J., *Gray v. Harvey*, 1 Dowl. 114; 1 Arch. Pr. K. B. [40], *sed quere.*

\* Tidd's Forms; T. Chitty's Forms, 16 to 38; those on Bills and Notes Chitty on Bills, 8th edit. 773, 774; the substance also of the great variety of common counts in 2 Chitty on Pleading, 5th edit. 37 to 178, may readily be applied.

The forms of several *jurats* are given in Chitty's Summary of Practice, 316, 317; and T. Chitty's Forms, 16, 17; and see more fully, *post*, chapter on Affidavits and Motions.

CHAP. VIII.  
PROCEEDINGS  
ON  
CAPIAS.

Before whom  
affidavit to be  
sworn.

deponent goes before the Court, judge, commissioner, or other officer authorized to administer the oath.

The 12 G. 1, c. 29, s. 2, enacts, "That the affidavit of debt *may* be made before any judge or commissioner of the Court out of which the process shall issue authorized to take affidavits in such Courts, or else before the officer who shall issue such process, or his deputy, which oath such officer or his deputy is hereby empowered to administer." Foreign affidavits are not affected by that act. (a) The 1 W. 4, c. 70, s. 4, impliedly authorizes the swearing an affidavit of debt before the judge of either of the superior Courts, though to be used in a Court of which he is not a judge; and an *affidavit to hold to bail* may be sworn before a commissioner, who is to be the plaintiff's attorney, and has already been retained in the cause; (b) and although it is expressly provided that *no other affidavit* pending the cause can be so sworn. When made in London it may be, and usually is, sworn before the officer who issues the process, or his deputy, under express enactment; (c) but if before the latter, he must have been expressly appointed to issue process, and not merely for taking affidavits; (d) and a deputy of a deputy is not within the act. (e)

It was recently decided that a capias issued *after* the uniformity of process act, upon an affidavit sworn *before* the passing of that act, before the deputy-signer of *Bills of Middlesex*, was not irregular; (f) but since that act, an affidavit to hold to bail in King's Bench must be sworn in Court, or before a judge or commissioner, or at the King's Bench office, and not at the Bill of Middlesex office.

In *Brett v. Hungal*, 11th June, 1834, in Bail Court of King's Bench, Mr. Justice Williams made absolute a rule nisi for discharging the defendant out of custody on common bail, on the ground that the affidavit to hold to bail was defective; because although it appeared to have been sworn before Mr. Horn, duly authorized to administer an oath, yet the *jurat* did not show that Mr. Horn was a commissioner of affidavits in the King's Bench, nor was the affidavit intituled "In the King's Bench." In another case it was held, that a *jurat* which stated the affidavit to have been sworn at Edinburgh, was not objec-

(a) Per Parke, B., in *Young v. Beck*, 1 Cr. M. & R. 455. As to *foreign* affidavits, see 1 Tidd, 181.

(b) R. E. 15 G. 2; R. H. 2 W. 4, r. 6.

(c) 12 G. 1, c. 29, s. 2.

(d) *Rogers v. Jones*, 7 Bar. & Crea. 86.

(e) *Hughes v. Jones*, 1 Bar. & Adol. 388.

(f) *Young v. Beck*, 1 Cr. M. & R. 448.

tionable on account of an omission to state the county within which that city is situate. (g)

CHAP. VIII.  
PROCEEDINGS  
ON  
CAPIAS.

Many decisions are to be found in the books relative to the *jurat* or statement of the deponent having been sworn, but these will be more fully stated when we consider the requisites of *affidavits in general* in support of or against a *motion*. (h) The *jurat* must contain the *day*, *year*, and *place* of swearing the affidavit; (i) but "sworn at Edinburgh," without stating the county within which it is situate, suffices. (k) The statement of time is essential, because after the lapse of a year without any proceeding, there should be a fresh affidavit. (l)

The *jurat* of  
affidavit.

The rule Mich. T. 37 G. 3, prohibits any *erasure* in a *jurat*, and this however plain the *jurat* may continue, whether in reading the same what has been erased or written upon the same be included or omitted. (m) The object of this rule was to prevent any ambiguity or doubt in the precise terms in which the defendant had sworn, which, if erasures were tolerated, might be rendered doubtful.

The *jurat* in England (though the reverse in Ireland) is usually subscribed at the left hand corner at the foot of the affidavit, and before the deponent is sworn he signs his name at the other corner, immediately under the last word of the body of the affidavit. The deponent is then sworn on the New Testament in these words, "The contents of this affidavit are true, so help me God," and he then kisses the book. If a Quaker, he thus affirms, "I solemnly affirm that the contents are true," and he does not kiss either Testament. For administering such oath or affirmation, the statute 12 G. 1, c. 29, enacts that a *fee* of one shilling shall be paid, and no more. In the country the deponent is usually sworn before a commissioner of the proper Court, and frequently (in this only instance of an affidavit to hold to bail) before the plaintiff's own attorney; but in London he is sworn before the officer who signs the writ, and who is to keep and file such affidavit.

The usual form of an affidavit to hold to bail is in the form given in the note. (n)

(g) *Urquhart v. Dick*, 9 Legal Observer, 221, 222.

404, 405; Rule M. 37 G. 3.

(h) *Post*; and see 1 Arch. 103; and a great variety of *jurats*, T. Chitty's Forms, 2d ed. 18, 19.

(k) *Urquhart v. Dick*, 9 Legal Observer, 221, 222.

(l) *Burt v. Owen*, 1 Dowl. 691; and see 1 Arch. 108.

(i) *Doe v. Roe*, 1 Chitty's Rep. 228; *Wood v. Stephens*, 3 Moore, 236; Tidd,

(m) *Williams v. Clough*, 1 Adol. & Ellis, 376.

(n) In the King's Bench, [or Common Pleas, or Exchequer of Pleas].

A. B., of Chelmsford, in the county of Essex, linen draper, maketh oath and saith

The usual form  
of affidavit on a

CHAP. VIII.  
PROCEEDINGS  
ON  
CAPIAS.

Defects in affidavits to arrest when to be objected to.

Although a *defect* in the affidavit to hold to bail may be substantial, yet it must, like irregularities in process, be objected to within a *reasonable time*, and before the plaintiff has taken any expensive proceedings, which would be deemed a waiver of the right to object; (o) and it is too late to object after the defendant has put in bail, (p) or after obtaining time for that purpose, (q) or after the time for putting in bail above has elapsed, (r) or the defendant has ineffectually attempted to justify bail, though the Court may be induced to give further time, partly in respect of an objection to the affidavit; (s) and when an affidavit has been expressly sanctioned by a judge by *his ordering* bailable process for a named amount, no objection can be taken with effect. (t) But delay in the application may be excused by the circumstance of the affidavit having been mislaid. (u) We have seen that the recent rule Hil. T. 2 W. 4,

promissory note, bill of exchange, goods sold, work done, money lent, paid, had, and received, and on an account stated.

that C. D. is justly and truly indebted to this deponent in the principal sum of £—, as indorsee of a promissory note dated on —, the — day of —, A.D. —, and made and signed by the said C. D., and for the payment of the said sum of £— to E. F. or order, at a certain day now past, and by the said E. F. duly indorsed to this deponent; and in the further principal sum of £—, as indorsee of a bill of exchange dated, &c. made and drawn by E. F. upon and accepted by the said C. D., and for the payment to the said E. F., or his order, of the said sum of £—, at a certain day now past, and by the said E. F. indorsed to this deponent; and in the further principal sum of —, for the price and value of goods sold and delivered by this deponent to the said C. D., at his request; and in the further principal sum of £—, for the price and value of work done, and materials for the same provided, by this deponent for the said C. D. and at his request; \* and in the further principal sum of £—, for money lent by this deponent to the said C. D. at his request; and in the further principal sum of £—, for so much money paid by this deponent for the use of the said C. D., and at his request; \* and in the further principal sum of £—, had and received by the said C. D. for the use of this deponent; and in the further principal sum of £—, for so much money before then found and acknowledged by the said C. D. to be due from the said C. D. to this deponent, upon an account stated and agreed by and between them, of divers sums of money before then due and owing from the said C. D. to this deponent.

Deponent's signature, A. B.

Sworn before a commissioner.

Sworn at —, in the county of —, on the — day of —, 1835, before me G. H., a commissioner for taking affidavits in the Court of King's Bench, [or Common Pleas or Exchequer.] }  
G. H.

Before signer of writs in K. B.

[Or if sworn in town in King's Bench.]  
Sworn at the King's Bench office in the Temple, on this — day of —, 1835, before me, }  
S. W.

Before filacer in C. P.

[Or if sworn in town in Common Pleas.]  
Sworn at the filacer's office in Elm Court, Temple, }  
[or as the case may be.] this — day of —, }  
1835, before me, }  
F. F.

(o) *Morgan v. Bayless and wife*, 5 Moore & Scott, 93; 3 Dowl. 117, S. C.; *D'Argent v. Vivant*, 1 East, 53, 34; *Shawman v. Whalley*, 6 Taunt. 185.

(p) *Reeves v. Hacker*, 2 Tyr. 161; 2 Crom. & J. 44, S. C.

(q) *Urquhart v. Dick*, 9 Legal Observer, 221, 222.

(r) *Tucker v. Colegate*, 2 Crom. & J. 489; 2 Tyr. 496.

(s) *Morgan v. Davis*, 5 Moore & S. 93, 94; *Downes v. Witherington*, 2 Taunt. 213.

(t) *Brackenbury v. Needham*, 1 Dowl. 439.

(u) *Iadbrook v. Phillips*, 1 Harrison Rep. 109.

\* These words are essential under the express rule, *ante*, 332, note (c).



r. 9, prohibits the use of a *supplementary affidavit* to supply any deficiency in the first.

CHAP. VIII.  
PROCEEDINGS  
ON  
CAPIAS.

Of filing the  
affidavit.

The 12 G. 1, c. 29, requires that the affidavit to hold to bail shall be *filed*, and the same is always *left* in the office of the officer who *signs* the writ, and whose duty it is forthwith to *file* the same. But as the statute is silent as to the *time* of filing the affidavit, it would seem that if it has been *duly left in the proper office*, an arrest would not be set aside on account of the neglect of the officer to file the affidavit. (x) If however the affidavit be *left* by the plaintiff's attorney in a *wrong office*, and there filed, then the arrest and proceedings thereon might be set aside. (y) The *filing*, however, is by no means essential to complete the crime of perjury, which it is obvious must, in a moral view, be complete the instant the defendant has wilfully sworn the affidavit with intent that it shall be used. (z) Some attorneys, at the conclusion of the indorsement on bailable process, cause to be stated the *time* when the affidavit was filed, as thus: "Bail for £——, by affidavit filed 14th June, 1834, one o'clock, H. S." We have already sufficiently considered the question upon the necessity of filing a fresh affidavit or copy of the first, on issuing concurrent or continued bailable process. (a)

*Fifthly*, The proper and indeed *only* process upon which one or more defendants who is *at large* can be *arrested*, is a writ of *capias*, though when a defendant is already in custody in one of the prisons of the superior Courts, a writ of *detainer* to *continue* such imprisonment at the suit of the new plaintiff, is the proper proceeding, and which is to be considered in the next chapter. It had been supposed, shortly after the passing of the uniformity of process act, 2 W. 4, c. 39, that a *capias*, as authorized by that act, was entirely a new process; (b) but afterwards, in banc, it was held not to be entirely a *new* process, and that therefore until a contrary regulation had been made, it might be issued by the same officer as bills of Middlesex had previously been issued, and that the affidavit on which it was to be founded might therefore be sworn before the deputy signer of bills of Middlesex; (c) but now it would be otherwise. (d)

*Fifthly*, Of the  
writ of *Capias*,  
its form and  
requisites.

We have seen the *form* of a writ of *capias*, (e) and of *several indorsements*, (e) as prescribed by 2 W. 4, c. 39, s. 4.

(x) *Knowles v. Stevens*, 1 Crompt. M. & Ros. 26; *Snow v. Stevens*, 2 Dowl. 664; ante, 325, 2 Kenyon's Rep. 374.

(y) *Hussey v. Baskerville*, 2 Wils. 225.

(z) *R. v. Crossley*, 7 Term R. 315.

(a) *Ante*, 219.

(b) *Young v. Bask*, 2 Dowl. 462.

(c) *Young v. Beech*, 1 Cr. M. & R. 448, 41.

(d) *Ante*, 222, 223, note (p).

(e) *Ante*, 155, in note.

CHAP. VIII.  
PROCEEDINGS  
ON  
CAPIAS.

12, 20, and by schedule No. 4, and that the 5th rule of Mich. T. 3 W. 4, referring to the rule of Hil. T. 2 W. 4, requires an *indorsement* of the claim for debt and costs in actions for *debts*. (f) And it might here suffice to refer to the previous pages, where those forms and requisites have been so fully considered. (g) But as the proceedings by *capias* to arrest a defendant are still so frequent, it may be useful to subscribe, in a note, the full form of that writ with references to the previous pages, where every part has been fully considered, together with some further annotations. (h)

(f) *Ante*, 160, in note.

(g) *Ante*, 162, to the end of Chap. V.

Full form of a writ of *capias*, with warnings.

(h) William the Fourth, (1) by the grace of God of the united kingdom of Great Britain and Ireland, king, defender of the faith. To the sheriff of —, greeting. (2) We command you that you omit not by reason of any liberty in your bailiwick, but that you enter the same (3) and take C. D. [defendant's full Christian and surname,] (4) of Maidstone in the county of Kent, (5) [his residence or supposed residence,] (5) and if there be more than one defendant, name them, (6) and the residence or supposed residence of each accordingly, if he (?) [or "they"] shall be found in your bailiwick, and him (?) [or "them"] safely keep, until he (?) [or "they"] shall have given you bail, (8) or made deposit with you according to law, (8) in an action on promises. (9) [or "of debt," or "of covenant," or "of detinue," or "of trespass," or "on the case," as the cause of action may be,] at the suit of A. B., (10) [or if more than one plaintiff name them all] or until the said C. D. [name all the defendants] shall by other lawful means be discharged from your custody. And we do further command you, that on execution hereof you do deliver a copy hereof to the said C. D. [name all the defendants]. (11) And we do hereby require the said C. D. [name all the defendants] to take notice, that within eight days after execution hereof on him [or "them,"] inclusive of the day of such execution, he [or "they"] should cause special bail to be put in for him [or "them,"] in our Court of King's Bench, (12) [or "Common Pleas," or

(1) As to the king's name, *ante*, 164.

(2) As to the sheriff or sheriffs, or other officer, *ante*, 185 to 190. If the defendant be in a county surrounded by another county, it may be advisable to direct the writ to the sheriff of the latter. See note 3, *infra*.

(3) This non omittas clause is now always inserted, *ante*, 190. If it be expected that the defendant may be found within a district or place, parcel of a smaller county, which is wholly situate within and surrounded by a larger county, as frequently occurs in cases of cities or towns which are counties of themselves, then it is most advisable to direct the writ of *capias* to the sheriff of the largest and surrounding county, because the defendant may then, provided the following clause be introduced into the *capias*, be arrested in either, by virtue of the 20th section of 2 W. 4, c. 39, *ante*, 153, in note. It will be observed, that the concluding part of that section seems to require such express clause, and which may be inserted in the writ, and be as follows: And take C. D. [naming him fully,] of —, in the county of —, if he be

found in your bailiwick, "or within any district or place which is parcel of the county of —, but is also wholly situate within and surrounded by your county of —."

(4) As to the name of defendant, *ante*, 165 to 174.

(5) As to description of defendant's residence, *ante*, 174; addition of degree, *ante*, 180; description of character, *ante*, 181.

(6) As to the names of several defendants, *ante*, 183.

(7) As to a mistake in *he*, *she*, or *they*, in this part of the writ, *ante*, 233, note (o).

(8) As to this direction, *ante*, 191.

(9) As to the form of action, *ante*, 194 to 199.

(10) As to description of plaintiff, *ante*, 199; and character, *ante*, 181, 200.

(11) As to the direction to the sheriff and the defendant, what each is required to do, *ante*, 191, 200 to 202.

(12) As to the description here of the Court in which defendant is required to put in bail, *ante*, 193.

In practice it is usual to purchase at a law stationer's a writ of *capias*, printed on parchment, with blank spaces, and copies with similar blanks, printed on paper. Such principal writ on parchment, with at least as many *copies* on *paper* as there are

CHAP. VIII.  
PROCEEDINGS  
ON  
CAPIAS.

Practice to be observed in filling up the blanks in a writ of *capias*.

"Exchequer of Pleas,"] to the said action, and that in default of his [or "their"] so doing, such proceedings may be had and taken as are mentioned in the warning hereunder written or *indorsed hereon*. (15) And we do further command you, the said sheriff, (14) that immediately after the execution hereof, you do return this writ to our said Court, together with the manner in which you shall have executed the same, and the day of the execution thereof; or that if the same shall remain unexecuted, then that you do so return the same at the expiration of four calendar months from the date hereof, or sooner if you shall be thereto required by order of the said Court. Witness, &c. (15) at Westminster, the — day of —, in the year of our Lord, 1835. (16)

*Memoranda to be subscribed to the Writ.* (17)

N. B. This writ is to be executed within four calendar months from the date thereof, including the day of such date, and not afterwards. (17)

*A Warning to the Defendant.*

1. If a defendant being in custody shall be detained on this writ, or if a defendant being arrested thereon shall go to prison for want of bail, the plaintiff may declare against any such defendant before the end of the term next after such detainer or arrest, and proceed thereon to judgment and execution. (18)

2. If a defendant being arrested on this writ shall have made a deposit of money according to statute 7 & 8 G. 4, c. 71, (19) and shall omit to enter a common appearance to the action, the plaintiff will be at liberty to enter a common appearance for the defendant, and proceed thereon to judgment and execution. (19)

3. If a defendant having given bail on the arrest shall omit to put in special bail as required, the plaintiff may proceed against the sheriff or on the bail bond. (20)

4. If a defendant having been served only with this writ, and not arrested thereon, shall not enter a common appearance within eight days after such service, the plaintiff may enter a common appearance for such defendant, and proceed thereon to judgment and execution. (21)

*Indorsements to be made on the Writ of Capias.* (22)

Bail for £—, by affidavit. (23)

Or,

Bail for £—, by order of [naming the judge making the order,] dated the — day of —, A. D. 1835. (23)

(13) The words in *italic* are usually printed in a *capias*, although the warning be in fact *subscribed*; but when so subscribed, it would seem more correct to omit those words, *ante*, 201, note (s).

(14) Or other officer to whom the writ is directed.

(15) As to the names of the chief justice or baron to be here inserted, *ante*, 202.

(16) As to the *teste*, *ante*, 202 to 205. As to the *signing* by the proper officer, *ante*, 222; and as to the *sealing*, *ante*, 224; and as to alterations and subsequent resealed, *ante*, 233.

(17) This and the following forms are prescribed by 2 W. 4, c. 39, schedule No. 4, *ante*, 155; and see *ante*, 205, 206.

(18) See *ante*, 201.

(19) The act referred to should have been 43 G. 3, c. 46, s. 2; see *ante*, 201.

(20) This implies also the giving notice of such bail having been put in within such eight days, *Grant v. Gibbs*, C. P. Hil. T. 1835; 1 Harrison & Hodges' Rep. C. P. 57.

(21) This refers to the enactment in 2 W. 4, c. 39, s. 4, where one of several defendants is not to be arrested, but only served with a copy of *capias*.

(22) This and the following forms are prescribed by 2 W. 4, c. 39, schedule No. 4, *ante*, 155, in note.

(23) See forms and decisions, *ante*, 207; and see a form directing sheriff not to arrest one of defendants, *ante*, 208.

CHAP. VIII.  
PROCEEDINGS  
ON  
CAPIAS.

defendants,<sup>(i)</sup> are then to be very accurately and legibly filled up, and carefully examined by the party who may afterwards have to swear to his having personally served a copy on the defendants. It will be obvious that the blanks must be filled up according to the varying facts of each case; as 1st, the name of the king for the time being; 2ndly, the name of the county or district to the officer of which the writ is to be directed; 3dly, the Christian and surname of the defendants, and place, parish, and (to avoid discussion) county of the defendant's supposed residence; 4thly, the introduction of the description of *him, her, or them* in the third blank, the writ when in blank having in general already printed only the letter *h* in the centre of a blank; (*k*) 5thly, statement of the intended form of action; 6thly, Christian and surname of the plaintiff; 7thly, in the three following blanks, repetitions of the defendant's Christian and surname; 8thly, statement of the Court in which the defendant is to put in bail; 9thly, the name of the chief justice; and 10thly, the real day of issuing the writ. The several *indorsements* must then be observed as directed in the fifth chapter, to which the student and practitioner must constantly refer.

As far as regards the officer to whom the writ is to be *directed*, other forms are prescribed by the general rule Mich. T. 3 W. 4, to be observed in the *counties palatine*. (*l*)

Indorsements  
on writ of capias,  
as first of sum  
sworn to.

The 12 G. 1, c. 29, s. 2, expressly requires that the sum or sums specified in the affidavit to hold to bail, shall be *indorsed* on the back of the writ or process, and only for which sum or sums so indorsed, the sheriff, or other officer to whom the process shall be directed, shall take bail and for no more. But that direction was considered merely directory to the sheriff,

---

This writ was issued by E. F. of —, attorney for the plaintiff [or plaintiffs] within named. (24)

Or,

This writ was issued in person by the plaintiff within-named, who resides at —, [mention the city, town or parish, and also the name of the hamlet, street, and number of the house of the plaintiff's residence, if any such there be.] (25)

(24) As to this indorsement, *ante*, 208; and see form of an indorsement where one attorney acts as agent for another attorney, and required by rule M. T. 3

W. 4, s. 9; see *ante*, 209.

(25) As to this indorsement, see *ante*, 211. As to the indorsement of the claim for debt and costs, see *ante*, 212.

(i) It would also be a prudent precaution for fear of loss, to file or enter an exact copy in a book kept for that purpose in the attorney's office.

(k) *Ante*, 232, note (o).

(l) See forms in rules M. T. 3 W. 4, and *ante*, 185 to 190.

and that the omission did not vitiate.<sup>(m)</sup> But now as the statute 2 W. 4, c. 39, in schedule No. 4, peremptorily requires *such indorsement*, and the rule Mich. T. 3 W. 4, declares that *all omissions* of any matter required by the statute shall constitute an *irregularity*,<sup>(n)</sup> it follows that the omission of such indorsement would entitle the defendant to be discharged out of custody, or to have the bail bond cancelled on entering a common appearance.

The 2 W. 4, c. 39, schedule No. 5, also requires an indorsement of the name and place of abode of the plaintiff's attorney, or of the name and place of abode of the plaintiff himself, if he sue *in person*. And the 7 & 8 G. 4, c. 71, s. 8, further entitles the sheriff or other officer required to issue a warrant to arrest, to insist on the plaintiff's attorney, or his clerk or agent, to write such indorsement in the *presence* of such officer, or he may refuse to grant the warrant.<sup>(o)</sup> But at least when the plaintiff proceeds in person, and has indorsed on the writ a statement of his abode, &c. in pursuance of 2 W. 4, c. 39, schedule 5, it seems that the direction of 7 & 8 G. 4, c. 71, sect. 8, is virtually dispensed with, and the form in schedule 5 may be a sufficient precaution against any abuse ofailable process.<sup>(p)</sup> As these are requisites of a general nature applicable to all mesne process, we have, to avoid repetition, considered the decisions respecting them in the fifth chapter, to which reference must be had.<sup>(q)</sup>

*Secondly*, Indorsement by plaintiff's attorney of his name and place of abode, or by plaintiff, of his name, abode, and addition.

We have further seen that the rule of M. T. 3 W. 4, referring to the prior rule of H. T. 2 W. 4, requires that in actions for a *debt* the sum *bonâ fide* claimed for debt and costs shall be indorsed, with a notice, in a prescribed form, to the defendant, that if he pay the amount within four days no further proceedings will be had. We have, stated the consequences of any omission of or defect in such indorsement.<sup>(r)</sup> We have suggested that since the 2 W. 4, c. 39, requires the supposed residence of the defendant to be stated in the *body* of the writ of *capias*, it is no longer necessary to indorse his full description as was previously required.<sup>(s)</sup>

*Thirdly*, Indorsement in actions for a debt of the debt and costs claimed.

<sup>(m)</sup> *Ante*, 207, 208; *Whishard v. Wilder*, 1 Barr. 330; *Evans v. Bidgood*, 4 Bing. 63; *Millar v. Bowden*, 1 Crom. & J. 563.

<sup>(n)</sup> *Ante*, 208.

<sup>(o)</sup> *Ante*, 211.

<sup>(p)</sup> *Semble*, and see 1 Arch. Pr. C. P. [41].

<sup>(q)</sup> *Ante*, 208 to 212.

<sup>(r)</sup> *Ante*, 212 to 215; and see the form, *ante*, 209, 211.

<sup>(s)</sup> *Ante*, 215, 216.

CHAP. VIII.  
PROCEEDINGS  
ON  
CAPIAS.

*Indorsement of the day of issuing a capias no longer requisite.*

The statute 5 & 6 W. & M. c. 21, and 9 & 10 W. 3, c. 25, required the officer at the time he *signed* bailable process to *indorse* the day and year of so doing; (t) but that regulation was made when mesne process was tested in term, although issued in vacation, and in general bore a *fictional date*, and even then the regulation was considered merely directory, and the non-observance did not render the proceeding irregular, and provided the teste was right it sufficed; (u) and as the 2 W. 4, c. 39, neither in its enactments nor its prescribed form of capias in schedule No. 4, requires any such *indorsement*, and now in lieu requires the writ in its body and conclusion to be tested of the *very day it is issued*, it seems to be no longer necessary to *indorse* the time of issuing this writ; and the former enactments are virtually repealed as respects such *indorsement*.

The *Præcipe* for a capias.

A *Præcipe* (being, as we have seen, a short memorandum of the substance of the writ of capias and indorsements, or the particular facts in which one writ will differ from all others,) is then to be accurately made in the subscribed form; (x) and it is to be taken, together with the writ and affidavit to hold to bail and judge's order, if any, to the proper officer of the Court for *signing* such writ, differing, as we have seen, in each Court, but always the same, without regard to the nature of the writ. (y) Such officer may swear the defendant to the affidavit, and then file the *præcipe* with the affidavit, and deliver the writ to the plaintiff's attorney. We have already sufficiently considered the *utility of a præcipe* in all cases, and the absolute necessity for that document by a particular rule of the Court of Exchequer. (z) It was held in the Common Pleas

(t) Impey's C. P. 154.

(u) *Coleby v. Norris*, 1 Wils. 91; *Win-*

*dle v. Ricardo*, 3 Moore, 249; *Millar v. Bowden*, 1 Crompt. & Jer. 563.

Form of *Præcipe* for a writ of capias.

(z) See requisites of *præcipe* in general, *ante*, 220 to 222.

In the King's Bench, [or "Common Pleas," or "Exchequer of Pleas."]

Middlesex.—Capias for A. B. and E. F. and G. H. against C. D. of — in the county of —, and L. M. of — in the same county, on promises, [or "in debt," or "in covenant," &c.] Tested the — day of —, A.D. 1835.

*Indorsed* oath for £ — by affidavit filed, [or "by order of the Honourable Mr. Justice —, dated the — day of —, A.D. 1835."]

E. F. of — in the county of —, attorney for the plaintiff, [or if in person, A. B. of, &c. *ante*, 209, §11.]

Indorsed claim £ — debt, and £ — costs.

(y) *Ante*, 222, as to *signing* writs.

(z) *Ante*, 220, n. (e).

that the omission of any notice of the *ac etiam* in the *præcipe* at the time when that clause was essential in the process itself, was immaterial. (a) And although we have seen that in the Exchequer a *præcipe* with certain particulars is expressly required, it appears that in King's Bench and Common Pleas an omission or defect in that document would now be deemed immaterial. (b) But still it is *recommended in all cases* to adopt a full form of *præcipe* in the terms required in the Exchequer. We have seen that cases may occur in which the use of that document may be important; (c) and if there be two concurrent writs of *capias*, the *præcipe* for that secondly issued should refer to the affidavit first filed. (d)

*Sixthly*, The *affidavit* to hold to bail having been either sworn or ready to be so when taken to the proper signer of writs, and the proper *præcipe* having also been prepared, the *capias* itself is then to be engrossed, or rather filled up, unless the names of the defendants are very numerous, on parchment previously printed with blanks, and which may be obtained at any law stationers, and at the same time at least as many similar blank writs on paper as there are defendants to be filled up; and the writ, with the copies, must have all the requisite notifications, memoranda, warnings, and indorsements on each. The writ on parchment is then to be taken to the proper officer of the Court for *signing* writs, (e) and who, after swearing the deponent to the affidavit of debt, (unless previously sworn,) will receive and file the affidavit, and then *sign* his name to the writ, the true teste or date of signing having immediately before been inserted.

*Sixth*, Practical mode of issuing a *capias*, viz. *Signing* same.

*Seventhly*, The *writ*, when to be returned in King's Bench and Common Pleas, is next to be taken to the *Seal-office*, at No. 3, Inner Temple Lane, and there duly impressed with the *seal* of the Court, and which completes the legal perfection of writ, as before shewn. (f) The *copies* of the writs are then to be carefully examined, and made precisely to correspond in every respect, even to a letter, or the deviation may be fatal, should the *sense* or *sound* be altered, but not otherwise. (g) We have seen that in the Exchequer the writ of *capias* is

*Seventh*, Of *Sealing* the *capias*.

(a) *Boyd v. Durand*, 2 Taunt. 161; but see *Hay v. Mann*, Barnes, 117; Tidd, 155.

(b) *Ante*, 221.

(c) *Id.*

(d) See the form in *Dunn v. Harding*, 10 Bing. 553; *ante*, 221.

(e) *Ante*, 222.

(f) *Ante*, 224.

(g) *Ante*, 229 to 233.

CHAP. VIII.  
PROCEEDINGS  
ON  
CAPIAS.

generally sealed in anticipation, and even before it is signed or filled up, so that in fact the sealing affords no real evidence of authenticity. *(h)*

*Eighth, Direction to serve only and not to arrest one or more of several defendants.*

*Eighthly,* We have seen that the 2 W. 4, c. 39, s. 4, expressly provides, that the plaintiff or his attorney may *order the sheriff* or other officer to whom a writ of capias is directed to arrest one or more only of the defendants therein named, and to *serve* a copy of the capias on one or more of the others, and which order is to be obeyed by such sheriff or other officer, and the service is to be of the same force and effect as the service of a writ of summons. *(i)* When the plaintiff resolves to give such order, it may be advisable to subscribe the same on the writ, or indorse it, *(k)* and particularly to draw the attention of the *under-sheriff* and the *officer* to such qualification of the terms of the writ, so that the former may frame the warrant accordingly, and the officer take care to avoid arresting the favoured party. The order may be written on a separate paper, addressed to the sheriff, his under-sheriff, and his officers as subscribed, or may be more concise and indorsed on the writ. *(l)*

*Ninth, Of concurrent original writ of capias into different counties, and proceedings on each.*

*Ninth,* Though at first doubted it is now settled, that as well before as since the uniformity of process act, 2 W. 4, c. 39 a plaintiff may *at the same time* have two or more original or first writs of capias against one or more defendants, directed to the sheriffs of different counties, and *each of them framed as originals*, and not referring to each other, *(m)* (as alias and

*(h)* *Ante*, 224, 225.

*(i)* *Ante*, 151, in note.

*(k)* See the form of indorsement, *ante*, 208.

Form of order not to arrest, but to *serve* one of several defendants in a capias.\*

*(l)* See also *ante*, 208.

"Pursuant to the stat. 2 W. 4, c. 39, s. 4, I, the attorney for the said plaintiff, order and direct the said sheriff to arrest only C. D. and E. F. in the annexed writ mentioned, and not to arrest G. H. of, &c. also in that writ named, but to serve upon him a copy of the said writ, and all memoranda, warnings, notices, and indorsements, pursuant to the said statute.

Y. Z. of, &c. attorney for the said plaintiff.

To the sheriff of —, and his under-sheriffs,  
and all officers of the said sheriff."

Or indorsed on the writ thus:—

"Arrest the within named C. D. and only *serve* the within named E. F. with a copy thereof.

Y. Z. of, &c. attorney for the said plaintiff."

The like by a short indorsement on writ, see also *ante*, 208.

*(m)* *Ante*, 216, 217.

\* See the forms, Tidd's Forms; T. Chitty's Forms, 47.



CHAP. VIII.  
PROCEEDINGS  
ON  
CAPIAS.

---

pluries writs of capias must when issued under the rule of M. T. 3 W. 4.) (n) and in such case it suffices to leave and file the affidavit to hold to bail in the proper office of the county into which the first writ is issued; and it is not necessary to file or leave a copy of such affidavit with the filacer or other proper officer who signs the other writ or writs into the other counties, and it suffices if the præcipe for each of such other writs refer to the affidavit as filed in the proper office for signing the first writ, and to which all persons might have access. (o)

We have sufficiently considered the requisites of an alias and pluries capias, and indorsements thereon. (p)

Alias and pluries Capias.

*Tenth*, When examining the proceedings on *concurrent* and alias and pluries writs of capias, we considered the necessity or at least the expediency of filing an office copy of the affidavit to hold to bail with the officer issuing the second or subsequent process. (q) It seems to be *requisite* to file the original affidavit at the proper office for signing the writ of capias for the county to the sheriff of which the *first* writ is directed; (r) and if another or other concurrent writs of capias be at the same time or afterwards issued into another county, no other affidavit or even any office copy of affidavit need be made; but it suffices in the præcipe for the second or subsequent process to refer to the original affidavit as filed in the office for the first county. (s) It may however be the safest course to file with the filacer, or other proper officer by whom any subsequent writ is signed or issued, an *office copy* of such original affidavit, to which the defendant might on search have access. (t) But it has been decided, that if a capias be issued into one county on an affidavit of debt, and no proceeding be taken on it, another original capias may be issued into another county on the same affidavit. (u) But in such case the præcipe for the writ secondly issued should refer to the affidavit first filed, so as to enable the defendant there to search for such affidavit. (x) And when an *alias* or *pluries* capias is issued into a different county, it seems advisable to file a *copy* of the original affidavit

*Tenth*, When more than one affidavit of debt or a copy must be filed.

(n) *Ante*, 217, 218; see rule, *ante*, 160, 161, in note.

(o) *Ante*, 217 to 220; *Dunn v. Harding*, 10 Bing. 553; overruling dictum in *Coppin v. Potter*, *id.* 445; and see the form of *præcipe* for the second capias, *id.* 553, and *ante*, 221, in note.

(p) *Ante*, 217 to 219.

(q) *Ante*, 219, 220.

(r) *Ante*, 219, 12 Geo. 1, c. 29.

(s) See form in *Dunn v. Harding*, 10 Bing. 553, *ante*, 221, in note.

(t) *Id.* 555.

(u) *Rodwell v. Chapman*, 1 Crompt. & M. 70; 1 Dowl. 634, S. C. and *Dunn v. Harding*, 10 Bing. 553.

(x) See form of *præcipe* in *Dunn v. Harding*, 10 Bing. 553, *ante*, 221, in note.

CHAP. VIII.  
PROCEEDINGS  
ON  
CAPIAS.

with the officer who signs such continued process. (y) And it has even been supposed that in the case of such continued process there ought to be a *fresh affidavit* made and filed in each county, unless the same officer or his deputy act for both counties. (z) But it is settled, that where a capias has issued into one county, upon an affidavit filed with the proper officer for that county, an *alias capias* may be issued by continuance into another county on the same affidavit. (a) So it has been decided, that if a writ of capias be issued into one county on an affidavit of debt, and no proceeding be taken on it, the defendant may be arrested upon another *original capias* into another county on the same affidavit; (b) and a party may be *arrested a second time* on the same affidavit, where the first action has been discontinued and the second proceeding is with the same filacer. (c) But to avoid discussion the safest course is, when the arrest is to be in a different county to that into which the first process was issued, to file either a *fresh affidavit* or at least a *copy* of the first affidavit with each officer who signs any subsequent process, with a *præcipe* for the writ referring to the original affidavit as filed with the officer who signed the first process. (d) And after the lapse of twelve months or a year from the time of swearing the first affidavit, it seems at least prudent to file a *fresh affidavit*, for otherwise it might be objected that the defendant might be arrested under colour of the first affidavit, although circumstances had subsequently intervened to render such arrest improper. (e)

*Eleventh*, Of obtaining *Warrant to arrest* from office of the Undersheriff of the proper county and other proceedings thereon.

*Eleventh*, The principal writ on parchment may then be forwarded into the proper county, or now it may be taken to the office of the proper undersheriff in London, enjoined to be kept by every sheriff *within one mile of Temple Bar*, by 3 & 4 W. 4, c. 42, s. 20, (f) and the *sheriff's warrant* is to be there obtained from the undersheriff, directed to any bound officer the plaintiff's attorney may name (or even to a particular person named *pro hac vice*), though the latter is rarely advisable,

(y) Per Tindal, C. J., in *Dunn v. Harding*, 10 Bing. 555; ante, 219, note (y), 222, note (i).

(z) *Anderson v. Hayman*, cited in *Coppin v. Potter*, 10 Bing. 441.

(a) *Coppin v. Potter*, 10 Bing. 441; see the former practice in *K. B. Baker v. Allen*, 7 Bar. & Cres. 526; 1 Man. & Ryl. 232, S. C.; and in *C. P. Anderson v. Hayman*, 2 Moore, 192; 8 Taunt. 242, S. C.; *Dalton v. Barnes*, 1 Maule & S. 230; *Dorville v. Whoomsall*, 3 Bing. 39; *Evans v. Bidgood*, 4 Bing. 63; Tidd, 154, 180.

(b) *Rodwell v. Chapman*, 1 Crom. & M. 70; 1 Dowl. 634, S. C.; approved per Tindal, C. J., in *Dunn v. Harding*, 10 Bing. 556.

(c) *Richards v. Stuart*, 10 Bing. 322.

(d) See form of *præcipe* for capias in *Dunn v. Harding*, 10 Bing. 553; and the observation of Tindal, C. J., *id.* 555; and ante, 219, note (y), 221, note (i).

(e) *Collier v. Hague*, 2 Stra. 1270; *Crooks v. Holditch*, 1 Bos. & Pul. 176; Tidd, 9 ed. 190; *Burt v. Owen*, 1 Dowl. 691; 1 Arch. 108.

(f) *Ante*, 47.

because it may discharge the sheriff from liability for any escape, &c. (f) The writ on parchment in practice is now *filed in the undersheriff's office* and not delivered to the officer, although we have seen that it has been supposed that the officer should have the writ in his possession, to shew to the defendant if required. (g) A *copy* of the writ, with the memorandum, warnings and indorsement thereon, must however be delivered to the *officer*, who is thereupon to proceed without delay and with due diligence to arrest the defendant or defendants, first obtaining from the plaintiff's attorney a *full description* of the defendant and his residence and when and where he is likely to be found, so as to identify him and prevent the risk of arresting a wrong person. And amongst inferior persons sometimes the plaintiff himself accompanies the officer to see that he performs his duty.

*Twelfth*, The *warrant* is usually under the *sheriff's seal* of office for the particular Court and is so pleaded. (δ) It may be addressed to an ordinary officer of the sheriff, usually termed a *bound* bailiff, or to any person named by the plaintiff's attorney though not a regular officer, though the latter is not advisable (j) unless named in conjunction with the regular officer, in order to see that the process is faithfully executed. The form of the warrant usually resembles that in the note, with the exception of an additional direction to the officer there suggested as *expedient* to be introduced. (k)

*Twelfth*, Form and requisites of Warrant. (h)

(f) *De Moranda v. Dunkin*, 4 Term Rep. 119.

(g) *Ante*, §67, note (o).

(h) See fully Tidd, 9 ed. 217; 1 Arch. K. B., 4 ed. 130.

(i) See form 3 Lev. 63; 1 Saund. 298, note 5. But it is not necessary though usual in a plea of justification of an arrest under *mesne* process to state that the

warrant was under seal, 2 Saund. 305, note 13; 1 Saund. 296. When it is necessary, see Com. Dig. Pleader, 3 M. 24; Willes, 411; Bul. Ni. Pri. 83.

(j) *De Moranda v. Dunkin and others*, 4 T. R. 119; *Hamilton v. Datsiel*, 2 Bla. R. 952; *Rex v. Sheriff of London*, 1 Chit. R. 613.

(k) Middlesex [the county &c. to the sheriff of which the writ is directed]. 8. 8. Form of a Esq. and J. S. Esq. sheriff of the county aforesaid: To B. B. and J. D. my bailiffs, greeting: By virtue of the king's writ issued out of his majesty's Court of K. B. [or C. P. or Exch. of Pleas], bearing date at Westminster, the — day of —, A. D. 1835, to me directed, I command you, each and every of you, jointly and severally, that you or any of you omit not by reason of any liberty in my bailiwick, but that you enter the same and take C. D. of &c. [describing the defendant as in the writ] if he shall be found in my bailiwick, and him safely keep until he shall have given me bail or made deposit with me according to law, in an action on promises [or of debt, &c. as the plea is described in the writ] at the suit of A. B., or until the said C. D. shall by other lawful means be discharged from my custody: And I do further command you and each and every of you, jointly and severally, that on execution hereof you do deliver to him the copy of the said writ herewith delivered to you. [It may be advisable here to insert the following direction: "And I command you immediately on the execution hereof, to request the said C. D. to nominate or appoint some safe and convenient dwelling-house in my bailiwick within three miles from the place of his arrest, not being his own dwelling-house, there to be kept and detained for and during the first twenty-four hours after his arrest, pursuant to the statute 33 Geo. 2, c. 28. s. 1."] And I do further command you or any of you, that you do within six days at the least, after execution of the said writ by service or arrest, inclusive, indorse on such

CHAP. VIII.  
PROCEEDINGS  
ON  
CAPIAS.

As the sole object of a *warrant* is to give the *officer* proper directions what he is to do, (i. e. to arrest and detain the defendant, and to deliver to him a copy of the writ, and to certify to the sheriff what the officer has done,) and is not designed to give any information to the *defendant* himself, the circumstance of a warrant not stating the Court in which the process is returnable is immaterial. (m) Nor is a variance between the sheriff's warrant and a writ of *capias* or *capias ad satisfaciendum* so material as to induce the Court or a judge to discharge the defendant merely on that ground. (n) And in a recent case a very learned judge considered, that at least when a defendant is no longer in custody, he has no right to the inspection of the warrant. (o)

*Thirteenth,*  
Delivery of war-  
rant and writ  
and copies to  
the officer.

*Thirteenth,* At any time within four calendar months from the day of thus issuing a bailable *capias*, during which it continues in force, the plaintiff or his attorney may take the principal writ on parchment, when intended to be used, to the office of the under-sheriff of the county to whom it is addressed, and require the officer there to make out his proper warrant, which by some ancient rules and by statute must not

write the true day of the execution thereof, and that immediately after the execution hereof you do certify to me the manner in which you shall have executed the same and the day of the execution hereof, so that I may return the same to his majesty's said Court, or if the same shall remain unexecuted then that you do so return this my warrant at the expiration of four calendar months from the day of the said writ or sooner if thereto required. Dated the — day of —, 1835.

(L. S.)\*

Writ issued by P. S. of —,  
plaintiff's attorney.

Oath for £ — by affidavit [or by order  
of the Honourable Mr. Justice —,  
made on the — day of —, A. D.  
1835.]

The plaintiff claims £ — for debt and £ — for costs, and if the amount thereof be paid to the plaintiff or his attorney within four days from the caption or service of the copy of the said writ proceedings will be stayed. Before you arrest the defendants beware they are not privileged as ambassadors or servants to ambassadors, or otherwise privileged or protected. This warrant is allowed for one defendant and no more and to be executed by no bailiffs but those who have given the said sheriff security.

Memorandum subscribed to the above named writ.

This writ &c. [here copy the memoranda and warnings as in the writ].

(m) *Asley v. Goodyer*, 2 Dowl. 619.

(n) *Williams v. Lewis*, 1 Chitty's Rep. 611; *Boyd v. Durand*, 2 Taunt. 161, as to mesne process; same point as to a ca. sa., *Rose v. Tomblinson*, 3 Dowl. 49, 55.

(o) *Hartley v. Sell*, in Exchequer, 3d

January, 1835. Bosanquet, J. refused, on hearing a summons for that purpose, to make an order for inspecting and taking a copy of a warrant, in order to enable plaintiff to declare more securely against the officer for extortion upon the arrest.

\* Here is to be impressed the official seal of the sheriff for the particular county.

be previously sealed; (p) and if it were, (p) or if the warrant were issued in blank, or if any alteration were introduced in the same after sealing, even the *homicide* of the officer, which would otherwise be *murder*, might amount only to *manslaughter*. (q) But it is as illegal as immoral to commit a *personal dangerous injury* to any person executing process, however irregular. (b)

CHAP. VIII.  
PROCEEDINGS  
ON  
CAPIAS.

*Fourteenth, Of the Arrest and incidents.*

The subject of arrest may be considered under the following heads:—

*Fourteen, Of the arrest and several incidents.*

1. Consequences of arrest by a wrong name.
2. Place of arrest.
3. Time of arrest.
4. Of second arrests.
5. Of arrests and detainers when the defendant is already in custody of the sheriff.
6. Mode of arrest.
7. Duty of officer thereupon.

To deliver to defendant a copy of the writ.

To inform defendant of his right to be taken to the house of a friend for 24 hours.

Conduct of officer if defendant be ill.

Production to defendant of writ and warrant.

Duty to indorse on the writ the time of arrest.

1. We have pointed out the consequences of *misnomer* of a defendant, or of arresting him by *initial* or *omitted* Christian name. (r) If the defendant be neither named nor known by the name in the writ, he may, unless in the excepted cases, (s) if arrested, support an action of trespass for false imprisonment, (t) unless he pretended to be of the name stated in the writ, (u) or he may be discharged out of custody on motion. (v) The officer should therefore always distinctly ask the defendant if his Christian and surname are those mentioned in the writ and warrant; and if he admit that they are, then such admission would preclude him from insisting the contrary, or at least from supporting any action for the arrest. (x)

1. Consequences of arresting a defendant by a wrong name, or of arrest of a wrong person.

(p) *Ante*, 224, note (b); 6 G. 1, c. 31, s. 53; and see as to the sheriff's warrant in general, Tidd, 216, 217.

(q) See observations, *ante*, vol. i. 634 to 639; *Cole v. Hindson*, 6 T. R. 234, 236; *Housin v. Barrow*, *id.*; *Burtlem v. Fern*, 2 Wils. 47; 1 East's P. C. 310.

(r) *Ante*, 165 to 174.

(s) *Ante* 166; and what is sufficient diligent inquiry, *Ladbrook v. Phillips*, 1 Har-

rison's Rep. 109.

(t) *Shadgett v. Clipson*, 8 East, 328; *Cole v. Hindson*, 6 T. R. 634; *Ladbrook v. Phillips*, 1 Harrison's Rep. 109.

(u) *Price v. Hurwood*, 3 Camp. 108; *Walker v. Willoughby*, 6 Taunt. 530.

(v) *Ladbrook v. Phillips*, 1 Harrison's Rep. 109.

(x) *Supra*, n. (u).

CHAP. VIII.  
PROCEEDINGS  
ON  
CAPIAS.

If a *wrong person* be taken, who was clearly not the person intended by the process, he might support an action of trespass for illegal imprisonment under the writ, unless he, by knowingly and fraudulently pretending to be the party intended, either to enable the latter to escape or avoid arrest, in which case his misrepresentation might be pleaded either specially, (or perhaps even generally as a license to imprison,) as an excuse for imprisoning him, and would be a bar to the action, (x) and an action might be supported against him for his deceit, and thereby occasioning the escape of the other party, and even the whole debt and costs might be recovered from him. But care to arrest the right person must in general be observed, for if a wrong party should be arrested, and be perfect bail, and defend the action without collusion with the proper party, the plaintiff would be nonsuited. (y) At all events, before the uniformity of process act, 2 W. 4, c. 39, if the real defendant was described in a capias *against the person* or *distringas* by a *wrong* Christian or surname, and it was executed against him, an action of trespass was sustainable; and the Court of King's Bench would not, after an action of trespass had been commenced in respect of such misnomer, permit an amendment. (z) In cases where a defendant obtains his discharge from imprisonment on the ground of misnomer in the writ, it has been usual to require him not to bring any action, or at least if he refuse to submit to that condition, he will not be allowed the costs of the application.

2. Place of arrest.

2. The officer having received the copy or copies of the writ and his warrant, and keeping them at all times about his person ready to be instantly executed, must proceed to arrest the defendant (now without regard to any liberty or franchise, as every writ is in effect a non omittas under the 2 W. 4, 39,) at some place *actually* within the county; for if the arrest should be made in fact out of the proper county, an action of trespass for the imprisonment might be sustained, because there is not any exception as to the 200 yards distance beyond the exact boundary line, as in the case of mere serviceable process. (a) But we have seen that places, parcel of a county, but *wholly* situate within and surrounded by some

(x) The author so pleaded such misrepresentation to an action for false imprisonment tried on the western circuit, and the defendant obtained a verdict; and see *Price v. Harwood*, 3 Camp. 108; *Walker v. Willoughby*, 6 Taunt. 530.

(y) *Wilde v. Keep*, 6 Car. & Payne,

235; and *ante*, 168, n. (k). *Aliter*, if the real party was arrested though misnamed, *Moody v. Aslat*, Exchequer, Hilary, 1835, 1 Harrison & Gale, 47.

(z) *Anon. M. T.* 41 G. 3, K.B.; Tidd, 9th ed. 161, n. (o).

(a) 2 W. 4, c. 39, s. 1.

other county, constitute an exception.(b) And though an action of trespass might be supported when an arrest has been indisputably made at a considerable distance out of the proper county, the Courts will not interfere to discharge a defendant on the ground that he has been arrested out of the proper county, unless it be sworn that place of arrest was not on the confines, and that there is not any dispute about the boundary.(c)

3. There is not now, as heretofore, the limit of any fixed return day, on or before which a writ of capias should be executed, though writs of distringas and process to outlawry must be returnable on a day certain in term. A capias is current for four months, and may be executed on any day excepting Sunday,(d) Christmas-day,(d) and Good Friday,(d) and at any hour of the night, excepting, as we have seen, Saturday night after the hour of twelve at night.(d)

3. Time of arrest.

4. If the defendant hath been discharged from custody under a capias, upon his giving a check on a banker afterwards dishonoured, or on an undertaking not afterwards performed, he may be arrested a *second time* upon the same writ and warrant, and without any fresh affidavit.(e) But in general we have seen that the rule of H. T. 2 W. 4, directs that after non pros. nonsuit or discontinuance, the defendant shall not be arrested a second time without the order of a judge.

4. Second arrest.

5. When a defendant is already in custody in the prison of the Court of King's Bench or Common Pleas or Exchequer, viz. in the *King's Bench or Fleet Prison*, the 2 W. 4, c. 39, s. 8, prescribes a particular form of *writ of detainer* at the suit of a third person, to continue the defendant in the same prison at his suit, and which proceeding will be considered in the following chapter; but when a defendant is in the custody of a *sheriff* or other officer having the execution and re-

5. Arrest of defendant whilst already in custody of the sheriff on a prior writ, and herein of detainers on subsequent process.

(b) 2 W. 4, c. 39, s. 20. In a case of that nature in T. Chit. Forms, 2d ed. 40, n.(b), it is suggested that the capias should command that the sheriff "take C. D. if he be found in your bailiwick, or within any district or place which is wholly situate within and surrounded by the said county of —;" or if the writ be directed to the sheriff of the surrounding county, then the writ may be, "within any district or place which is wholly situate within and surrounded by your county;" and see concluding part of

2 W. 4, c. 39, s. 20, which seems to require such express directions in the body of the writ in such cases; and see form, ante, 342, n.(3).

(c) *Webber v. Manning*, 1 Dowl. 24; *Hammond v. Taylor*, 3 Barn. & Ald 408; Tidd, 218, 219.

(d) *Ante*, 110.

(e) *Puckford v. Maxwell*, 6 T. R. 52; 1 Chit. Rep. 274, n.; *Cantellow v. Freeman*, 3 Tyr. 579; 1 Crompt. & Mee. 536, S. C.

CHAP. VIII.  
PROCEEDINGS  
ON  
CAPIAS.

turn of mesne process, then he is to be proceeded against in *bailable* cases by the same process, viz. *capias*, as if he were at large; and the delivery of a *capias* to the under-sheriff of the county in which such defendant is already a *prisoner*, has immediately the same effect as if the sheriff had issued his warrant, and his officer had actually made a fresh arrest at the instance of such fresh plaintiff, and so as to subject the sheriff to an action for an escape, if inadvertently the defendant should be discharged from the first arrest, and suffered to go at large, instead of being continually *detained* on the fresh writ. (f) And this liability gave rise to the necessity for a sheriff's officer searching the office of the under-sheriff, to ascertain whether any fresh process has been lodged or brought in immediately before he discharges the defendant either on a bail-bond or deposit of the sum sworn to, and £10 for costs.

But before a sheriff's officer ventures to detain a party upon fresh process, he must consider whether the first arrest was legal; for if it were illegal, and attributable to the *misconduct of the sheriff, under-sheriff, or any officer of the former* in making the first arrest, or occasioned by the wrongful contrivance of the *same plaintiff*, then any subsequent process, even at the instance of a third person proceeding without collusion, would be illegal and inoperative; as where an assistant, in the absence of the officer named in the warrant, illegally arrested a party on mesne process, and a *ca. sa.* at the suit of *another person* was lodged in the office whilst the defendant was so illegally in custody, the Court discharged the defendant. (g) So if the *same plaintiff*, who has arrested and caused a defendant to be detained on irregular process, (afterwards set aside,) issues and at the same time detains the defendant on regular process, the defendant will be entitled to be discharged from both. So if the second process were even issued by a *third person in collusion* with the plaintiff in the first irregular process, the same consequence would ensue. But where the only objection to the first affidavit or process, or arrest, is, that it *was irregular*, and neither the sheriff nor his officer have been to blame, then a *third person's* regular process would entitle *him to detain* the defendant at his suit, though he be discharged from custody under the first. (h)

(f) *Jackson v. Humphreys*, 1 Sulk. 273; *Tuylor v. Brander*, 1 Esp. Rep. 45; and post, 360, 361.

(g) *Barratt v. Price*, 9 Bing. 566; 1 Dowl. 725; 1 New Rep. 133; Bagl. Pr. 121.

(h) *Davis v. Chippendale*, 2 Bos. & Pul. 282, 367; *Barclay v. Faber*, 2 Barn. & Ald. 743; and observations in *Barratt v. Price*, 9 Bing. 566; 1 Dowl. 725; see further 1 Arch. K. B. 4th ed. 140, 141.



6. It was formerly supposed that in making an arrest the officer must actually seize or touch the person of the defendant,<sup>(i)</sup> but it now suffices if the officer named in the warrant be actually close to the defendant, and declares his purpose, and the defendant submits and conducts himself as if in custody, especially if they be in the same room and the officer lock the door.<sup>(k)</sup> And it is not necessary that the officer who has the authority should be the very hand that arrests; nor in the actual presence or view of the person arrested, nor actually in sight, nor is any exact distance prescribed, for it is sufficient if he be near and acting in the arrest.<sup>(l)</sup> But if without even seeing the officer the defendant, with sureties, executes a bail-bond, and sends it to the officer, although the obligors will be estopped from insisting that there was no arrest in an action on the bail-bond, yet these circumstances would not afford sufficient evidence of an *arrest* to support an action for *maliciously arresting* the defendant; though perhaps the facts might support a declaration differently framed for maliciously issuing the bailable writ, and occasioning the trouble and expense of executing a bail-bond, and putting in bail above.<sup>(m)</sup> So where in consideration of the officer not arresting the defendant, an attorney gave his undertaking to give a bail-bond, which was accordingly given, the Court considered that they could not give the defendant his costs under the 43 G. 3, c. 46, s. 3, because the defendant had not been "*arrested and held to bail*" within the terms of that act.<sup>(n)</sup>

It is clearly illegal for an officer after an arrest on civil process to handcuff or manacle the defendant, unless he has been clearly guilty of an attempt to escape or rescue himself.<sup>(o)</sup>

CHAP. VIII.  
PROCEEDINGS  
ON  
CAPIAS.

6. *Mode of Arresting, and what amounts to the same.*

No right to handcuff a party.

7. *Immediately or forthwith* after the arrest, it is the duty of the officer, under the 2 W. 4, c. 39, s. 4, to cause one copy of the capias, with every memorandum or notice subscribed thereto, and all indorsements thereon, to be delivered to every defendant,<sup>(p)</sup> and if this be omitted, or if an insufficient copy be delivered, the Court or a judge, we have seen, would discharge the defendant out of custody, nor would an amendment of the copy be permitted.<sup>(p)</sup>

7. *Duty of officer after arrest to deliver to defendant a copy of writ.*

(i) 1 Salk. 79; 1 Ry. & Moody, 26; 1 Car. & Payne, 153, S.C.; Tidd, 9th ed. 219.

(k) *Id.*; Cas. Temp. Hardw. 301; 2 New Rep. 211.

(l) Cowp. 65; Tidd, 219.

(m) *Berry v. Adamson*, 6 B. & C. 528, cited in *Bates v. Pilling*, 4 Tyr. 232;

*Amor v. Blofield*, 9 Bing. 91; *ante*, vol. i. 48.

(n) *Bates v. Pilling*, 4 Tyr. 231.

(o) *Ante*, vol. i. 653, n. (s); *Wright v. Court*, 4 B. & C. 596; 6 D. & R. 623, S.C.

(p) *Ante*, 242, 243; *Byfield v. Street*, 10 Bing. 27; *Bagley's Prac.* 121.

CHAP. VIII.  
PROCEEDINGS  
ON  
CAPIAS.

To inform defendant that he may go to the house of a friend for 24 hours.

Conduct in case the defendant be ill.

Production of the warrant to defendant.

It is the imperative duty of the arresting officer, in pursuance of 32 G. 2, c. 28, s. 1 & 12, (q) *immediately* after the arrest, to *inform the defendant* that he is at liberty to be taken to any safe and convenient house of any third person nominated by him within three miles, and in the county where the arrest took place, *not being the defendant's own residence*, there to remain for twenty-four hours, and that he cannot legally be taken to any gaol or prison, or into any tavern, ale-house, or victualling-house, or drinking-house, or to the private house of the officer until after that time; and if the officer should neglect to do so, and within twenty-four hours attempt to take the defendant to prison, he and the principal returning officer incur the forfeiture of £50 to the party aggrieved. (r)

If the party arrested be so ill as to render it dangerous to remove him, the officer may and ought unquestionably to abstain from removing him, and may permit him to remain even in his own house, in the custody of a follower, though not named in the warrant, he keeping the key of the house in his possession; and it suffices for the officer to remove the party as soon as he is sufficiently recovered; (s) and the sheriff, if ruled or required, may return languidus in the form already stated. (t) If the officer be doubtful upon the state of health of the party, he should require the attendance and advice of some respectable medical attendant, and require him, at the peril of the consequences of misrepresentation, to certify in writing whether it be fit to remove the party, or take him to any prison within the county. (u)

If the defendant should require the production of the writ itself on parchment, it was formerly supposed to be the duty of the officer to produce the same; (x) but this was not necessary unless expressly required by the defendant. (y) And now we have seen that the practice is to file the principal writ in the sheriff's office, and only a copy is delivered or shewn to the defendant. (z) It is however expedient to demand inspection of the warrant so as to ascertain that the person making the arrest is an officer named in the warrant, and not a mere

(q) See statutes and notes, Chit. Col. Stat. 53, 335.

(r) *Dewhurst v. Pearson*, 1 Crompt. & M. 365; 3 Tyr. 242, S. C.; *Simpson v. Benton*, 2 Nev. & Man. 52; *id.* 5 Barn. & Adol. 35, overruling *P. M. v. Sheriff of Middlesex*, 4 Moore & P. 726; 1 Dowl. 201; and see *Summers v. Mosley*, 2 Crom. & M. 417.

(s) *Stevens v. Jackson*, 6 Taunt. 106; 1 Marsh. 496, S. C.; and see *Perkins v. Meacher*, 1 Dowl. 21; *Baker v. Davenport*, 8 Dowl. & Ry. 606; *Cavenach v. Collet*,

4 Bar. & Ald. 279.

(t) See the form, *ante*, 249.

(u) *Per Lord Ellenborough*, Mich. T. 1816.

(z) As to serviceable process, see *ante*, 250, 274, n. (l); and *Tidd*, 168, 169; *Worley v. Glover*, 2 Stra. 877; *Panchard v. Woolley*, Barnes, 302; *Rowell v. Roberts*, *id.* 422; *Westley v. Jones*, 5 Moore, 162.

(y) *Edgar v. Farmer*, Cas. Temp. Hardw. 138.

(z) *Ante*, 351.

assistant, illegally making the arrest in the absence of the officer. (z) Before the uniformity of process act, 2 W. 4, c. 39, and which seems to introduce no difference in this respect, where the defendant, at the time he was served with a copy of process, or even a quarter of an hour after, demanded to see the original, which was refused, the service was deemed irregular. (a) A fortiori, in bailable process, where a party is to be deprived of his liberty, it should seem but reasonable that the defendant should be afforded, on request, an inspection of the writ itself at the office of the under-sheriff, though as now he is to have an exact copy, perhaps the Court would not discharge him from the arrest on account merely of the refusal to produce the principal writ. It should seem at all events but reasonable that the officer should, on demand, produce his *warrant* to satisfy the defendant that authority to arrest him has been duly delegated to him by the sheriff, and connect him with the writ; though we have seen that after the defendant has been released from the imprisonment, a judge will not order the inspection. (b)

It is the duty of the sheriff or his officer, within six days inclusive after the arrest, to indorse on the *writ* the true day of the execution thereof, i. e. arrest of the defendant whom he may have arrested, and service of the copy delivered to one of several defendants whom he has been ordered only to serve; and in default thereof, the sheriff or other officer is to be liable in a summary way, to make compensation for any damage that may have resulted from the neglect. (c)

Duty to indorse  
time of arrest,  
&c.

*Fifteen, Of Extortion on Arrests.*—The statute 23 Hen. 6, c. 9, in express terms prohibits a sheriff or his bailiff, or other officer, having the execution of bailable process, from taking more than *fourpence* for making an arrest or attachment, or more than the like sum for making a bail-bond, warrant, or precept, under pain of forfeiting to "the party indamaged or grieved" his treble damages, and which is recoverable by action of debt, and £40 penalty, recoverable by a common informer in an action of debt, half for the king, and half for himself. (d) The 32 G. 2, c. 28, s. 1, (e) repeats the prohibition against taking or demanding for any arrest, or taking more than is by

*Fifteen, Extortion on arrests.*

(z) As in *Barrett v. Price*, 1 Dowl. 725; and see a reason why a defendant ought to be allowed to see the warrant, 8 T. R. 187; Bagley's Prac. 121.

(a) *Thomas v. Pearce*, 2 Bar. & Cres. 761; 4 Dowl. & R. 317, S. C.; *Westley v. Jones*, 5 Moore, 162; Tidd, 169, 267, (c), 351.

(b) *Supra*, n. (z).

(c) 2 W. 4, c. 39, s. 4, Rule 4, Mich. T. 3 W. 4, ante, 151, and in note, 160, in note, 243, 244; and see form of indorsement on capias, ante, 244, note (g).

(d) See 23 Hen. 6, c. 9; Chitty's Col. Stat. 87; *Martin v. Bell*, 6 Maule & Sel. 220.

(e) See 32 G. 2, c. 28, s. 1; see Chitty's Col. Stat. 53, 333.

CHAP. VIII.  
PROCEEDINGS  
ON  
CAPIAS.

*law allowed*, and for *such taking* the 12th section in effect entitles the party aggrieved to recover in an action of debt the cumulative forfeiture of £50, and treble costs, for taking more than the allowed sum of fourpence for an arrest. The act also prohibits *other* extortions, but in consequence of no table of fees having been settled by the Courts at Westminster, the latter act is not so extensively useful as it might be. (*f*) Although it is *usual in practice*, even in taxing costs, to allow a larger fee to the officer for the caption, viz. 10s. 6d. in London, and a guinea when the arrest has been made in the country, yet if the officer receive the same from the *party arrested*, he will still be liable to the above-mentioned penalties. (*g*) There are numerous other provisions for the prevention of extortion *after* the defendant has been taken to a lock-up house, and whilst there, (*h*) and which not only give the party aggrieved an action for £50, but also provide a summary remedy by application to the Court in which the process is returnable against the officer; (*i*) and excessive charges for an arrest or bail-bond are recoverable back from the officer by motion and reference to the master. (*k*) But the application must be made within a reasonable time, or the delay accounted for by affidavit. (*l*)

Sixteen, Duty of officer to search for other writs before discharging the defendant.

*Sixteen, Officer's duty to search.*—The officer having thus arrested the defendant, is not, it should seem, bound to discharge him at the very instant, even upon tender of a bail-bond, or tender or deposit of the debt sworn to, and £10 for costs, under the statute 43 G. 3, c. 43. (*m*) But the sheriff's officer may and ought, *first*, though with the utmost expedition, (though twenty-four hours under circumstances were held not an unreasonable time, (*m*)) to search the office, so as to ascertain whether there may not have been delivered at the sheriff's office another bailable writ, or *capias ad satisfaci-*

(*f*) See *Boldero v. Mosse*, 3 Term Rep. 417; *Jaques v. Whitcomb*, 1 Esp. Rep. 361; *Martin v. Slade*, 2 New Rep. 59; *Martin v. Bell*, 6 Maule & Sel. 220; *Ex parte Evans*, 2 Bos. & P. 88.

(*g*) *Dew v. Parsons*, 2 Bar. & Ald. 562; 1 Chitty's Rep. 295, 302, S.C.; *Savage v. Smith*, 2 Bla. Rep. 1101. In *Townsend v. Carpenter*, 2 Car. & Payne, 118, it was held that a sheriff's officer may claim a guinea or half-a-guinea against the plaintiff's attorney for a caption; and see Bills of Costs, page 7. But if received from a defendant, the Court will on motion compel the officer to refund, *Watson v.*

*Edmonds*, 4 Price's Rep. 309.

(*h*) See fully 32 G. 2, c. 28.

(*i*) *Ex parte Evans*, 2 Bos. & Pol. 88.

(*k*) *Watson v. Edmonds*, 4 Price, 309; *Pitt v. Coombs*, 1 Harrison's Term Rep. 13; In re the Sheriff of Northamptonshire, January, 1835. K. B. when Mr. Erle obtained a rule against the sheriff for charging 7s. for a warrant on a *capias* which the master had reduced to 4s., but the legal demand was only 4d.

(*l*) *Pitt v. Coombs*, 1 Harrison's Rep. 13.

(*m*) *Taylor v. Brander*, 1 Esp. Rep. 45.

dum, and which if not searched for immediately before the actual discharge, would subject the sheriff to an action for an escape. (n) To avoid this temporary detention pending the search, and the risk of other process coming into the office, it is advisable for a defendant to anticipate and prevent actual arrest by prevailing on some attorney to induce the plaintiff's attorney to accept his undertaking to perfect bail above, or by having prepared and sending to the officer a satisfactory bail-bond, with proper fees, and which may be legally taken without any actual arrest. (o)

*Seventeen, Conduct of Defendant on Arrest.*—The defendant may, immediately after the arrest, demand the delivery to him of a copy of the writ and an inspection of the warrant, (p) and then insist on being taken to a proper private house of a friend, within three miles, for the first twenty-four hours. (q) If the process were regular, or only irregular and not void, it would be indictable to escape or rescue the party. (r) But if the defendant find that the writ or warrant is so defective as to be absolutely void, and not merely irregular, he may then in strictness legally resist or escape; (s) but it is rarely advisable even to attempt to do so; (t) and he must always *carefully* abstain from using a dangerous weapon, or committing any personal injury to the officer or his follower beyond a mere struggle to escape, for if death were to ensue, however illegal the warrant, he might be indicted for manslaughter and transported for life; as where the defendant deliberately shot at and killed the officer whilst illegally breaking an outer door to effect a caption. (u) And if the process should turn out regular, an escape or self rescue is an indictable offence at common law, as it is the duty of every one to submit to regular process. (x) The safest course is to submit under protest, and apply immediately to a judge, or by habeas corpus, and the judge will forthwith discharge the party, if the affidavit or process be illegal, or the defendant were in any respect privileged. (y)

*Seventeen, The proper conduct of a defendant on his arrest.*

(n) *Jackson v. Humphreys*, 1 Salk. 273; *Taylor v. Brander*, 1 Esp. Rep. 45. *Semble*, the sheriff incurs some risk in a large county of a writ coming into his office either in the country or in London, between the time of search and discharge, and which should be provided against.

(o) 2 Saund. Rep. 591. *post*, 365, note (m).

(p) *Ante*, 359.

(q) *Ante*, 357, 358.

(r) *Ante*, vol. i. 633, &c.

(s) *Ante*, vol. i. 633, 635, 636; *R. v. Osmer*, 5 East, 304.

(t) *Ante*, vol. i. 638.

(u) *R. v. Nestor*, and other cases, *ante*, vol. i. 634 to 639.

(x) *R. v. Osmer*, 5 East's R. 304.

(y) *Ante*, vol. i. 694, 695

CHAP. VIII.  
PROCEEDINGS  
ON  
CAPIAS.

*Eighteen, The several legal modes of defendant's obtaining his release from imprisonment.*

*Eighteen, The Legal Modes of obtaining Release from Imprisonment.*—A defendant having been arrested, and received a copy of the writ, and finding that *prima facie* at least the arrest is legal *in form*, may adopt one of the following means of obtaining release from imprisonment:—1st, he may, under 43 G. 3, c. 46, sect. 2, immediately *deposit* the sum sworn to, and £10 to cover the costs, in the hands of the sheriff, by delivering the same to him or his under-sheriff, *or other officer to be by him appointed*, (usually the officer named in the warrant); 2nd, by executing a *bail bond* with *two* sureties; or, 3dly, by applying to an attorney and prevailing on him to give his *written undertaking* to the plaintiff's attorney that bail above shall be put in and perfected, which, if accepted, in general, occasions an immediate discharge on payment of the officer's fee. The last proceeding, when an attorney is at hand, and has confidence in the defendant, and the plaintiff's attorney will accept his undertaking, is the most summary and convenient, when no advantage of an irregularity is intended to be taken. But if the defendant have the money at command, the first measure may be the best; because, if the proceedings should turn out to be irregular, the defendant may then, immediately after the deposit, and within four days if possible, but at all events within eight days, take out a summons or move the Court to set aside the writ, or copy, or arrest; and if he succeed, he may then have back the money from the sheriff; and if the proceeding has been regular, and he resolves within a few days after arrest to settle the action, he might require the sheriff to pay the indorsed claim to the plaintiff's attorney, and thereby avoid further costs; and within the four days give the plaintiff's attorney a written notice to that effect, accompanied with a written order on the sheriff for the amount. (x) When the defendant's attorney gave notice to the plaintiff's attorney of the payment to the sheriff, and that he should not defend the action, but reclaim only the surplus which remained, after payment of the debt and costs, and the plaintiff's attorney, on the sheriff omitting after request to remit the money, proceeded in the action, the Court held that the defendant was not liable to pay the costs incurred after the arrest. (a)

If a sheriff's officer discover that the arrest is illegal, either

(x) *Semble*.

(a) Tidd, 229; *Clarke v. Yeates*, 3 Brod. & B. 273; 7 Moore, 83, S. C.; but see *Offley v. Weaver*, 7 Moore, 557,

and note the first decisions were before 2 W. 4, c. 39, and rules Mich. T. 3 W. 4.

on account of such a material defect in the writ, or on account of privilege, &c. so that any continued detention would only increase the damages in an action for false imprisonment, then he may instantly discharge the party arrested, though it might be advisable first to obtain the order of the Court or a judge. But if the arrest was legal, or the writ merely irregular, then the officer cannot safely discharge the defendant without first ascertaining that the defendant has executed a proper bail bond, or deposited the sum sworn to and £10 for costs, or that the plaintiff's attorney has accepted the undertaking of the defendant's attorney; and in the latter case it would be prudent to require the *written authority* of the plaintiff's attorney for the discharge. If after an arrest the defendant be suffered to go at large without a previous bail bond with *two* sureties, the sheriff might perhaps be fixed with personal liability by the immediate commencement of an action for the escape, against which the Court would not afterwards relieve the sheriff. (b)

CHAP. VIII.  
PROCEEDINGS  
ON  
CAPIAS.

Consequences  
of discharging a  
defendant with-  
out requiring  
one of these.

*Nineteen, Of the Bail Bond.*—The most usual proceeding after an arrest, is for the defendant and two other persons, as his sureties, to execute a *bail bond* (c) conditioned in express terms "*for his causing special bail to be put in* for him in a named Court, as required by the writ of *capias* previously recited (i.e. *in effect* not only for putting in such bail within eight days after the arrest, but also giving due notice thereof, and if excepted to causing such bail to swear to their sufficiency.) Sheriffs were required to accept the security of a bail bond by the statute 23 Hen. 6, c. 9, and that enactment still applies, although the terms of a bail bond have necessarily been altered since the introduction of the new form of a writ of *capias* in lieu of the former writs; and if a sheriff should refuse to accept a bond framed according to the requisites of 23 Hen. 6, c. 9, as varied by 2 W. 4, c. 30, viz. a bail bond executed by the defendant, with *two* sureties having sufficient in the county, but not otherwise, (d) (a requisite prescribed in order that the sheriff might be the better enabled to ascertain the sufficiency of the tendered sureties,) he would be liable to an action of debt by an informer, to recover £40 penalty, and also to a special action on the case, at the suit of the party aggrieved, to recover

*Nineteen, Of  
executing a  
Bail Bond.*

(b) *Fuller v. Prest*, 7 Term R. 109; *Pariente v. Plumbtree*, 2 Bos. & Pul. 35; *Allingham v. Flower*, id. 246; *Birn v. Bond*, 6 Taunt. 554; *How v. Lacy*, 1 Taunt. 119.

(c) See form in *Evans v. Moseley*, 4 Tyr. 170; 2 Crom. & M. 490, and in note, *infra*.

(d) *Lovell v. Plomer*, 15 East, 320; *Matson v. Booth*, 5 Maule & S. 223.

CHAP. VIII.  
PROCEEDINGS  
ON  
CAPIAS.

treble damages for any subsequent imprisonment, both of which actions are given by the 23 Hen. 6, c. 9. (e) The form of bail bond now adopted is given in the note. (f) Such bond is usually dated of the day of the arrest, though executed on a subsequent day; (g) and the condition recites the arrest of the defendant on the very day when it took place under the writ of *capias* shortly recited, and that a copy of the writ, with all the memoranda, notices and indorsements thereon, had been delivered to the defendant; and then follows the condition for the defendant's putting in bail in the proper Court, as required by such recited writ; (g) but as no express alteration in the terms of a bail bond has been introduced by 2 W. 4, c. 39, it would seem questionable whether a defendant is bound to execute a bail bond conditioned for more than the putting in bail above within eight days after the arrest inclusive, omitting the recital of his having received a copy of the writ, memorandum, notices and indorsements, the admission of which might prejudice him in insisting that no such *copy* had been delivered to him.

It has been decided that an attorney ought not to prepare a bail bond in a larger penalty than is requisite according to the

---

(e) *Evans v. Moseley*, 4 Tyr. 169; 2 Crom. & M. 490, S. C.

The form of a  
Bail Bond.

(f) Know all men by these presents, that we C. D. [the defendant arrested,] of —, E. F. of —, and G. H. of —, are held and firmly bound to S. S. Esq. sheriff of the county of —, in the sum of [double the sum sworn to and indorsed on the writ], of lawful money of Great Britain, to be paid to the said sheriff, or his certain attorney, executors, administrators or assigns, for which payment well and truly to be made we bind ourselves and each of us for himself in the whole, our and every of our heirs, executors and administrators, firmly by these presents sealed with our seals. Dated the — day of —, in the year of our Lord, 1835.

Whereas the above bounden C. D. was, on the — day of — instant, taken by the said sheriff, in the bailiwick of the said sheriff, by virtue of the king's writ of *capias* issued out of his majesty's Court of King's Bench, [or C. P. or Exch. of Pleas,] bearing date at Westminster, the — day of —, to the said sheriff directed and delivered against the said C. D. [and J. K. &c. as in the writ,] in an action on promises, [or of debt, &c. as in the writ,] at the suit of A. B. [And whereas a copy of the said writ, together with every memorandum or notice subscribed thereto, and all indorsements thereon was, on the execution thereof, delivered to the said C. D.] And whereas the said C. D. was and is, by the said writ, required to cause special bail to be put in for him in the said Court to the said action, within eight days after the execution thereof on him, inclusive of the day of such execution. Now the condition of this obligation is such, that if the said C. D. do cause special bail to be put in for him to the said action in his Majesty's said Court, as required by the said writ, then this present obligation will be void and of no force, otherwise to stand and remain in full force, vigour and effect.

Sealed and delivered in the presence of W. W.

C. D. (L. s.)  
E. F. (L. s.)  
G. H. (L. s.)

---

(g) *Evans v. Moseley*, 4 Tyr. 171; 2 Crom. & M. 490, S. C.



practice of the Court. (*h*) And it may be important to observe this injunction, because otherwise the bail to the sheriff might be exposed to greater liability than the affidavit to hold to bail had required. (*h*) Although a bail bond with *one* surety is not invalid, (*i*) and the sheriff cannot be sued directly for taking only one, (*k*) yet as the statute implies a duty to take *two* sureties for the greater security of the plaintiff, if he take only one, and an attachment be obtained against the sheriff, the Court will not set aside the same at his instance, though they might on the application of the bail above. (*l*) A defendant should not *voluntarily* execute a bail bond without a previous arrest, without first ascertaining that the affidavit to hold to bail is sufficient, because he would thereby be precluded from afterwards objecting to such affidavit. (*m*)

A bail bond having been taken, care must be observed by the plaintiff and his attorney not to grant any binding indulgence to the defendant himself as to time or otherwise, that might, on the ordinary principle of principal and surety, discharge the latter. (*n*) At all events more time should not be given to a defendant than the ordinary course of a suit would occupy, unless the bail, *or one of them*, expressly concur; and it is advisable to require them to sign their *written* consent, reciting that the indulgence is to be at their request, and that the same shall not prejudice. Indeed this precaution equally extends to bail above. But if one of the bail to the sheriff consent to time being given to the defendant to perfect bail above, his act is binding upon both. (*o*) And it has been considered, that after a bail bond has been forfeited, and an assignment thereof taken, then time subsequently given to the principal would not discharge the sureties. (*p*)

Consequences of indulgence to principal, discharging sureties.

It is the duty of the sureties, executing the bail bond, to take care that the defendant *puts in bail above within the eight days* allowed for that purpose *at all times of the year*; and even without the consent of the defendant they may put in and

(*h*) *Wingrave v. Godmond*, 6 Car. & P. 66.

(*i*) *R. v. Sheriffs of London*, 9 Moore, 422; 2 Bing. 227, S. C.; *Beaufage's case*, 10 Coke, 100 b; *Austen v. Howard*, 7 Taunt. 28, 327.

(*k*) *Clifton v. Webb*, Cro. Eliz. 808; Tidd, 223.

(*l*) *R. v. Sheriff of Middlesex*, 2 Dowl. 140; *R. v. Sheriffs of London*, 9 Moore, 422; 2 Bing. 227, S. C.

(*m*) *Norton v. Danvers*, 7 Term Rep.

375.

(*n*) *Thomas v. Young*, 15 East, 417; *Farmer v. Thorley*, 4 Bar. & Ald. 91; Tidd, 295, 301, 305.

(*o*) *Howard v. Bradberry*, 3 Dowl. 92.

(*p*) *Woosnam v. Price*, Cromp. & M. 352; 3 Tyr. 373, S. C.; *Lee v. Levi*, 4 Bar. & Cres. 390; 1 Car. & P. 553, S. C.; *Pike v. Sweet*, 1 Dans. & Lloyd, 159, *sed quare*. See Chitty on Bills, 8th ed. 448.

CHAP. VIII.  
PROCEEDINGS  
ON  
CAPIAS.

justify bail above for their protection, though, to prevent an adverse render by bail above, put in by the bail below or bail to the sheriff, the defendant himself may, at the same time, put in and justify bail above, and in that case the Court will direct that the rule for the allowance of the bail put in by the defendant himself only shall be drawn up, and the other stand; for otherwise, however sufficient the persons who had become bail above, as *friends* of a defendant, might be, other bail put in by the sheriff, or bail below for their indemnity, might render and subject the defendant to imprisonment, at least for a time. (q)

Twenty, Of a deposit with sheriff, &c. of the sum sworn to, and 10*l.* for costs under 43 G. 3, c. 46, s. 2. (r)

*Twenty, Deposit in lieu of a Bail Bond.*—The 43 G. 3, c. 46, s. 2, (singularly, not noticed in any of the forms prescribed by the 2 W. 4, c. 39, but by mistake the 7 & 8 G. 4, c. 71, is there referred to in lieu of that act,) (s) authorizes the party arrested, in lieu of giving bail to the sheriff, to deposit in the hands of the *sheriff*, by delivering to him or to his undersheriff, or other officer to be appointed for that purpose, (t) (usually the officer named in the warrant,) *the sum indorsed on the writ by virtue of the affidavit for holding to bail in that action, together with 10*l.* in addition, to answer the costs up to and at the time of the return of such writ*, and thereupon the sheriff is to discharge him. Such payment may be accompanied with the subscribed notice. (u) The sheriff is, within eight days after the arrest, to pay the sum thus deposited to the same officer who signed the writ, and if the defendant should afterwards in due time perfect bail above, he is, on motion to the Court in

(q) *Wheeler v. Rankin*, 1 Chit. Rep. 81; *R. v. Sheriffs of London*, *id.* 329; *Taylor v. Evans*, 1 Bing. 367.

(r) Tidd, 9 edit. 227; 1 Arch. K. B. 4 ed. 145.

(s) The 2 W. 4, c. 39, schedule No. 4, only refers to 7 & 8 G. 4, c. 71; evidently by mistake inserted for 43 G. 3, c. 46.

(t) Therefore not to the arresting officer, unless expressly authorised.

(u) In the King's Bench.

{ A. B. plaintiff,  
and  
C. D. defendant.

Take notice, that I have this day deposited with you the sum of 57*l.* viz. 47*l.* for the debt sworn to, and 10*l.* for costs, in lieu of bail to this action, and pursuant to the statute, and that the same is deposited with you without prejudice to the right of the said defendant to object to any irregularity in the affidavit to hold to bail, writ or other proceeding, or to an action against the sheriff of Middlesex, his officers, and all other persons concerned in holding him in custody in this action, or his taking any other proceedings he may be advised. Dated this — day of —, A. D. 1835.

To the sheriff of Middlesex,  
his under-sheriff and officers,  
to A. B. the plaintiff, and G. H.  
his attorney, and to whom else  
it may concern.

Your's &c.

F. F. attorney for the said defendant.

banc, (but not on an application to a single judge) to have the money back. (x)

If a defendant has deposited money in the hands of the sheriff, and which has also been paid into Court, then if he put in bail according to the exigency of the *capias* in *due time*, he may have the money out of Court, but if he do not put in bail above in due time, he will not be allowed to take the money out, although the *capias* did not mention such a deposit in the warning subscribed to the writ. In case, however, bail above be afterwards perfected before the plaintiff has taken the money out of the Court though not in due time, then the plaintiff will be put to his election, and cannot retain the security of the bail as well as the money. (y)

CHAP. VIII.  
PROCEEDINGS  
ON  
CAPIAS.

Proceedings  
after deposit of  
debt and 10*l.*  
for costs.

*Twenty-one, Payment of the further sum of £10 for Costs in lieu of Bail above.*—Under the 7 & 8 G. 4, c. 71, the defendant, in lieu of perfecting bail above, may pay into Court the further sum of £10 (*i. e.* altogether 20*l.* for costs) towards the costs, and which, with the sums deposited with the sheriff, are then to remain in Court in lieu of bail above. (z)

*Twenty-one, Payment into Court in lieu of bail above of a further sum of £10 in addition to the £10 and the debt sworn to, deposited with sheriff.*

*Twenty-two, Attorney's Undertaking.*—Sometimes, when an attorney has confidence in his client, he will give his undertaking for the defendant's putting in and perfecting bail above to the plaintiff's attorney, and thereby save the client from the annoyance of an arrest, and the expense and trouble of a bail bond or deposit; but to avoid personal responsibility, most attorneys decline to incur such liability, and their articles of co-partnership frequently expressly prohibit the same. As the 23 Hen. 6, only affects securities to the sheriff, engagements of this nature are not within that act, when given to the plaintiff or his attorney, though it would be otherwise if given to the sheriff or his officer; (b) and even a verbal undertaking to sign a bail bond for the defendant is not deemed an undertaking to answer for the debt, default, or miscarriage of a third person within the meaning of the 29 Car. 2, c. 3, s. 4, and therefore need not be in writing to sustain an action. (c) The Court, however, it has been supposed, will not enforce by *attachment* an attorney's undertaking to appear or put in or perfect bail

*Twenty-two, Undertaking by defendant's attorney to put in bail in lieu of bail bond. (a)*

(x) *Geach v. Coppin*, 3 Dowl. 75; 43 G. 3, c. 46, s. 2.

(y) *Geach v. Coppin*, 3 Dowl. 74.

(z) 7 & 8 G. 4, c. 71, s. 2.

(a) As to an attorney's undertaking to put in bail in general, see Tidd, 9 ed.

227, ante, 240, 273.

(b) *Sedgworth v. Spicer*, 4 East, 568; *Lewis v. Knight*, 8 Bing, 271; 1 Moore & S. 353.

(c) *Jarmain v. Algar*, 2 Car. & P. 249, R. & M. 343, S. C.

CHAP. VIII.  
PROCEEDINGS  
ON  
CAPIAS.

*Twenty-three,  
Change of  
officer.*

above, unless it be in writing and signed by him. (d) It may be expedient to adopt the subscribed form. (e)

*Twenty-three, Change of Officer.*—There is also another mode of accommodating a defendant who has been arrested, not unfrequently practised, viz. by the defendant's attorney getting the sheriff's officer, whom he usually employs, and who may have more convenient apartments or better accommodation, to give what is termed a *receipt* for the defendant to the officer who made the arrest, and which the latter officer will receive of the new officer, if he be known to him to be trustworthy, and thereupon will hand over his warrant and relinquish the custody of the defendant to such fresh officer, who may at the request of the defendant's attorney shew the defendant more indulgence than the first officer might be disposed to do, and even take his word for giving a bail bond or for putting in and perfecting bail above. But this practice is in some respects objectionable, as each officer expects a *douceur* for the civility and accommodation.

*Twenty four,  
Motions and  
summons on  
part of defend-  
ant to set aside  
a proceeding  
for irregularity  
in affidavit,  
writ, copy, or  
arrest.*

*Twenty-four, Proceedings for Irregularities.*—The party arrested having removed the immediate annoyance and inconvenience of an arrest, by depositing the debt and 10*l.* for costs, or executing a bail bond, or by his attorney giving an undertaking to the plaintiff's attorney, should then immediately, or at least *before he puts in bail above*, ascertain whether the *affidavit* to hold to bail, or the *writ*, or the *copy* served on the defendant, or the *arrest*, has been sufficient, or was *irregular*, and if so, should, if the defendant be in prison under the proceeding, take out a summons in vacation, or in term time move the Court *at the earliest opportunity* to set aside the proceeding, and that

(d) 2 Saund. 60, *Rogers v. Reeves*, 1 T. R. 418, 422, but see *ante*, 273.

Form of an attorney's undertaking to put in and perfect bail above.

(e) In K. B. [or C. P. or Exchequer.]

Between { . plaintiff,  
and  
defendant.

In consideration of Mr. G. H. the plaintiff's attorney, having agreed, at my request, to consent to the discharge of the defendant out of the custody of the sheriff of — in this action, without executing a bail bond or making a deposit according to law, [or consenting not to arrest the said C. D. nor require a bail bond or deposit in this action,] I do hereby undertake and agree that the said defendant shall duly put in and perfect bail above in this action, but without prejudice, nevertheless, to the right to object to the affidavit or other proceeding thereon, in respect of any defect or irregularity therein.\*

Dated this — day of —, A.D. 1835.

Signed, E. F. of, &c. as attorney for the said defendant, C. D. in this action.

\* A plaintiff's attorney might do well to refuse an undertaking from a defendant's attorney, unless he will *expressly*

consent, in writing, to *wire* all such objections.

he may be discharged out of custody, or if he have given a bail bond, that the same may be given up to be cancelled; for after voluntarily executing a bail bond without a previous arrest, (f) and after obtaining time to put in bail, (g) and after putting in bail above, (h) and still more after perfecting bail, (i) or paying the *further* 10*l.* into Court under the 7 & 8 G. 4, c. 71, s. 2, any summons or motion of that nature would be too late. In the Exchequer, as any motion against the validity of an affidavit to hold to bail is considered in delay of the plaintiff, the objection he intends to rely upon must be specified in the rule nisi, or cannot be urged on the subsequent argument, but that is not the practice in the other Courts. (k)

*Twenty-five, Of Contradictory Affidavits.*—Supposing the affidavit, writ, copy, and arrest to be regular in form, or not intended to be objected to; then the next consideration is, whether the necessity for causing two or more bail above to be put in for double the sum sworn to can be avoided. The *general rule* in all the Courts is, that no *contradictory affidavit*, denying the existence of the debt sworn to shall be admitted, (l) so as to vary the effect of the affidavit to hold to bail, or to dispense with the necessity to put in and perfect bail above to the full amount of the sum which any deponent has ventured to swear to, under the 12 G. 1, c. 29, so that any malicious individual who will positively swear to the existence of a named sum, may, without any previous examination of the circumstances by any Court or judge, or third person, arrest and imprison a party, and if he be unable to deposit the sum sworn to, and 20*l.* to cover costs, or to procure two persons to become his bail who can satisfactorily swear to their being worth double the sum sworn to, he may be kept in prison until final judgment has been obtained.

*Twenty-five,*  
Of motions to  
set aside or re-  
duce the neces-  
sity for putting  
in *full* bail  
above on *contra-*  
*dictory* affidavits  
of the non exist-  
ence of the debt.

But the Courts (especially the C. P.) have, under particular circumstances, relaxed or deviated from this harsh rule, as in a very recent case, where the affidavit to hold to bail disclosed that the debt was *prima facie* barred by the statute of limitations, and other peculiar facts were stated in a contradictory affidavit

(f) *Norton v. Danvers*, 7 Term Rep. 375.

(g) *Moore v. Stockwell*, 6 Bar. & Cres. 76; 9 Dow. & Ry. 124, S. C.

(h) *D'Argent v. Vivant*, 1 East, 330; *Shawman v. Whalley*, 6 Taunt. 185; *Dalton v. Barnes*, 1 M. & Sel. 230; *Reeves v. Hucker*, 2 Tyrwh. 161, 2 Crom. & J.

44, S. C.

(i) *D'Argent v. Vivant*, 1 East, 330.

(k) *Naylor v. Eagar*, 2 Young & J. 99.

(l) Tidd, 9 ed. 189; 1 Arch. K. B. 4 edit. 109; *Imlay v. Ellefsen*, 2 East, 453; *Isaacs v. Silver*, 11 Moore, 348.

CHAP. VIII.  
PROCEEDINGS  
ON  
CAPIAS.

to shew that the plaintiff had no cause of action; the Court granted a rule nisi calling upon the plaintiff to shew cause why the defendant should not be discharged out of custody on entering a common appearance, and afterwards on shewing cause the matter was referred to the prothonotary for his fuller investigation. (m) So, if a plaintiff has acknowledged in writing, that no debt was due to him the Court thus interfered. (n) But it is only under strong circumstances rendering it clear that no debt does or can exist that the Court will thus interfere, especially where the defendant has actually found bail, and is no longer suffering under imprisonment. (o) The general rule (p) may on principle be well founded to avoid the temptation to perjury by defendants, who not being able to find bail, might, for the sake of obtaining liberty, be induced to swear too boldly; but on the other hand, where an affidavit to hold to bail has been made only by the plaintiff himself without corroboration by a witness to the debt, and especially under suspicious circumstances, and for a large sum, for which it would be impossible to find bail, and ruin to a defendant would probably ensue, it seems a strong measure to allow an alleged creditor on his own ex parte affidavit to cause imprisonment, which may afterwards be established by a jury to have been wholly unjust.

*Twenty-six.*  
Putting in bail  
above, or deposit  
in Court of  
sum sworn to,  
and £20 for  
costs, in lieu of  
bail.

1. Time of put-  
ting in bail  
above,

*Twenty-six. Of putting in Bail above.*—If on behalf of the defendant no available objection to the affidavit, writ, copy or arrest, so as to support an application to set aside the proceeding, or if it be resolved not to take any such objection, then the defendant must, in observance of the writ and statute 2 W. 4, c. 39, sect. 4 and 16, (q) *within eight days after the execution of the writ on him, i. e. of the arrest, inclusive of the day of such execution, cause special bail to be put in for him, or a proper deposit to be made within the same time; or he must, upon summons returnable before the expiration of that time, obtain a judge's order for further time to put in bail, or in default of his so doing, such proceedings may be taken as are mentioned in the warning and indorsements, viz, an assignment of the bail bond may be taken, and action thereon commenced*

(m) *Tucker v. Tucker*, 1 Harrison and Woolaston's Term Rep. 15; *Jackson v. Tompkin*, 2 Chitty's R. 20, and note.

(n) *Nizelitch v. Bonacick*, 5 Bar. & Ald. 904; *Chambers v. Bernasconi*, 6 Bing. 496; 1 Crompt. & J. 451, S. C., observed upon in *Burton v. Haworth*, 1

Nev. & Man. 320, overruling cases in Tidd, 9 edit. 189, n. (e).

(o) *Burton v. Haworth*, 1 Nev. & Man. 318; 4 Bar. & Adol. 462, S. C.

(p) See cases in note (n), *supra*.

(q) *Ante*, 150, 153, 155.

against all the obligors, or proceedings may be had against the sheriff. The 24th general rule of Hil. T. 2 W. 4, (when writs were returnable in term,) in cases of arrest elsewhere than in London and Middlesex, allowed eight days from the *appearance day* of the process, in *effect twelve days* after the return day; but that rule was virtually annulled by the 2 W. 4, c. 39, schedule No. 4, prescribing the warning to put in bail *in all cases in eight days inclusive of the day of arrest*, and putting an end to return days and appearance days in bailable process. (r) So that now the defendant *must in all cases*, without regard to distance from London, or to term or vacation, put in bail in *eight days* after the day of the arrest, inclusive of that day, and without any distinction as respects *time*, between the 10th August and 24th October. (s) But if the last of the eight days be a Sunday, Christmas-day, or Good Friday, or a day appointed for a public fast or thanksgiving, then the defendant has all the next day to put in bail. (t) Within those eight days such bail above must be put in, or a deposit of the sum sworn to, and £20 for costs in lieu of bail, under the 7 & 8 G. 4, c. 71; or if he have already deposited the sum sworn to, and £10 for costs with the sheriff, then he may deposit the additional sum of £10 for further costs, pursuant to 7 & 8 G. 4, c. 71, and 2 W. 4, c. 39, schedule No. 4, to remain in Court in lieu of bail. But in the latter cases the defendant must enter his common appearance within the same time as he had to put in bail, or the plaintiff may do so for him, and the action will then proceed precisely as if bail above had been put in as heretofore. But the defendant may, by sect. 3 of 7 & 8 G. 4, c. 71, at any time before issue joined in law or fact, or before final or interlocutory judgment, receive the money deposited out of Court, upon putting in and perfecting special bail, and upon payment of such costs to the plaintiff as the Court shall direct; (u) or the defendant may convert the payment of the amount of the debt so deposited in Court, or a part of the same, into a payment in discharge of the action, by moving that the plaintiff may take the same, or a named part, in discharge of the action, and that unless he do so, with costs to be taxed, the same may be struck out of the declaration. (x) But it has been held, that

(r) *Grant v. Gibbs*, 1 Har. & Hodges' Rep. C. P. 56; *Hillamy v. Rowles*, 5 B. & Adol. 460; *Alston v. Underhill*, 3 Tyr. 427; 1 Crom. & M. 492, S. C.; *Thompson v. Dicus*, 4 Tyr. 875.

(s) *Grant v. Gibbs*, 1 Har. & Hodges' New Rep. 56. And see *R. v. Sheriff of*

*Middlesex*, 2 Dowl. 286.

(t) Reg. Gen. Hil. T. 2 W. 4, r. 8.

(u) *Terrall v. Alexander*, 1 Dowl. 134; *Hanwell v. Mure*, 2 Dowl. 155.

(x) *Hubbard v. Williams*, 8 Bar. & Cres. 496.

CHAP. VIII.  
PROCEEDINGS  
ON  
CAPIAS.

the money so paid in cannot be applied to a plea of tender, because the 7 & 8 G. 4, c. 71, s. 2, imports that money paid in under the act is to *remain in* Court until the end of the suit, as a security for *the costs* as well as the sum sued for; (y) and therefore in such a case the defendant must either provide and pay into Court a *further and other* sum upon pleading his plea of tender or a plea of payment into Court, or must put in and perfect bail above in the precise manner prescribed by section 3 of that act Where money, however, had been deposited in Court in lieu of putting in and perfecting bail above, pursuant to statute 7 & 8 G. 4, c. 71, and the plaintiff obtained a verdict, it was held that he was not at liberty to issue execution for the whole sum recovered, but was bound to take the sum deposited out of Court, and to limit his execution to the surplus only. (z) It has been expressly decided, that if a defendant be arrested before or *between the 10th August and 24th October*, he must put in and perfect bail before a judge at chambers within the same time, eight days inclusive of the day of arrest, and in the same manner as in any other part of the vacation, notwithstanding the exception in 2 W. 4, c. 39, sect. 11. (a)

Of obtaining  
further time for  
putting in bail.

It may be objected that some of the provisions in 2 W. 4, c. 39, and other enactments and rules, in allowing only eight days to a defendant to put in bail, or even less time to a sheriff, when the proceedings have been in a county very distant from the metropolis, are unreasonably expeditious. (b) However, in the case of bail, a defendant may, on application to a judge, obtain further time for putting in bail. (c)

Of putting in  
bail at any time  
pending action,  
and before de-  
fendant be  
charged in ex-  
ecution.

Bail may however, if the defendant be *in prison*, either from the commencement of the suit, or in consequence of a subsequent render, be, as of right, *put in at any time pending the action*, even after verdict, and before the defendant has been actually charged in execution, so as to enable the defendant to obtain his release; (d) but not after the defendant has been brought into Court to be charged in execution. (e) So at any time pending the suit, the defendant may deposit the sum sworn

(y) *Stultz v. Hensage*, 10 Bing. 561.

(s) *Hens v. Pike*, 2 Crompt. & J. 359.

(a) *R. v. Sheriff of Middlesex v. Wright*, 2 Cr. & M. 333; ante, 371.

(b) *Ante*, 247, 248, and per Park, J., in *Grant v. Gibbs*, 1 Harrison & Hodges' Rep. C. P. 58.

(c) And see form of summons and or-

der for the purpose, T. Chitty's *Forms*, 2nd ed. 68.

(d) *Dyott v. Dunn*, 2 Chitty's R. 72, 73, 74; 1 Dowl. & R. 9, S. C.; *Todd v. Etherington*, 2 Marsh. 374; Tidd, 9 ed. 248, 278, 279.

(e) *Bircham v. Chambers*, 11 Moore, 343.



to and £20 for costs under the statute 7 & 8 G. 4, c. 71, so as to obtain his release, and by leave of a judge, (but by an express rule, *not otherwise*), (e) the original bail may be *changed* and others substituted, or the debt and a sum to cover costs brought into Court; and this is essential when it is discovered that one of the bail is a material witness for the defendant. (f) And in a recent case the judge permitted the sum sworn to and £40 to be brought into Court even pending the trial, and one of the bail to be thereupon admitted a witness. (f)

The term in the statute and writ of capias, "*cause special bail to be put in*," is obviously a technical expression; for the bail themselves, being always two living persons, and not moveable inanimate chattels, that could be deposited, cannot literally be *put into Court*. It is a term descriptive of more than a single act, for it imports that *two persons only* (unless leave for more has been obtained,) competent to become bail, or at least not so incompetent as to constitute a nullity, shall, by acknowledging what is termed a recognizance of bail according to the practice of the Court, become bound for the defendant that he shall pay the sum that may afterwards be recovered by a judgment, or render himself to the proper prison of the Court, or that the bail themselves will do so for him, i. e. pay the debt and costs, or render him to such custody. *Secondly*, that such bail, if required, shall *justify*, i. e. swear and establish, to the satisfaction of a judge of the Court, their competency to become such bail in every respect; and *thirdly*, by the general practice of the Courts, and by an express rule of Court of Common Pleas, Easter T. 49 G. 3, it was ordered that special bail shall not be considered "*put in*" until *due notice* of their having become bail should have been given; and it has been recently held, that unless or until such notice has been regularly given, the condition of the bail bond "*to cause bail to be put in*," has not been complied with, so that if such *notice* be not given in due time, the plaintiff in the action, or the sheriff, may on that account prosecute an action on the bail bond. (g)

Import of term "*putting in bail*," and several requisites of.

As soon as practicable after an arrest, the defendant should obtain the *express consent* of two persons, who are in *every respect competent* to become bail, that they will do so; and he should be certain that he can confide on their *continuing friend-*

Proceedings antecedent to putting in bail above, and who competent to become bail, and to what facts they must be prepared to swear.

(e) Reg. Gen. Trin. T. 1 W. 4, r. 5.

(f) *Baillie v. Hale*, 1 Mood. & M. 289; 3 Car. & P. 560, S. P.; *Young v. Wood*, Barnes, 69; Bing. 92; 2 Chitty's

R. 103.

(g) *Grant v. Gibbs*, 1 Har. & Hodges' New Term Rep. 56.



Each bail must be a *housekeeper*, (not a lodger, householder or leaseholder, or a mere occupier of less than the main part of a house, (j)) or he must be a *freeholder* or *copyholder* in fee or for life in his own right and not in right of his wife, (k) and not a mere householder or leaseholder, however long the term of years, (l) and the housekeeping or freehold must be in England or Wales, and not in Scotland or Ireland. (m) But where partners both keep the same house, both may be bail, though one of them only lodge in the neighbourhood. (n) The property of each to be sworn to must be double the sum sworn to in the affidavit to hold to bail, or if that sum exceed 1000*l.*, then 1000*l.* in addition to it, after paying all his just debts.

Hence it is to be collected that each of the bail must be able to swear, first, that he is a *housekeeper*, not merely a *householder*, or that he is a *freeholder*, or copyholder in his own right; *secondly*, to state the full particulars of his present and antecedent residences for the last antecedent six months, in order that the plaintiff's attorney may thereby be better enabled

Summary of  
who can or can-  
not become  
bail.

*street or place, and number if any*] that he is worth\* property to the amount of £—— [the amount required by the practice of the Courts] over and above what will pay all his just debts,† [if bail in any action, add, "and every other sum for which he is now bail,"] and that he is not bail for any defendant except in this action [or if bail in any other action or actions, add, "except for C. D., at the suit of E. F., in the Court of ——, in the sum of £——, for G. H., at the suit of J. K., in the Court of ——, in the sum of £——," specifying the several actions, with the Courts in which they are brought, and the sums in which the deponent is bail]: and that the deponent's property, to the amount of the said sum of £—— [and if bail in any other action or actions "of all other sums for which he is now bail as aforesaid"] consists of [here specify the nature and value of the property in respect of which the bail proposes to justify as follows:] "stock in trade in his business of ——, carried on by him at ——, of the value of £——; of good book debts owing to him to the amount of £——; of furniture in his house at ——, of the value of £——; of a freehold [or "leasehold"] farm of the value of £——, situate at ——, occupied by ——; or "of a dwelling-house of the value of £——, situate at ——, occupied by ——" [or of other property, particularising each description of property, with the value thereof,] and that this deponent hath for the last six months resided at —— [describing the place or places of such residence, or if he has had more than one residence during that period state the same,] and not elsewhere.‡

Sworn, &c.

\* The word "worth" in lieu of "possessed," is rendered necessary by Reg. Gen. Hil. T. 2 W. 4, r. 19. He's possessed, &c. instead of he is possessed, held sufficient, *Lanyon's Bail*, 3 Dowl. 85. Where the affidavit of justification by country bail omitted to state that each of the bail was worth the sum required, but merely stated that they were possessed, &c. time to amend the affidavit was refused, *Rogers v. Jones*, 3 Tyr. 256,

sed quare, as to the refusal of time to amend, see *Darling v. Hutchinson*, 2 Tyr. 491; 2 Crom. & J. 487, S. C., where time was allowed.

† The words "what will pay" have been introduced in consequence of Reg. Gen. Hil. T. 2 W. 4, r. 19.

‡ Mr. Chapman, in his edition of the New Rules, p. 48, suggests that the concluding negative should be inserted, sed quare.

(j) *Bold's Bail*, 1 Chitty's R. 288, 316, 502.

(k) *Anon.* 2 Chitty's R. 97.

(l) *Smith's Bail*, 1 Dowl. 1, 127.

(m) *Anon.* 1 Dowl. 61; *aliter*, if the

bail be a native of England, 1 Arch. K. B. 4th ed. 197, note (s).

(n) *Hemming v. Plenty*, 1 Moore, 329; *Savage v. Hall*, 1 Bing. 430; 8 Moore, 525, S. C.

CHAP. VIII.  
PROCEEDINGS  
ON  
CAPIAS.

to inquire into his property, character and circumstances; *thirdly*, to swear that he is *worth* (not merely *possessed of*) property to a named amount, being a sum equal to the required amount, viz. of double the sum sworn to, or 1000*l.* above the sum sworn to, over and above not only his own just *debts*, but also his *liabilities* as bail in other actions, or that he is not bail in any other action. Persons, on being applied to to become bail, should *immediately* and in the first instance be requested deliberately to examine into and consider the nature and extent of their property and of their debts and liabilities, and as soon as possible to communicate the result to the defendant's attorney, so that if the inquiry turn out unsatisfactory, notice of bail more competent to justify may be given; and *fourthly*, the proposed bail must be prepared to specify the *particulars* of his property of the requisite value, and to shew where it is situate or to be found.

By rules of Court and established practice there are *disqualifications to become bail*; some persons are so absolutely disqualified as if put in as bail to constitute a nullity; and others only so, if objected to. Questions of this nature in general relate to peers or members of the House of Commons, and other persons, who, being privileged, would not be desirable sureties. Practising attorneys and their clerks, except for the mere purpose of rendering a defendant, are so disqualified, that the putting them in as bail might be treated as a nullity. *(p)* Sheriffs' officers and gaolers, bankrupts and discharged insolvent debtors, and persons in doubtful circumstances, residing in privileged places; and foreigners, having no property in England, may also be objected to with effect. These disqualifications have been so ably examined in previous publications that it would be redundant here to investigate the subject at length.

Moral character.

At one time it was supposed that defect in moral character constituted an objection to bail, at least when the deviation excited a suspicion that if the party really had property, he would not have been guilty of the deviation. Thus a person, who proposed to justify as bail for a *friend*, was rejected because he had suffered his child or his father to continue in gaol. *(q)* But no such ground of objection at present prevails, and even the keeper of a brothel has recently been permitted to justify as bail in respect of his property. *(r)*

*(p)* Reg. Gen. Hil. T. 2 W. 4, r. 13; 78; and see *Anon. id.* 77.  
*Jervis's Rules*, 45, note (n).

*(r)* *Gonge's Bail*, K. B. Hil. T. 1835,

*(q)* *Holme v. Booth*, 2 Chitty's Rep. 9 Legal Obs. 331.

The general rule of Hilary term, 2 W. 4, r. 18, orders that *notice of more* bail than *two* shall be deemed irregular, unless by order of the Court or a judge, thus rendering the practice of the Courts of King's Bench and Exchequer similar to that of the Court of Common Pleas. (*s*) In cases, therefore, where, in consequence of the magnitude of the debt or other circumstances, two bail cannot be obtained, the defendant should, upon a proper affidavit of the facts, in due time apply by summons to a judge for leave to put in as many bail as may be shewn to be essential, and an order for which will be readily granted. (*t*)

The *mode* in which the sureties for the defendant *testify their consent* to become bail, is nearly in the same terms in all the Courts. (*u*) It will be observed that in the form of their contract not even the precautions enacted by the statute against frauds, 29 Car. 2, c. 3, s. 4, in ordinary engagements for the debt, default or miscarriage of a third person are required. In the King's Bench and Common Pleas, in case of town bail, the intended sureties merely attend before a judge or an appointed officer, and a bail-piece in the subscribed form in the King's Bench (*x*)

CHAP. VIII.  
PROCEEDINGS  
ON  
CAPIAS.

Not more than two bail to be put in, without previous leave of a judge.

The mode or form in which the sureties become bail in the several Courts.

(*s*) Jervis's Rules, 46, note (*s*).

601; and see form of affidavit, &c.

(*t*) *Id. ibid.*; *Easter v. Edwards*, 1 Dowl. 39; *Jell v. Douglas*, 1 Chitty's R.

T. Chitty's Forms, 2d edit. 68.

(*u*) Bagley's Prac. Ch. 138.

(*x*) In the King's Bench [or Common Pleas or Exchequer.]

On the ——— day of ——— A. D. 1835.

Middlesex [the county in the writ] to wit. C. D., [defendant,] is delivered to bail upon a cepi corpus to

{ Job Allen, of Red Lion Street, Holborn,  
county of Middlesex, Taylor,  
and  
Thomas Jackson, of Hart Street, Bloomsbury  
Square, in the said county, Ironmonger.

Oath for £50  
E. F. of  
Clifford's Inn,  
Attorney for the Defendant. }

At the suit of A. B.  
N. B. Here the bail sign their  
names when proceedings  
in the Exchequer.

Taken and acknowledged, condition-  
ally, at my Chambers in Serjeants'  
Inn, Chancery Lane, this  
—— day of ——— A. D. 1835.

Before me [Judge's signature.]

Form of bail-piece on parchment in either Court.\*

\* See a printed form, Chitty's Summary 321, before the 2 W. 4, c. 39; and see other forms in T. Chitty's Forms, 2d edit. 69, 70.

CHAP. VIII.  
PROCEEDINGS  
ON  
CAPIAS.

is produced, and the bail *verbally* enter into their engagement, and do not even sign the bail-piece as in the Exchequer. It has been considered that the circumstance of the verbal engagement being entered into before one of the judges or a regular officer of the Court affords sufficient protection against misapprehension or fraud, and on that account we have seen that even an infant may be bound. (x) Ancient statutes also rendered it a capital offence to personate bail. The course is for the judge, or rather an officer of the Court in his presence, or a commissioner, addressing himself to the two bail, to state to them verbally the substance of their engagement, varying in some respects in each Court, and then asks them *are you content?* to which they verbally express their consent, and then depart. (y) In the Exchequer, however, the *bail-piece* is not only produced to *but signed by both the bail*, a form which it would be well to adopt in the other Courts. Afterwards, at any time before issue joined on the existence of the *record* of the recognizance, there is a formal record of the proceedings and the recognizance is drawn up on parchment. (z)

The modes of putting in bail, with whom or before what officer and for what county bail must be put in.

The *modes or before whom* bail must be put in, vary in several cases, for they may be put in before a *judge in town*, or before a *commissioner* in the country, or before a judge pending the circuit. The bail must now by express rule in *all* cases be put in with the *filacer*, who signed the process on which the defendant was arrested, whether that was the first process or not, it being ordered by the general rule of Michaelmas term, 4 W. 4, A. D. 1834, that where a defendant is arrested upon an alias or pluries, issued into another county, pursuant to the rule of Michaelmas term, 3 W. 4, s. 7, the defendant must put in bail in the *county* where he was arrested. (a) The defendant's attorney must observe great care in this respect, for if by mistake the bail should not be put in in the *proper office*, where only the plaintiff's attorney is bound to search, but in a *wrong office*, an assignment of the bail-bond or proceedings against the sheriff might be taken, and much costs incurred in setting the same aside, even if that indulgence should be granted without an affidavit that the defendant has a sufficient defence on the merits.

(x) *Ex parte Williams*, M'Clel. Exch. Rep. 495; *ante*, vol. ii. 396.

(y) See *Forms*, T. Chitty's *Forms*, 2d edit; 69.

(z) See T. Chitty's *Forms*, 2d edit. 310 to 312.

(a) Reg. Gen. Mich. T. 1834; see 4 Tyr. 1; 2 Crompt. & M. 352.

We have seen that the expression in the stat. 2 W. 4, c. 39, s. 4, and writ of *capias*, "*putting in bail*," implies also the necessity for *giving notice of such bail having been so put in*, and that, until such notice has been duly given, bail are not to be considered as *having been put in*. (c) The rule Mich. T. 16, Car. 2, still in force, requires the plaintiff's attorney to give a *written notice of the bail having been put in before the time for putting in bail has expired*, so as to prevent an assignment of the bail bond, and it has been decided that it is no bail until such notice has been given, so that the defendant's attorney should serve the *notice of bail* before nine o'clock at night on or before the eighth day after the arrest, inclusive of that day, or obtain further time for putting in bail and giving such notice. (d) Amongst the other general rules of Trin. T. 1 W. 4, the 2d rule requires that *every notice of bail* shall, in addition to the description of the bail, mention the *street, or place and number*, if any, where each of the bail resides, and all the streets or places and numbers, if any, in which each of them has been resident at any time within the last six months, and whether he is a housekeeper or freeholder. (e) But an uncertainty as to the description of the residence may be aided by an annexed affidavit of justification. (f) Upon the requisites of the notice of bail, there have been many decisions, most of which have been so ably collected and digested in the recent publications, that it would be inexpedient here to do more than take a very compact view of the subject. (g) The forms of the proceedings relative to bail are very numerous, those of most general use will be found in the notes. (h)

CHAP. VIII.  
PROCEEDINGS  
ON  
CAPIAS.

Notice of bail prospectively or of the same having been put in, and requisites of each notice. (b)

(b) See in general, Tidd, 9th ed. 253; 1 Arch. 4 ed. 179.

(c) *Ante*, 375; *Grant v. Gibbs*, 1 Harrison & Hodges' New T. R. 56; and see Rule Easter, 49 G. 3, C. P. Tidd, 253.

(d) *Id. ibid.*; — *v. Pasman*, 5 Taunt. 759.

(e) *Jervis's Rules*, p. 25, 26, note (l), and decisions on the rules there collected;

see *Fenton v. Warre*, 2 Tyr. Rep. 158; 2 Crom. & J. 54, S.C.; see form and notice, *infra*, (h).

(f) *Ward's bail*, 3 Tyr. 208.

(g) As to the notice of bail and other proceeding, see *Jervis's Rules*, 26, 27, n. (l); Tidd, 9th ed. 253 to 297; and 1 Arch. K. B. 4th ed. 179 to 211; T. Chitty's Forms, 71 to 94.

(h) Every form that can be required will be found in Tidd's Forms and Supplements; T. Chitty's Forms, 2nd edition, and in Chitty's Summary of Practice, 316 to 336. The form of affidavit of justification, which may be made by each bail separately in anticipation, under the Gen. Rule, Trin. T. 1 W. 4, reg. 3, has been given *ante*, 374, 375. That form includes all the requisites to be observed.

In the K. B. [or C. P. or Exchequer of Pleas.]

Between { A. B. plaintiff,  
and  
C. D. defendant.

Take notice, that special bail was this day put in [if in C. P., say, "put in with the filacer"] in this cause for the defendant before the Honourable Mr. Justice — [or

Usual notice of bail having been put in in K. B. or C. P. or Exchequer, in town, and that

CHAP. VIII.  
PROCEEDINGS  
ON  
CAPIAS.

It has recently been decided, that a plaintiff cannot take proceedings on a bail bond on the ground of an informality in the notice of bail, (s) and the Court of Exchequer has de-

both are  
housekeepers,  
and one also a  
freeholder, and  
shewing their  
residences for  
the last six  
months.

Mr. Baron —] at his chambers in Serjeants' Inn, Chancery Lane, London,\* and the names, additions, and particulars of and relating to such bail are as follows. The said bail are John Adams, of No. 31, Red Lion Street, Holborn, in the county of Middlesex, tailor, and who is a housekeeper there; and Joseph Pitt, of No. —, — place, in the said county, ironmonger, and who is a housekeeper there; and who is also a freeholder of a messuage and land in the parish of Dagenham, in the county of Essex, and which is now in the possession of O. P. as his tenant. [All these statements are to accord precisely with the facts, and see affidavit, ante, 374, 375.] And the said J. A. hath resided continually for upwards of the last six months at No. —, — street aforesaid, and the said Joseph Pitt, in the month of — last, [just before the commencement of the last six months] did reside at No. 7, in Milman Street, Guildford Street, in the county of Middlesex, and in that month he removed from thence to No. —, — street, in the county of —, where he resided continually from on or about the — day of the said month of — until on or about the — day of — last, and on or about that day he removed from thence to No. —, — street aforesaid, and from that time the said Joseph Pitt hath there resided continually till this day. [If the notice of bail is to be accompanied with an affidavit of their sufficiency in the form as ante, 374, 375, then conclude as follows.] "And further take notice, that the said J. A. and J. P. [names of the bail] have duly made and sworn to the affidavits which accompany this notice for your perusal, and copies of which affidavits are herewith left." Dated this — day of —, A. D. 1835.

Yours, &c. E. F.  
No. 10, Clifford's Inn,  
Defendant's attorney,  
[or agent.]

To Mr. G. H. Plaintiff's attorney,  
[or agent.]

Four days' notice that bail will be put in, and will justify at the same time in open Court in person.

In the K. B. [or C. P., or Exchequer of Pleas.]

Between { A. B. plaintiff,  
and  
C. D. defendant.

Take notice, that special bail will be put in in this cause for the defendant on — the — day of — instant, [or "next"] in open Court, at Westminster Hall, and the names and additions of the persons so to become such bail are, &c. [State the names and additions of the bail, and whether they are housekeepers or freeholders, and their residences for the last six months, as in the last form to the end, and then conclude thus.] And further take notice, that the said J. A. and J. P. will, at the same time, justify themselves as good and sufficient bail for the said defendant. Dated this — day of — A. D. 1835.

Yours, &c.  
E. F. of —,  
Attorney for the defendant.

To. Mr. G. H. Plaintiff's attorney [or agent.]

Notice of putting in and justifying bail before a judge at chambers in vacation.

In the K. B. [or C. P. or Exchequer of Pleas.]

Between { A. B. plaintiff,  
and  
C. D. defendant.

Take notice, that J. A., of, &c., and J. P., of, &c., [describe as in last form] will, on the — day of — next, [or, "instant,"] be put in as special bail for the defendant in this cause, and will on the same day, at the hour of — of the clock in the forenoon, justify themselves before the Honourable Mr. Justice — [or "Baron —,"] or such other judge [or "baron,"] as shall be then sitting at his chambers,\* in Serjeants' Inn, Chancery Lane, London, as good and sufficient bail for the defendant in this cause.

\* In the Exchequer, it is no longer necessary to state in the notice, that the bail piece has been filed, *Wigley v. Edwards*, 188. Exchq. 20 November, 1833; *Jervis's Rules*, p. 7, note (m).

(i) *R. v. Sheriff of Middlesex*, 3 Tyr. 448; *Wigley v. Edwards*, 2 Cr. & M. 380; 4 Tyr. 235; *Jervis's Rules*, 7, note (m).



clared that in future it is not to be considered necessary in that Court any more than in K. B., to state in a notice of bail

CHAP. VIII.  
PROCEEDINGS  
ON  
CAPIAS.

And take further notice, that (&c., *here state whether the bail are freeholders or housekeepers, and their residences for the last six months, &c., as in the form ante, 379, 380, to the end*).

Dated this — day of —, A. D. 1835.

To Mr. G. H. Plaintiff's attorney,  
[or agent.]

Yours, &c.  
E. F. of —  
Attorney for the defendant.

I except against these bail.

G. H. plaintiff's attorney,  
19th March, 1835.

Usual entry  
of exception.

In the K. B. [or C. P., or Exchequer of Pleas.]

Between { A. B. plaintiff,  
and  
C. D. defendant.

The usual notice  
of exception to  
bail.

Take notice, that I have excepted against the bail put in in this cause for the defendant, [and if it be intended to require the bail to justify before a judge at chambers in vacation, then add, "And I hereby give you notice, that I require such bail to justify before a judge at chambers."] Dated this — day of — A. D. 1835.

Yours, &c.

To Mr. E. F. defendant's attorney,  
[or "agent."]

G. H. plaintiff's attorney,  
[or "agent."]

In the K. B., [or Exchequer of Pleas.]

Between { A. B. plaintiff,  
and  
C. D. defendant.

Usual notice of  
justification in  
Court in K. B.  
or Exchequer  
in person or by  
affidavit.

Take notice, that J. A. and J. P. the bail already put in in this cause for the defendant, and of whom you have before had notice, will on — next justify themselves [if country bail, here say, "by affidavit,"] in open Court, at Westminster Hall, in the county of Middlesex, as good and sufficient bail in this cause for the defendant.\* Dated the — day of — 1835.

Yours, &c.

To Mr. G. H., plaintiff's attorney,  
[or "agent."]

E. F., defendant's attorney,  
[or "agent."]

In the C. P.

Between { A. B. plaintiff,  
and  
C. D. defendant.

The like in  
C. P.†

Take notice, that J. A. and J. P., the bail already, &c. [same as the last to the asterisk, and then as follows.] and the additions, descriptions, particulars, and residences of such bail, have been, and are, as follows, namely, the said J. A. of No. —, [describe as in form ante] and who is a housekeeper there, and the said J. P. of No. —, [describe as in the form ante] and who is a freeholder of a messuage and land in the parish of, &c. [repeating the addition, description, particulars, and residences of the bail during the last six months as ante, 379, 380.] Dated this — day of — A. D. 1835.

To Mr. G. H., plaintiff's attorney,  
[or "agent."]

E. F., attorney,  
[or "agent."]

In the K. B., [or C. P., or Exchequer of Pleas.]

Between { A. B. plaintiff,  
and  
C. D. defendant.

Notice of justification  
before a judge  
at chambers,  
on 1 W. 4, c.  
70, s. 12.

Take notice, that J. A. and J. P., the bail already put in in this cause for the de-

† The reason for this form in C. P. differing from that in K. B. and Exchequer is that the rule M. T. 7 G. 4, C. P. 4 Bing. 51, expressly requires a notice of justification,

although of the same bail, to repeat the description of the addition and residences of the bail, but which is not necessary in K. B. or Exchequer, Tidd, 259, 266.

CHAP. VIII  
PROCEEDINGS  
ON  
CAPIAS.

that the bail piece has been filed with the filacer at the proper office. (j)

defendant, and of whom you have had notice, will, at the hour of — o'clock in the forenoon, on — next, justify themselves [if the bail were put in before a commissioner in the country, here say, "by affidavit"] before the Honourable Mr. Justice — [or Baron —] or such other judge [or baron] as shall be then sitting in chambers, in Serjeants' Inn, Chancery Lane, London, [or if any other place be appointed, "at —, in the county of —"] as good and sufficient bail for the said defendant.\* [In the C. P. here repeat the addition, description, and particulars of the bail, and their residences during the last six months, as directed in the form *supra*, 381; but see Jervis's Rules, 26, note (1).] Dated this — day of — A. D. 1835.

Yours, &c.

D. A., defendant's attorney,  
[or "agent."]

To Mr. P. A., plaintiff's attorney,  
[or "agent."]

Affidavit of the  
service of notice  
of justification.

In the K. B., [or C. P., or Exchequer of Pleas.]

Between { A. B. plaintiff,  
and  
C. D. defendant.

J. K. clerk to E. F., of —, gentleman, attorney for the above-named defendant, maketh oath and saith, that this deponent did on the — day of — instant, before eleven o'clock in the forenoon,† serve Mr. G. H. the attorney for the above named plaintiff, with a true copy of the notice hereunto annexed, marked "A" [anner on exact full copy] by delivering the same to and leaving it with a clerk of the said Mr. P. A., at his chambers, in —, [or if the service were on the attorney personally then from the above asterisk proceed thus: "personally serve Mr. P. A. the attorney for the above named plaintiff, with a true copy of the notice hereunto annexed."]

Sworn, &c.

J. K.

Affidavit of  
justification  
of country bail  
sworn before a  
commissioner  
in the country.‡

In the K. B., [or C. P., or Exchequer of Pleas.]

Between { A. B. plaintiff,  
and  
C. D. defendant.

J. A., of the parish of —, in the county of Kent, farmer, and J. P. of High Street, Maidstone, in the same county, linen draper, severally make oath and say, and first this deponent, J. A. for himself saith that he is a housekeeper, in the parish of — aforesaid, in the county of Kent aforesaid, and that he this deponent is worth the sum of £ — [double the sum sworn to] over and above what will pay all his just debts and every other sum for which he is now bail, or is in any respect whatsoever liable or chargeable, [or say, "that he is not bail," &c. the same as in the form, ante, 374, 375, stating also the nature of the deponent's property as there stated, and his residences during the last six months]. And this deponent, the said J. P. for himself saith that he is a housekeeper, &c. [state also that he is worth the requisite amount, and the nature and situation of his property, and his residence for the last six months as in the form, ante, 374, 375, 380.]

The above named deponents, J. A. and J. P. were severally and respectively sworn at — in the county of —, this — day of —, A. D. 1835, before me, X. Y. [a commissioner for taking affidavits in the Court of —.]

J. A.  
J. P.

X. Y.

† These words are here introduced in consequence of Rule *Trim.* T. 59 G. 3, K. B. 2 Bar. & Ald. §18; Rule Mich. T. 60 G. 3, C. P. 4 Moore, 2; and Rule T. 59 G. 3, in Exchequer, 8 Price, 509, requiring service to be sworn to when the notice was served only two days before the morning of justification, but if the notice were served three or more days before the appointed time no statement of the hour of service is necessary.

‡ This form is the fullest, and best cal-

culated to anticipate and prevent subsequent trouble in obtaining explanatory affidavits; but the next more concise form still suffices in the first instance, though the above is preferable. If the two bail live at considerable distances from each other, then it is usual to make separate affidavits, and swear them before different commissioners.

(j) See note \* ante, 380; and Wigley v. Edwards, Jervis's Rules, 7, n. (m).

The other practical proceedings relating to bail are numerous and somewhat complex, and if very fully considered would fill a volume. There are several *general rules* relating to bail of Trinity Term, 1 W. 4, and rules 1 to 6 (k) of Hil. Term, 2 W. 4, rules 13 to 31, which, with some useful notes relating to the same by Mr. Jervis, should be carefully examined. (l) These rules and proceedings relate as well to bail when taken in *London*, as when taken in the *Country*; and when the latter, regulate the *time* (m) and *mode* of transmitting the bail piece to London and filing the same.

Before the rule of Trinity Term, 1 W. 4, bail were put in and did not justify unless expressly required by the plaintiff's attorney to do so. But now by that rule bail may save the trouble of two attendances and justify at the same time that they are put in, upon giving four day's notice before eleven o'clock in the morning, exclusive of Sunday; and by rule 3 of the same term; if the notice of bail shall be accompanied by an

CHAP. VIII.  
PROCEEDINGS  
ON  
CAPIAS.

The other practical proceedings relating to bail.

Time and mode of putting in bail.

In the King's Bench, [or C. P., or Eschequer of Pleas.]

Between { A. B. plaintiff,  
and  
C. D. defendant,

Another form of justification of country bail, sworn before a commissioner.\*

J. A., of —, and J. P. of —, bail in this cause for the above named defendant, severally make oath and say, and first this deponent J. A. for himself saith, that he is a *housekeeper* at No. — aforesaid, and that he this deponent is worth the sum of £ — over and above what will pay all his debts; and this deponent J. P. for himself saith, that he is a *housekeeper* at No. — aforesaid, and that he, this deponent, is worth the sum of £ — over and above what will pay all his debts.

The above named deponents, J. A. and J. P. were sworn at — the — day of —, A.D. 1835, before me,  
Y. Z.

J. A.  
J. P.

A commissioner.

In the K. B. [or C. P., or Eschequer of Pleas.]

Between { A. B. plaintiff,  
and  
C. D. defendant.

Affidavit to oppose bail.

L. M., of —, clerk of Mr. G. H. of —, attorney for the plaintiff in this cause, maketh oath, and saith, that a notice of justifying bail in this action having been served on the said G. H., he, this deponent, by his direction hath made diligent inquiries into the sufficiency of the said bail, and saith that, &c. [here state the particular objections intended to be relied on against the bail according to the facts, avoiding any unnecessary calumny and general abuse, 1 Chitty's Rep. 676, Tidd, 274; and when the representation of neighbours or other matter of hearsay be stated, "and the whole of which statements and information this deponent verily believes to be true."] And this deponent further saith that B. B. one of the said bail, hath been a bankrupt, and hath not yet obtained his certificate, as this deponent hath been informed and verily believes, [or "hath been twice a bankrupt," or "that the said B. B. hath obtained his discharge under the last insolvent act," or otherwise according to the facts.]

Sworn, &c.

L. M.

\* See the last preferable form and note, ante, 362.

(k) Jervis's Rules, 25 and 32.

(l) Jervis's Rules, p. 45 to 50; and id. Index, tit. Bail.

(m) R. H. T. 2 W. 4, r. 15.

CHAP. VIII.  
PROCEEDINGS  
ON  
CAPIAS.

affidavit of *each of the bail*, (n) according to the form subjoined to the note, and which we have already stated. (o) And if the plaintiff afterwards except to such bail, he shall, if such bail are allowed, pay the costs of justification; and if such bail are rejected, the defendants shall pay the costs of opposition, unless the Court or a judge thereof shall otherwise order. (o) And the 4th rule of the same term orders, that if the plaintiff shall not give one day's notice of exception to the bail by whom such affidavit shall have been made, the recognizance of such bail may be taken out of Court without other justification than such affidavit, and the bail become complete. The first rule, however, provides that if the plaintiff shall be desirous of time to inquire after the bail, and shall give *one day's notice* thereof as aforesaid to the defendant, his attorney or agent, as the case may be, before the time appointed for justification, stating therein what further time is required, such time (not to exceed three days in the case of town bail, and six days in the case of country bail,) then (unless the Court or a judge shall otherwise order) the time for putting in and justifying bail shall be postponed accordingly, and all proceedings shall be stayed in the mean time.

*In general*, bail are put in and notice thereof given, without any antecedent or prospective affidavit of justification; and if the plaintiff's attorney be satisfied with the sufficiency of the proposed bail, he takes no proceedings relating to them, and the bail become absolute, or in other terms complete.

Entry of exception to bail.

If the sufficiency of the bail be disputed, the plaintiff *excepts to them*, which must be done within limited times, or they become complete. The mode of excepting is by writing in a book at the proper office of the particular Court, "I except against these bail. E. F. Plaintiff's Attorney. April 15, 1835." (p)

Written notice of exception.

A *proper written notice of such exception* must thereupon be given; (q) the proper form of which has been stated in a previous note. (r)

Of adding bail.

Thereupon if it be discovered that the named bail cannot

(n) It seems that in this particular case of a *prospective* affidavit of justification, the affidavit of each of the bail must be separate, Reg. Gen. Trin. T. 1 W. 4, r. 3. In other cases it may be joint or separate, according to the convenience of the bail.

(o) *Ante*, 374, 375.

(p) See form, *ante*, 381, in note; R.

v. *Sheriff of Middlesex*, 5 Bar. & Cres. 389; *Hodgson v. Garrett*, 1 Chit. R. 174; Tidd, 301.

(q) T. Chitty's Forms, 74; R. v. *Sheriff of Middlesex*, 5 Bar. & Cres. 389; *Hodson v. Garrett*, 1 Chit. R. 174; T. 301.

(r) *Ante*, 381, in note.

justify, the course is to endeavour to obtain leave of a judge to *change* the bail, but which is no longer a matter of course. (s)

CHAP. VIII.  
PROCEEDINGS  
ON CAPIAS.

If the *same bail* are to justify, the defendant's attorney must then serve a *written notice of the intention to justify*, at least *two days* before the intended time of justification, which by express rule is to suffice, (t) but which must be, by several particular rules of each Court, sworn to have been served before eleven o'clock of the forenoon of the second day before justifying, or on a *third* previous day. (t)

Written notice  
of justification,  
when to be  
served.

But upon a sufficient affidavit of the illness of one of the bail, or other unexpected occurrence, preventing the justification within the named or proper time, further time may be obtained, (u) except in cases of bail or error, or on habeas corpus, when more strictness is required, and a very sudden or extraordinary occurrence to prevent the attendance of bail will be the only admitted excuse.

Of obtaining  
further time to  
justify.

At the time appointed for justifying bail in person, there must be an *affidavit of the due service of a notice of justification*, (x) and to which a copy of such notice is to be annexed.

Affidavit of  
service of such  
notice.

The next step is to make a concise brief for counsel, entitled in the cause, and indorsed "Mr. —, to move to justify," and which, when signed by the counsel's signature under the fee, is usually handed to the proper officer. But it is recommended to every careful practitioner to have another *private brief*, which the defendant's counsel may retain, and which should contain a full and not a mere abbreviated copy of the notice of justification and all affidavits, but also instructions to answer any objection that may possibly be urged against the bail.

Brief and motion  
to justify  
bail in Court in  
term.

The proper officer will then cause the bail to be called in due order, and which is effected by calling the name of the defendant, thus: "C. D.'s bail." Whereupon such bail, if they be in attendance, come forward and are sworn to answer all questions.

Calling and  
appearance of  
bail to justify.

The *justification of bail in term time* now usually takes place before one of the judges, early in the morning, viz. from half-past nine o'clock, until all the bail in attendance have been examined, differing but little in the three Courts.

The usual hour  
of bail justifying.

Sometimes counsel are instructed to *oppose* the bail, and

Opposition to  
bail.

(s) Reg. Gen. Trin. T. 1 W. 4, r. 5; Jervis's Rules, 27, 28, note (p).

(t) Hil. T. 2 W. 4, r. 16; Jervis's Rules, 46, note (q); and see form of affidavit, 382, in note.

davit, 382, in note.

(u) Gublene's Bail, 1 Harrison's New Term Rep. 111.

(x) See form, ante, 382, in note.

CHAP. VIII.  
PROCEEDINGS  
ON  
CAPIAS.

*Allowance of bail, and rule for allowance of and service thereof on plaintiff's attorney.*

affidavits on each side are adduced, and concise arguments, or rather observations, take place, upon which the judge decides.

If the bail be *allowed*, a *rule for the allowance* should be forthwith drawn up and *served* upon the plaintiff's attorney, for until such service the allowance is considered incomplete, and the plaintiff's attorney might proceed on the bail bond, or against the sheriff, as if the bail had not justified; and this although the plaintiff's attorney himself attended and heard the judge decide in favor of the allowance of bail. (y) After service of the rule for the allowance of the defendant's bail, they become complete, and the defendant is considered completely in Court, so that the plaintiff may *declare absolutely*, and regularly proceed in the action.

The declaration, how affected by the process of capias.

As far as process affects the *time* and *mode* of delivery, it seems clear that the plaintiff may always declare *de bene esse* upon a writ of capias, being process against the *person* of the defendant; though we have seen that he cannot do so upon a writ of summons (s) or distringas. (a) The uniformity of process act, 2 W. 4, c. 3, it is true, is silent on the subject; but the *general rule*, Mich. T. 3 W. 4, r. 11, (b) expressly orders, that as regards actions commenced *by writ of capias*, and whether all the defendants have been arrested, or one or more of them has not been arrested, but only served with a copy of the writ, (c) the plaintiff may declare *de bene esse*, i. e. before the bail above have been perfected. (c)

Where a defendant or several defendants have been arrested, and have put in bail above to a *capias*, and are not in custody, the *general rule* Mich. T. 3 W. 4, prescribes *three* forms for *commencing* the declaration; the first where the party arrested is not in custody, the second where he remains in custody of the sheriff, or marshal, or warden, and the *third* where one or more of several defendants has been arrested, and another defendant only served with a copy of the process, and has not been arrested. The particulars relative to those forms will be more properly examined in the chapter relative to the practical conduct of the pleadings in an action.

(y) *R. v. Sheriff of Middlesex*, 2 Chit. Rep. 99; *Holland v. White*, 2 B. & P. 341; *R. v. Sheriff of Middlesex*, 4 T. R. 493; *sed quære* the principle of allowing an attorney to obtain costs so dishonourably.

(z) *Ante*, 296.

(a) *Ante*, 321, 322.

(b) See rule, *ante*, 161, in note.

(c) 1 Arch. C. P. [68], 1; *Gilbert v. Kirkland*, 1 Dowl. 153.

## PROCEEDINGS ON A BAIL BOND.

The proceedings on a bail bond can only ensue on account of the defendant's *neglect to put in bail above*, in the technical sense of that term, within eight days inclusive after the arrest, or afterwards to *perfect* such bail; the proceedings on such bail bond are therefore obviously only *collateral* to the principal action, and to enforce the putting in and perfecting bail above, or where the bail-bond has been ordered to *stand as a security* to secure the payment of the debt and costs, or render of the defendant at the termination of the suit. A bail bond itself, it will be observed, is *principally regulated* by the 23 Hen. 6, c. 9, but it is influenced by subsequent enactments and rules. A general rule of Hil. T. 2 W. 4, r. 24, ordered that no bail bond taken in London or Middlesex shall be put in suit until after the expiration of four days, nor if taken elsewhere till after the expiration of *eight days* exclusive from the appearance day of the process; (d) but that rule was virtually annulled by the 2 W. 4, c. 39, abolishing the prior writs returnable on a general or particular day, and now requiring bail above to be put in in all cases within *eight days inclusive* of the day of arrest, without regard to the distance of the place of such arrest. So that now in all cases, unless the bail above be *put in* and notice thereof given within such eight days, the plaintiff may on the ninth take an assignment of the bail bond, and commence his action thereon. (e) In general only one action should be commenced, and not three separate actions. (f)

At common law a chose in action is not assignable so as to enable the assignee to sue thereon in his own name, but as regards a bail bond the statute 4 & 5 Ann. c. 16, s. 20, introduces an exception, and if a *bail bond* be forfeited, the sheriff may, in the presence of *two witnesses*, assign the same to the plaintiff in the action, and *he* may sue thereon in his own name; and such two witnesses need not attest the same as subscribing witnesses, and therefore the absence of the usual attestation subscribed by them is immaterial. (g) But the action on a bail bond cannot be commenced until after it has been forfeited by the neglect to put in or perfect bail in due time. (h)

(d) See Jervis's Rules, 48, note (y).

(e) *Ante*, 371; *Grant v. Gibbs*, 1 Harrison & Hodges' New Term Rep. C.P. 56.

(f) Reg. Gen. Hil. T. 2 W. 4, r. 30; Jervis's Rules, 50, note (e).

(g) *Phillips v. Barlow*, 6 Car. & P. 781.(h) *Alston v. Underhill*, 2 Dowl. 26; *ante*, 371.

CHAP. VIII.  
PROCEEDINGS  
ON  
BAIL BOND.

If bail above be not put in or perfected in due time, the plaintiff has an absolute right to an assignment of the bail-bond, and may support an action in his own name for the breach of the condition in the Court in which the writ of *capias* was returnable, (*k*) or the sheriff, by a recent rule, for his indemnification, may support an action on the bail-bond against the obligors in any Court. (*l*)

If the condition of a bail-bond have become forfeited, and an action be brought thereon, the Courts will nevertheless, under circumstances and upon just terms, stay the proceedings, so as to afford the original defendant an opportunity of trying on the *merits*. (*m*) In the King's Bench and Common Pleas an affidavit is by express rule required when the application is by or on the behalf of the *original defendant* that he has a good defence on the *merits*; and if the application be at the instance of the *bail*, then it must be sworn that they make the application at their *own* expense and for his or their indemnity only, and without collusion with the original defendant; (*n*) and the same rule requires a similar affidavit that the application is on behalf of the sheriff or his officer without collusion. (*n*) But the present practice of the Exchequer is not so strict, there not being in that Court an express rule as in the King's Bench, and there a trial of the original action may be obtained on payment of costs without any affidavit of merits or shewing on whose behalf the application is made. (*o*) In no case before the 2 W. 4, c. 39, was the bail-bond to stand as a security, unless the plaintiff had expedited the proceedings by declaring *de bene esse*, (*p*) and as respects the term "*losing a trial*," it imports not only when a trial but also a judgment in or after the same term in which the process was returnable has been lost or delayed, or if returnable in vacation, of the next term, or the bail-bond was not to stand as a security. (*q*)

But the express general rule of Hilary T. 2 W. 4, reg. V., is now very explicit upon the question of *losing a trial*, for it

(*k*) 4 Ann. c. 16, s. 20; Chitty's Col. Stat. 87; see a form of declaration in Tidd's Supplement, A. D. 1833, p. 291, on a bail-bond executed on a *capias* on 2 W. 4, c. 39, and T. Chitty's Forms, 2d ed. but perhaps more lengthy than essential. The declaration need not aver the day of the arrest, *Evans v. Mossley*, 4 Tyr. 172; and 1 Crom. & M. 490.

(*l*) Gen. Reg. Hil. T. 2 W. 4, r. 28; Jervis's Rules, 49.

(*m*) 4 Ann. c. 16, s. 20; Reg. Gen. Hil. T. 2 W. 4, r. 29, 30; Jervis's Rules, 49.

(*n*) 2 Bar. & Ald. 240. N. B. The rule, as there presented, omits one or two material words. See the MS. rule at the Clerk of the Rules.

(*o*) *Bourne v. Walker*, 2 Crom. & M. 338; *Coll v. Thelwall*, Exch. 21 January, 1835, Tyrwhitt's MS.; but see *Weston v. Wood*, Mich. T. per Lord Lyndhurst, C. B.

(*p*) Rule Gen. Hil. 2 W. 4, r. 5; Jervis's Rules, 73, 74; 2 Tyr. 351; *Bullivant v. Morris*, 3 Tyr. 820; *The King v. Middlesex*, 3 Dowl. 194.

(*q*) *Bevan v. Knight*, 1 Tyr. 420.



orders (r) that upon staying proceedings, either upon an attachment against the sheriff for not bringing in the body, or upon the bail-bond, on perfecting the bail above, the attachment or bail-bond shall stand as a security, *if the plaintiff shall have declared de bene esse*, and shall have been prevented for want of special bail being perfected in due time from entering his cause for trial, *in a town cause in the term next after that in which the writ is returnable*, and in a country cause at the ensuing assizes.

By the express general rule of Hilary term, 2 W. 4, r. 29, it was ordered, that in all cases where the bail-bond shall be directed to stand as a security, the plaintiff shall be at liberty to sign judgment upon it; and by the following rule 30, it was ordered, that proceedings (s) on the bail-bond may be stayed on payment of costs in *one action*, unless sufficient reason be shewn for proceeding in more; before which rule there had been a contrariety in the opinion of the judges. (t) By another express rule it was recently ordered, that a plaintiff shall not be at liberty to proceed on the bail-bond, pending a rule to bring in the body of the defendant, which put an end to the previous vexatious double and concurrent proceedings. (u)

PROCEEDINGS AGAINST THE SHERIFF.

If the defendant make default in putting in or perfecting bail above in due time, then the sheriff, although he bona fide took a bail-bond, with two sureties, whom he had just reason at the time to think sufficient, is liable to certain proceedings, not indeed to an action for taking an insufficient bail-bond, or a bail-bond with insufficient sureties, but he may be proceeded against, first, by *ruling* him to return the writ of *capias*, and if he return *cepi corpus*, he may then be *ruled* to bring in the body, and unless the defendant then in due time put in and perfect bail, or be rendered, the sheriff is liable to an *attachment* for not bringing the defendant into Court, and this, *although in truth he has in all respects performed his duty*. This may appear to be an unreasonable liability to impose upon a public officer. It proceeds upon the supposition that the sheriff, by his officers, may readily ascertain the solvency of the sureties, and he may always resort to them for

(r) And see Jervis's Rules, 73, 74, note (i); see Chitty's Addenda, 33.  
(s) See Jervis's Rules, 49, note (d).

(t) Jervis's Rules, 50, note (e).  
(u) Reg. Gen. Hil. T. 2 W. 4, r. 23; Jervis's Rules, 48, note (x).

CHAP. VIII.  
PROCEEDINGS  
ON  
BAIL BONDS.

indemnification, and that if he were not absolutely liable for the defendant's putting in sufficient bail, or for the defendant's rendering himself shortly after the time of making the arrest, there would be great facilities to collusion between the officer and the defendant, who, unless the sheriff were absolutely liable, would for a trifling douceur be induced to take any description of bail, though secretly known to him to be in insolvent circumstances. There have, however, of late been attempts to qualify this liability of a sheriff, though hitherto without success. In general, as regards other parts of the office of sheriff, if he perform his duty faithfully to the utmost of his power, he is free from risk, as if upon granting replevin, two sureties, pursuant to the statute, are tendered, and the officer make due inquiries into their *then existing* supposed solvency, and being reasonably satisfied thereupon, grant replevin and deliver the goods distrained to the party applying for replevy, he can only be sued for not taking sufficient sureties, and if on the trial of the action a jury be satisfied that the sheriff and his officers performed their duty in making all requisite inquiries, he will succeed in his defence, although it appear that from change of circumstances or disclosure of facts before concealed, the sureties have since become insolvent.(v) But the law is not thus qualified as regards the sheriff's liability for the party arrested putting in and perfecting bail above or rendering; for on the one hand he is, under the 23 H. 6, liable to a special action on the case for refusing to accept a bail-bond, when tendered to be executed by two sureties, *apparently* having sufficient within his county, and for continuing the defendant in custody;(x) whilst on the other, if he bona fide take such a bail bond, and it should turn out that the defendant and the sureties were at the time or have afterwards become insolvent, he will nevertheless be liable to pay the debt and costs, in case bail above be not perfected or the defendant rendered in due time. As however bail above must now be put in within eight days after the arrest, and if a bail-bond be tendered and executed, bail above must be put in within eight days, and justify very shortly afterwards, it can but rarely happen that a sheriff will be seriously prejudiced by a sudden change in the circumstances of both the bail.

The course of proceedings to fix the sheriff with liability to pay the debt and costs, in consequence of bail above not

The course of  
proceeding to  
fix the sheriff  
with liability.

(v) *Hindle v. Blades*, 5 Taunt. 225; 1 Marsh. 27, S. C.; *Sutton v. Wait*, 8 J. B. Moore, 27; 1 Saund. 195.

(x) *Ante*, 363, 364.

having been put in or justified in due time, is by obtaining a *rule* from the *Court* in term time, or from a *Judge in vacation*, requiring the sheriff to *return the writ* of *capias*. (y) Then there should be an *affidavit* of the search at the proper office for the return and of the result. Next a *rule or judge's order*, requiring the sheriff, when he has returned *cepi corpus*, to *bring in the body*. (z) Then an *affidavit* of the service of such *rule or order*, and of the disobedience thereof, and if either of those rules or orders has been disobeyed, then there should be a *motion* for and a *rule* obtained for an *attachment*. (a) Upon which the sheriff must either pay the debt and costs, or must, upon *affidavit of facts*, obtain a *rule nisi* for *staying proceedings* upon the attachment, which will, under circumstances or upon terms, be granted, sometimes absolutely on payment of costs, where bail above have been put in and perfected, although not in due time; or conditionally to let in a trial on the merits, the attachment to stand as a security, as in cases where the plaintiff has declared *de bene esse*, and took a part, the import of which term, we have seen, is now fixed by the general rule of Hil. term, 2 W. 4, reg. V. (b)

The proceedings on a bail-bond, or against the sheriff, are so collateral to the principal suit, that it is considered preferable here merely to give this outline of the subject, reserving the full practical detail until the last part of this work.

(y) *Ante*, 246 to 250.(z) *Id. ibid.*(a) *Ante*, 247.(b) See the rule, *ante*, 388, 389.

## CHAPTER IX.

## OF THE WRIT OF DETAINER, AND PROCEEDINGS THEREON.

CHAP. IX.  
WRIT OF  
DETAINDER.

WHEN the defendant is already in the *legal* custody of the Marshal of the Marshalsea, i. e. in the King's Bench Prison, (being the prison of the Court of K. B.) or in the custody of the Warden of the Fleet, (being the Fleet Prison and the prison of the Courts of Common Pleas and Exchequer,) the proper course is to issue a *writ of Detainer*, in the form and manner prescribed by the 2 W. 4, c. 39, s. 8, and schedule No. 5. (a) And it has been determined that a plaintiff may issue a writ of Detainer from and returnable in the Court of Common Pleas, directed to the Marshal of the King's Bench; (b) or a writ of detainer may be issued from the Court of King's Bench and returnable in that Court, directed to the Warden of the Fleet Prison; and it is not necessary in either case to bring up the prisoner by habeas corpus into the Court from which the writ issued, in order to charge him with a declaration. (c) It has been suggested that where there are two defendants in a joint action, one of whom is at large and the other is in custody of the Marshal of the King's Bench or Warden of the Fleet Prison, it may be necessary to issue two writs of different descriptions, one of summons or *capias* against the defendant who is at large, and the other of *detainer* against the defendant who is in custody, (d) naming all the defendants in each writ; but where one of several defendants is in the custody of a *sheriff*, then, if he is to be held to bail, a *joint capias* would be proper. The writ must be duly directed to the marshal or warden by the proper description, and where a writ of detainer was directed "to the Marshal of our prison of the Marshalsea," instead of "the Marshal of the Marshalsea of our Court before

(a) See form, *ante*, 156.(b) *Millard v. Millman*, 3 Moore & S. 63; 2 Dowl. 723, S. C.(c) *Barret v. Harris*, 2 Dowl. 186; 6 Legal Observer, 236, S. C.

(d) Tidd's Supp. 1833, p. 68.

us," the defendant was discharged out of custody, (e) on account of the doubt whether the intended officer was the gaoler of the Palace Court, or that of the proper King's Bench Prison. (e)

If the existing imprisonment has been occasioned by *illegal* process or proceeding of the *same plaintiff*, and not of a third person, a writ of detainer at his suit would be inoperative, (f) and in that case a *capias* should be issued, and an arrest take place at a time and under circumstances that would be clearly legal. (g) Where a *sheriff* has *arrested* a defendant by an illegal act or contrivance of *his officer* in one action, *he* cannot detain him in another; (h) nor can a defendant who has been just discharged by a judge from an illegal writ be arrested as he was returning. (i) But in the former case a material distinction exists as to the *nature of the illegality*. When the *same plaintiff* has caused an arrest upon an affidavit or writ so defective as to entitle the defendant to his discharge, then, as he ought not to be at liberty to avail himself of any irregularity for which he is responsible, the defendant would be equally entitled to his discharge from any detainer or other process at the suit of the *same plaintiff*, though not from a detainer at the suit of a third person not in collusion with the first plaintiff, (k) or where the first process was irregular. (k) But where the first arrest has been occasioned by the illegal act, fraud or contrivance of the *sheriff* or *his officer*, then the defendant would be entitled to his discharge, not only from the first process, but also from every detainer or process of *every third person*, though the latter were free from imputation of fraud or contrivance. (k)

The statute 2 W. 4, c. 39, s. 8, we have seen, (l) prescribes that the *declaration* upon process to *detain* a prisoner in King's Bench or Fleet Prison, "shall and may" allege the prisoner to be in the custody of the *marshal* or *warden*, as the fact may be, and the proceedings shall be as against prisoners in the custody of the *sheriff*, unless otherwise ordered by some rule to be made by the judges of the said Courts; (l) and the

Declaration on  
a writ of de-  
tainer.

(e) *Stor v. Mount*, 2 Dowl. 417; ? *Legal Observer*, 301, S. C.; *ante*, 187.

(f) *Rose v. Tomblinson*, 3 Dowl. 55, 56; *ante*, 355, 356.

(g) And see *ante*, 335, 356.

(h) *Barratt v. Price*, 9 Bing. 586;

1 Dowl. 725; *ante*, 335, 356.

(i) *Rex v. Blake*, 2 Nev. & Man. 312.

(k) *Barratt v. Price*, 9 Bing. 586; 1 Dowl. 725; 1 Chitty's Rep. 579, and cases there cited; *ante*, 355, 356.

(l) *Ante*, 151, 152, in note.

CHAP. IX.  
WRIT OF  
DETAINDER.

---

General Rule of M. T. 3 W. 4, prescribes the precise form of commencement of a declaration against a prisoner in custody of the marshal or warden. But the allegation in the commencement of a declaration that the defendant was *detained* in the custody of *the sheriff*, is not traversable by a plea in bar, and on demurrer such a plea was holden bad. (m)

---

(m) *Rex v. Kingston*, M.T. 1834, Each., 9 Legal Observer, 110.

## CHAPTER X.

PROCEEDINGS AGAINST A MEMBER OF PARLIAMENT, A TRADER,  
UNDER 6 GEO. 4, c. 16, s. 10.

IN general the mesne process against a *Member of Parliament* who is privileged from arrest, is to be by the *ordinary writ of summons*, prescribed by 2 W. 4, c. 39, s. 1, the same as if he were an unprivileged person, and without even the necessity for describing him in the writ to be a member of parliament or esquire, excepting voluntary courtesy. But if the defendant be a member of parliament and also a *trader*, then the general *bankrupt* act, 6 G. 4, c. 16, s. 10, enacts, that if a creditor file an *affidavit* of the requisite debt, viz. in case of a single creditor a debt of £100 or upwards, and that the defendant was according to his belief a *trader*, and issue a summons, and personally serve the defendant with a copy, and the defendant do not within one calendar month after such service pay the debt or secure the same, or enter into a bond with two sureties to pay the condemnation money and costs in such action, and within such calendar month cause an appearance to be entered, then every such trader shall be *deemed to have committed an act of bankruptcy* from the time of the service of such summons; and any creditor to the requisite amount may issue and prosecute a commission of bankrupt against such trader. As the 2 W. 4, c. 39, abolishes all prior process, and amongst others the summons mentioned in the above act, it became necessary to substitute a new proceeding in lieu, and accordingly we find that sect. 9 and schedule No. 6, prescribe the new form of proceeding.<sup>(a)</sup> As this new proceeding against a member of parliament when a *trader* is not of very frequent occurrence, it must here suffice to refer to Mr. Tidd's work for further information relative to the exact course of proceeding in such a case.<sup>(b)</sup>

CHAP. X.  
OF THE WRIT  
OF SUMMONS  
AGAINST AN  
M. P.

Writ of summons against a member of parliament to enforce provisions of 6 G. 4, c. 16, s. 10.

(a) *Ante*, 156, note, for the mode of proceeding and form of writ. The form of *præcipe* for such writ, and of the writ

itself, are also stated in Tidd's Supp. A.B. 1833, p. 263, 264.

(b) See Tidd's Supp. 1833, p. 75, 76.

## CHAPTER XI.

## PROCEEDINGS TO OUTLAWRY ON MESNE PROCESS.

Proceedings to outlawry in general..	396	Substance of modern practice in proceedings to outlawry under 2 W. 4, c. 39, s. 5.....	399
The improved and more expeditious proceedings to outlawry .....	397	First, on serviceable process	400
The necessity for proceedings to outlawry when one of several defendants is abroad, removed by 3 & 4 W. 4, c. 48, s. 7 .....	398	Secondly, on bailable process	403
		Thirdly, in joint action where one defendant a prisoner..	404

CHAP. XI.  
PROCEEDINGS  
TO OUTLAWRY  
IN GENERAL. (a)

Introductory  
observations.

WE have seen that although it is a maxim in law that a party should not be *concluded* by a final judgment unheard, (b) yet that, if owing a debt in this country he keep out of the way, or be absent from the kingdom to avoid process, requiring him to appear and shew cause why he does not pay such debt, it is but reasonable that he should be placed under such disability with respect to any of his British rights as to induce him to appear and enable a plaintiff to proceed in his action. It is on this principle that the custom of foreign attachment in London, viz. of seizing goods in the possession of a third person where the debt is due from him there to the debtor, whether in England or abroad, is valid, so that the goods or credits of a debtor may be vested in the plaintiff, unless the debtor appear and defend within a year and a day. (c) And, on the same principle, *process to outlawry* may be issued against a debtor, upon which he is at five several county Courts or Hustings publicly called, exacted or *proclaimed*; and it being presumed that he has heard of the proceedings, he may be *outlawed* for his contumacious disrespect of the legal process of the Court. And although the outlawry of a defendant who has previously left the kingdom, although for the very purpose of delay, may be set aside by the outlawed defendant by writ of error, or even on motion, (d) yet its effect

(a) See the former law and practice as to outlawry (most of which is still applicable) clearly stated in Tidd, 9th ed. 128 to 145; and the practice as recently altered, 2 Arch. Pr. K. B. by T. Chitty, 3d ed. 702 to 713; 4th ed. 795 to 807. It has been held that a writ of exigent is not a writ within the 12th section of the

uniformity of process act, which only relates to the *new* process thereby created, *Lewis v. Davison*, 3 Dowl. 272.

(b) *Ante*, 141; and per Bayley, J. in *Williams v. Bagot*, 3 B. & C. 786.

(c) *Turbill's case*, 1 Saund. 67, and notes.

(d) *Bryan v. Wagstaff*, 5 B. & C. 314.



cannot be avoided by another defendant, (e) nor even by the outlawed defendant, *except upon the terms of his appearing to a new action*, either by entering a common appearance when no affidavit of debt has been made, or of perfecting bail where there is an affidavit of debt. (f) And in a late case, where a debtor obtained a rule nisi for setting aside proceedings to outlawry, on the ground that the plaintiff had outlawed him when he knew he was in America, and also on the ground that the plaintiff had at the same time taken proceedings against him in America, where he was arrested, and had taken the benefit of the insolvent act there, the Court (it being sworn on the part of the plaintiff in the action that the debtor went abroad to avoid his creditors) refused to make the rule absolute, except on the terms of the debtor's paying all the costs and putting in bail or rendering, saying, that if the discharge in America afforded any defence at all, the facts might be pleaded. (g) And it seems that even a discharge from debts under an insolvent act does not relieve the defendant from the consequences of his contumacy, or entitle him to have his outlawry set aside. (h).

The 2 W. 4, c. 39, s. 5, contains an express provision authorizing *more expeditious and less expensive proceedings to outlawry* than previously prevailed, and which will be presently noticed. Before that act, in case of a *joint contract*, if one or more of several co-contractors, who ought to be jointly sued, effectually avoided service or execution of process, either by secreting himself, or by leaving the kingdom, the usual course was to commence an action by *original writ* against all the parties, and after the sheriff had returned non est inventus as to the party who could not be served or arrested upon an alias and pluries capias founded upon such original writ, a writ of *exigent* and writs of proclamation issued against him, and after several successive proceedings, and much expense and delay, he was *outlawed*; and not until after such dilatory proceedings could the plaintiff declare and proceed in the action separately against the other defendants who had appeared or perfected bail, (i) and they could not interfere to set aside or impeach the outlawry of their co-defendant on account of any irregularity or

The improved  
and more expeditious proceedings to outlawry.

(e) Post, 405; 31 Eliz. c 3, s. 3; 2 Salk. 496; Tidd, 140, 141.

(f) 3 Bla. Com. 284.

(g) Probert v. Rogers, 3 Dowl. 170.

(h) Dickson v. Baker, 3 Nev. & Man. 775; 2 Arch. K. B. 4th ed. 800, n. (1); and vide Rex v. Castleman, 4 Burr. 2119,

2127, post, 405.

(i) Haigh v. Conway, 15 East, 1; Goldsmith v. Levy, 4 Taunt. 299; Fort v. Oliver, 1 Man. & Sel. 242; Sanderson v. Hudson, 3 East, 144; Mackmichael v. Johnson, 7 East, 50.

CHAP. XI.  
PROCEEDINGS  
TO OUTLAWRY  
IN GENERAL.

of his absence beyond sea; (*k*) and whereupon the plaintiff in the action might obtain a judgment separately against the served or arrested defendants. And he might also obtain satisfaction of his debt and costs from the outlaw's effects by application to the Court of Exchequer; or if above £50, by petition. (*l*) And although such outlaw might on motion, or by writ of error, reverse the outlawry, supposing there were any irregularity or error in the proceedings to outlawry, and he might of *right* do so if he were beyond sea at the time the writ of exigent was awarded, although he went abroad on purpose to avoid the payment of his just debts, (*m*) yet he could do so *only on terms*, i. e. on entering an appearance, or on perfecting bail in a new action against him separately for the debt or cause of action. (*n*) So that although the outlawry were illegal or erroneous, still it operated as a mode of compelling the defendant to appear and put in bail according to the nature of the original claim, whether or not bailable, and thus ultimately enable the plaintiff to proceed to judgment and execution in an action against the outlawed defendant; and the Court might even require bail although no affidavit of the debt had originally been made. (*o*) The same practice of outlawing one of several defendants in substance, continues, although the 2 W. 4, c. 39, s. 5, renders the process and proceeding more expeditious and less expensive, especially by repealing the necessity for issuing an original writ, or any alias or pluries capias, (*p*) and by rendering it sufficient in non-bailable actions to issue a writ of summons, and a writ of distringas returned nulla bona and non est inventus; and in bailable actions, one writ of capias returned non est inventus, immediately after which the exigent and writ of proclamation may be issued. (*q*)

The necessity for proceeding to outlawry against one of several defendants when abroad, removed by 3 & 4 W. 4, c. 42, s. 7.

As regards *joint* claims upon *several* defendants, the necessity for including in the writ all co-contractors who are *within the jurisdiction* of the Court still continues, (unless where a party has obtained his certificate as a bankrupt, or his discharge under an insolvent act, who then may be omitted); (*r*) but if one or more of them be abroad, or *out of the jurisdiction*, the 3 & 4 W. 4, c. 42, s. 7, enacts, that no plea in abatement

(*h*) *Symonds v. Parmenter*, 1 Bla. Rep. 20.

(*i*) Tidd, 138.

(*m*) *Bryan v. Wagstaffe*, 5 Bar. & Cres. 314.

(*n*) 31 Eliz. c. 3, s. 3; 2 Salk. 496; *Sercoold v. Hampson*, 2 Stra. 1178; 1 Wils. 3; 12 East, 624, a note; and see the lucid statement, Tidd, 140, 141.

(*o*) *Id. ibid.*; *Fortes*, 39, and Tidd, 136; 3 Burr. 1482; *Barnes*, 522.

(*p*) See the terms of s. 5, 3 W. 4, c. 39; and yet in *Probert v. Rogers*, 3 Dowl. 170, it appears there were an alias and pluries capias.

(*q*) 3 W. 4, c. 39, s. 5.

(*r*) 3 & 4 W. 4, c. 42, s. 9.

for the non-joinder of any person as a co-defendant shall be allowed in any Court of Common Law, unless it shall be stated in such plea that such person is resident within the jurisdiction of the Court, and unless the place of residence of such person shall be stated with convenient certainty in an affidavit verifying such plea. The effect of this enactment is, that where one of *several* co-contractors is *abroad*, it is no longer *absolutely necessary* for a plaintiff to proceed to outlawry against him, but he *may* in the first instance proceed against those who are within the jurisdiction. But still it must be kept in view, that if the party abroad have property in England, it may be most important, with a view to actual satisfaction of the debt, to include him in the action, and to proceed to outlawry against him, in the first instance, especially as under 2 W. 4, c. 39, such proceedings are not now so expensive or dilatory as heretofore; and therefore, in concluding this division of the subject, we will distinctly consider the course of proceeding to outlawry against one of several defendants.

The 2 W. 4, c. 39, s. 5, we have seen, (s) authorizes proceedings to outlawry as well in actions commenced by a serviceable writ of summons as by a bailable writ of *capias*, and extends to the outlawry of a *single* defendant as well as of one of several. Before that act, as no original writ was returnable in the *Court of Exchequer*, no proceedings to outlawry were sustainable in that Court; but the 2 W. 4, c. 39, s. 5, dispenses with, and indeed abolishes original writs, and as all the Courts alike authorize an outlawry founded on a preceding writ of *distringas*, or of *capias*, (t) and the same act, s. 7, and 2 & 3 W. 4, c. 110, s. 1, 4, 9, contain enactments relative to the proper officers to execute the duties of filacer, exigenter, and clerk of the outlawries in that Court. (t) The enactment is, "That upon the return of *non est inventus* as to any defendant against whom a writ of *capias* has issued, and of *non est inventus and nulla bona* as to any defendant against whom a writ of *distringas* has been issued, whether such writs shall have issued against such defendant alone, or against him and any other person or persons, it shall be lawful to proceed to outlaw or waive such defendant *by writs of exigi facias and proclamation*, and otherwise in such and the like manner as might then be lawfully done, upon the return of *non est inventus* to a pluries writ of *capias* issued after an original writ;" and the act then provides for the re-

The substance of the practice in proceedings to outlawry as altered by 2 W. 4, c. 39, s. 5.

(s) *Ante*, 151.

(t) See observations in Tidd's Supp. 1833, p. 100.

CHAP. XI.  
PROCEEDINGS  
TO OUTLAWRY  
IN GENERAL.

turn and teste of the writ of exigent and proclamation. (u) So that the effect of this enactment was to dispense with the antecedent necessity for commencing the proceedings to outlawry by an *original writ*, and also to dispense with the necessity for an *alias* and *pluries* writ of capias. But the concluding part of the fifth section makes a distinction between writs of distringas and capias issued for ordinary purposes, and those when issued for outlawry, by requiring more time in the latter case, viz. absolutely *fifteen days* after the delivery thereof to the sheriff and the time of the return thereof; and this, no doubt, with the view of affording more time and opportunity for the defendant to hear of the proceeding, and by appearing, to guard against the consequences of his neglect; and hence the enactment affords a presumption that it was intended by the legislature that the sheriff and his officers should endeavour *actually* to execute the writ by service or arrest, and that it would be irregular, if the defendant be known to be in England, or to have an attorney there, to instruct the sheriff to keep the process secret, and still more so, under those circumstances, expressly to require him to return non est inventus. (x) In a late case, where the plaintiff's attorney knew the defendant's attorney, and delivered a capias to the sheriff, with directions to return the same non est inventus, the Court thought this proceeding, without making any application to the defendant's attorney, was an abuse of the process of the Court, made absolute a rule for setting aside the outlawry with costs. (y) The practice has been stated to be, for the plaintiff or his attorney to go before a judge with an affidavit that the defendant cannot be found, and that then the judge will give leave to return the capias non est inventus. (z) But the concluding part of section 5 expressly enacts, that at least fifteen days shall intervene between the delivery of the capias to the sheriff and his return thereof.

The present practice in proceeding to outlawry when the process is serviceable.

If the process is to be serviceable, the practice is to issue a writ of *summons* as in ordinary cases, and as before described. (a) We have seen that when it is intended to obtain a distringas, and proceed to outlawry against a single defendant, or one of several, the modes of attempting to serve the defendant personally must be open and candid, by making three several calls

(u) See the statute, *ante*, 151, in note.

(z) *Pigou v. Drummond*, 1 Bing. N. C. 354; and see observations in *Lewis v. Davison*, 3 Dowl. 275. But see 2 Arch. K. B. 3d edit. 703; *id.* 4th edit. 797.

(y) *Pigou v. Drummond*, 1 Bing. N. C. 354.

(s) *Lewis v. Davison*, 3 Dowl. 375, *quere*.

(a) *Ante*, 255 to 260; and *ante*, 298 to 303.

at the defendant's residence, if any, stating the object of the call, and there leaving a copy of the writ of summons and indorsements on the last call. (q) We have also seen what are the requisites of the affidavit and the other proceedings to obtain a *writ of distringas*, which must be returnable in term, on a day certain; and the fifth section of 2 W. 4, c. 39, requires that it shall be delivered to the sheriff at least fifteen days before he returns it.

The form of *affidavit*, in order to obtain a *distringas* preceding *outlawry*, materially differs from that when the Court or judge is to be required to issue a *distringas* with the view of enabling the plaintiff to *enter an appearance* according to the statute; and in the latter case more particularity is required than when the proceedings are to outlaw the defendant, because in proceedings to outlaw the defendant when he keeps out of the way, or is abroad, it would be useless to endeavour to see him. (r) The *former* affidavit states facts from which it is to be inferred that the defendant *is* in England, and has intimation of the process, whilst the *latter* shews that he *is absent, and probably has no knowledge of the process*, but is *generally* contumacious as to all process by wilfully being out of the way, and states that the party has not been nor can be found to be served with a copy of the writ of summons, and shews, if the fact, that *it is known he is abroad*, as well as that he has *not any distrainable property*; (s) and *it may omit* the statement of the repeated calls, and other formalities required to be sworn to in cases when it cannot be sworn that the defendant has absconded or left the kingdom. (t) On moving for the *distringas* also, the counsel must declare his election for what purpose he requires the *distringas*, viz. in order to proceed to outlawry, and not that the plaintiff may enter an appearance according to the statute; and the *distringas* must particularly intimate the intention to proceed to outlawry, and cannot be framed in the alternative. (u) The subscribed form of affidavit has been suggested as proper in such a case, but must of course vary according to circumstances. (x)

(q) *Ante*, 302 to 365.

Bing. 464.

(r) *Reuth v. Mellor*, 3 Tyr. 822; *Jones v. Price*, 2 Dowl. 42.(i) *Price's Gen. Prac.* 88, 89.(s) *Price's Gen. Prac.* 51, 52, 58; and see *id.* 53, 54, note \*; *Fraser v. Case*, 9(u) *Fraser v. Case*, 9 Bing. 464; *Price's Gen. Prac.* 58, *ante*, 309.(x) *Price's Gen. Prac.* 89.

In the Court of King's Bench, [or Common Pleas, or Exchequer of Pleas.]

Between { [Plaintiff's name], Plaintiff,  
and  
[Defendant's name], Defendant.

[Deponent's name], clerk to [name of plaintiff's attorney], of [address], attorney for the above-named plaintiff in this cause, maketh oath and saith that he this deponent did

Form of affidavit of one call, and service of copy of summons on defendant's w

CHAP. XI.  
PROCEEDINGS  
TO OUTLAWRY  
IN GENERAL.

It has been suggested that in the affidavit the intention to proceed to outlawry should be stated. (y)

The writ of *distringas* thereupon obtained is usually to be directed to the sheriffs of London, because the sheriffs' hustings, at which the defendant may be exacted or called to appear on the subsequent exigent, are there held every fortnight, whilst in other counties the County Courts are only holden every month. The 2 W. 4, c. 39, s. 5, we have seen, requires that fifteen days shall elapse between the *delivery* of the writ of *distringas* to the sheriff and his return. After his return in the conjunctive of *nulla bona* and *non est inventus*, the *writ of exigi facias* and other proceedings take place. Writs of *distringas* are signed and sealed, and issued from the same offices of the respective Courts as the writ of summons, (z) and the same fees are payable. (a)

Writs of exigent  
and proclamation.

It is to be observed that writs of *exigent* and *proclamation* existed before, and are not founded on the uniformity of process act, 2 W. 4, c. 39, and therefore the 12th section of that act, as respects the *teste* of an exigent or proclamation, does not extend to writs of exigent. The 5th section, however, pro-

and the absence of defendant, in order to obtain a *distringas* and proceed to outlawry.

on the — day of [month], instant, [or "last,"] go to the dwelling-house and residence of the above-named defendant, being No. — [street, &c.] in the county of Middlesex, [or "situate at," &c.] for the purpose of serving the defendant personally with a writ of summons, "which appeared to this deponent to have been regularly issued out of and under the seal of this Honourable Court against the said defendant, at the suit of the said plaintiff in this cause, on the — day of [month], instant, [or "last,"] and this deponent saith that he then saw there a person who informed him that she was the wife of the said defendant, and which information this deponent verily believes to be true; and this deponent saith that he did thereupon inquire of her if the said defendant, her husband, was at home, and that she thereupon immediately said he was not; that this deponent then shewed her the said writ and copy, and thereupon informed her that he had called for the purpose of serving the said writ, by delivering to her husband the defendant in person therein named, the said copy so as aforesaid then produced and shewn to her; and that it was a writ of summons issued out of the Court of —, at the suit of [plaintiff's name], the plaintiff, to compel him the defendant's appearance thereto in the said Court. And thereupon this deponent saith that the defendant's said wife then told him this deponent that it would be of no use to seek her husband for the purpose of serving him with process, because he had withdrawn himself for the purpose of avoiding proceedings at law at the suit of his creditors, and that he was then absent, and would remain from home until he could make some arrangement with them; and this deponent believes the said communication and information of the said defendant's wife to be true: and the deponent saith that he thereupon left the said copy of the said writ of summons with the said defendant's said wife, at his said dwelling-house; and this deponent further saith, that such copy had then thereupon all the indorsements that are required to be made thereon by the statute and rules of the Courts in such case made and provided; and he saith that he did on the — day of [month], instant, [or "last,"] indorse on the said writ the day of the week and month, and the year of the service thereof; and this deponent further saith that he did on the — day of —, [or "instant,"] carefully make search in the proper office of this Court, and that he there found that no appearance was then entered to the aforesaid writ of summons by or on the part of the said defendant.

Sworn, &c.

(y) Atherton on Personal Actions, 61,  
62, 139, 140, *sed quare*.

(z) Price's Gen. Prac. 59.  
(a) Rule Mich. T. 3 W. 4.

vides that the teste of the exigent and writ of proclamation shall be regulated as therein mentioned, by the return of the previous *capias*, &c. (b) As respects the *writ of proclamation*, it has been recently held that a writ directing the proclamation to be made at the *parish church* is sufficient, though the act says "*nearest church or chapel*," it not appearing by affidavit that there was any nearer church or chapel. (c) For the same reason also, it should seem that the several *indorsements* required on writs issued by authority of 2 W. 4, c. 39, and by rules Hil. T. 2 W. 4, and Mich. T. 3 W. 4, are not requisite on an exigent or writ of proclamation. (d) It seems also from a recent decision, that as the writ of exigent and other proceedings are filed, and accessible to search by a defendant, he is bound to search and object to any irregularity in either writ within a reasonable time, although he may not in fact have had any intimation of the outlawry until after it had been completed. (e)

In *bailable* actions no *distringas* is required, and the *writ of capias*, with the foregoing indorsements, is to be issued into the county in which the outlawry is intended to be completed; and usually, for the above reason, the *capias* is directed to the sheriffs of *London*, and who should execute the same if the defendant can be found; and it would be improper and irregular to instruct him to return the writ *non est inventus* when the party is known to be in the kingdom, and that he might by due enquiry be arrested; (g) though when the defendant is abroad, it is usual to obtain leave of a judge to have the writ speedily returned *non est inventus*; (h) or even without such leave, to indorse on the *capias*, "The sheriffs are requested not to execute this writ, but at the expiration of fifteen days after the date thereof to make a return of *non est inventus* for outlawry proceedings. G. H. 24th December. 1834." (i) But the circumstance of the defendant's having constantly appeared in public during the proceedings to outlawry would not invalidate them, unless perhaps he swear that he had no intimation of them; (j) and the sheriff is not to return the writ until fifteen days have expired after he *received* it. (k) No alias or pluries

The practice  
when process  
bailable. (f)

(b) *Lewis v. Davison*, 3 Dowl. 272.

(c) *Id. ibid.*

(d) *Id. ibid.*; ante, 152, 160; but see post, 404, note (e).

(e) *Id. ibid.*

(f) See per tot. *Lewis v. Davison*, 3

Dowl. 272.

(g) *Ante*, 400.

(h) *Ante*, 400, note (e).

(i) See Arch. K. B. 4th edit. 797.

(j) *Johnson v. Driver*, 1 Dowl. 127.

(k) 2 W. 4, c. 39, s. 5.

CHAP. XL  
PROCEEDINGS  
TO OUTLAWRY  
IN GENERAL.

writ of *capias* are required ; (k) but on the return of *non est inventus*, a writ of *exigi facias* may be issued on the day of the sheriff's return of the *capias* ; and it seems that the proper *teste* of the writ of *exigent* is the day on which the sheriff made his return to the writ of *capias*. (l) Such writ of *exigent* must be *returnable* on a day *certain in term*, and should have so long a time between its *teste* and delivery to the sheriff and the return day as to allow at least five County Courts, (holden monthly,) or in London five *hustings*, holden every fortnight, to intervene, (m) for otherwise it would become necessary to issue an *allocatur exigent*, so as to make up the requisite number of callings and proclamations. A bailable writ of *exigent* should be *indorsed* in all respects as a *capias*, and if it be issued in an action for a *debt*, it should be indorsed with the amount of the claim for the debt and costs ; (n) and where a defendant was arrested on an *exigent* which was not so indorsed, a bail-bond executed by him was recently ordered to be cancelled on entering a common appearance. (o) At the time of issuing the *exigent*, a *writ of proclamation*, requiring the sheriff to make three proclamations in pursuance of 31 Eliz. c. 3, should also be sued out.

Proceedings to outlawry in a joint action where one is a prisoner.

In a bailable action against *several* defendants, if it should become necessary to outlaw one of them, and one or more of the other defendants is a prisoner in the same action, as it would be irregular to declare separately against him or any other defendant before the outlawry has been completed, and the rule of Trin. T. 3 W. 4, 1833, requires that all prisoners shall be declared against within a certain time, i. e. before the end of the next term after his arrest or detainer, *unless further time to declare be given to the plaintiff by rule of Court or order of a judge*, so as to prevent lengthened imprisonment, it becomes necessary, (p) before the limited time has expired, or at least immediately after demand of declaration when necessary, (q) to obtain from the Court or a judge time to declare against the prisoner upon shewing the necessity for, and already active diligence in proceeding to outlawry against the absent defendant, (r) and which time it should seem a plaintiff in such a case

(k) In terms of s. 5, 2 W. 4, c. 39 ; but in *Roberts v. Rogers*, 3 Dowl. 170, there were an alias and pluries *capias*.

(l) Tidd's Supp. 1833, p. 99, note (d).

(m) Com. Dig. Pleader, 2 W. 4 ; and see Tidd, 9th edit. 132, 133 ; *id.* Supp. 1833, p. 99.

(n) *Ante*, 160, in notes.

(o) *Gibbon v. Spalding*, 1 March, 1835, coram Bosanquet, J. but see *ante*, 403,

note (d).

(p) 9 Bar. & Cres. 544 ; 2 New Rep. 404.

(q) Rule Trin. T. 1 W. 4.

(r) The terms of a previous rule K. B. R. H. 26 G. 3, Tidd, 360 to 363, to the same effect, differed, as they only required the plaintiff to declare within the limited time, "if by the course of the Court he could so declare."



is entitled to be allowed. (s) In a late case, where in a joint bailable action against several, and one of them (who had represented that the others were his partners in the purchase of the goods for the price of which the action was brought) only had been arrested, and was in prison, the Court of Exchequer, (after intimating that the plaintiff might proceed to outlawry against the defendant who could not be found, and in the meantime detain the arrested defendant, on an affidavit of such facts, and that it was believed the other named defendants were not in existence, in order to prevent the arrested defendant getting out of custody,) gave the plaintiff leave to discontinue without costs, and that the plaintiff should be at liberty to commence a fresh bailable action against the already arrested defendant, he declaring before the end of the term. (t) The circumstance of an outlawed defendant having obtained his complete and unqualified discharge from imprisonment under the bankrupt act, (u) or the insolvent act, 7 G. 4, is no ground for a motion to set aside his outlawry. (x) But in a late case in the Practice Court, a learned judge made a *prospective* order in Hilary term, 1835, that when on a named day in the following vacation, a defendant should have completed his imprisonment under the adjudication in the Insolvent Court, he should be discharged from the outlawry, because otherwise, as all applications to set aside an outlawry must be *made in term time*, the defendant would have to continue in prison until the subsequent Easter term. (y)

The author, in concluding this chapter, desires particularly to have it understood that his observations are to be received as merely *in continuation* of what will be found in prior works, and not as assuming to supply their utility.

---

(s) Barnes, 383; 9 Bar. & Cres. 544; 2 New Rep. 434; Tidd, 420, 424. 775; 2 Dowl. 517; *Nicholson v. Nichols*, 3 Dowl. 326. But see *Waters v. Johnson*, 9 Legal Observer, 300.  
 (t) *Ames v. Ragg and others*, 2 Dowl. 35.  
 (u) Tidd, 9th edit. 136; 3 Taunt. 141.  
 (x) *Dickson v. Baker*, 3 Nev. & Man. 9 Legal Observer, 300.  
 (y) *Waters v. Johnson*, Hill. T. 1835,

## CHAPTER XII.

OF PROCESS AND PROCEEDINGS TO SAVE THE STATUTE OF  
LIMITATIONS.

CHAP. XII.  
Of process and  
proceedings to  
save a statute of  
limitations.(a)

BEFORE the 2 W. 4, c. 39, s. 10, it frequently became necessary to issue process within six years or other limited time after the cause of action accrued, but either on account of the absence of the defendant or of witnesses, or for some other reason, such process was not actually served, but merely returned by the sheriff or under-sheriff *non est inventus*, and then all further proceedings were suspended until a fit opportunity, when an alias or pluries reciting the first process was issued, and such first process was not filed until it became necessary to do so, in support of a replication stating the first and continued process thus returned; and instances occurred even of an under-sheriff having at the request of a plaintiff's attorney, after the lapse of several years, returned *non est inventus* on process long before actually issued, but which had *never been in his possession* until the instant of such return. But the 10th section puts an end to such practice, and after enacting that every writ of summons and *capias* may be *continued* by alias and pluries, expressly provides, that no *first* writ shall be available to prevent the operation of any statute of limitations, *unless* the defendant be *arrested* thereon or *served* therewith, (b) or proceedings to or towards outlawry shall be had thereupon, *or unless such writ and every writ, if any issued in continuation of a preceding writ, shall be returned non est inventus, and entered of record within one calendar month next after the expiration thereof*, (i.e. within the four calendar months during which it is to continue in force,) *and unless every writ issued in continuance of a preceding writ shall be issued*

(a) See Tidd's Supp. 1833, p. 77; and Tidd, 9th ed. 27, 28; and manner of entering on the roll, *id.* 162.

(b) That means *personal* service; and the Court will not allow process to be served at the house of the agent of a defendant out of the jurisdiction, in order

to save the statute of limitations, and consequently every plaintiff must now strictly observe the recent regulations, *Frith v. Lord Donegal*, 2 Dowl. 527; see the present practice fully, Arch. K. B. by T. Chitty, 4th ed. 793.

within one such calendar month after the expiration of the preceding writ, *and shall* contain a memorandum indorsed thereon or subscribed thereto, *specifying the day of the date of the first writ, and return to be made* in bailable process by the sheriff or other officer to whom the writ shall be directed, or his successor in office; and in process not bailable, *by the plaintiff or his attorney* suing out the same. (c) So that it is not now permitted to a plaintiff's attorney, even with the assent of a sheriff or under-sheriff, at any indefinite period, to obtain a return of process to prevent the operation of the statute, but the *first process must be actually returned non est inventus within one calendar month* after the same would expire, and such return must be *entered of record* within the same time; and all continued process thereon must be *promptly* issued and acted upon, or the statute will bar the remedy. (d) The provision in the conclusion of sect. 10, authorizing the *plaintiff or his attorney* to return serviceable process "*non est inventus*," is new, and introduced in consequence of the writ of summons not being addressed to the sheriff or other officer, but merely to the defendant himself, so that the plaintiff or his attorney may execute the same in person, and never employ the sheriff or other officer.

We have seen that when the statute of limitations would otherwise bar any remedy, the Courts will permit the *amendment* of a writ to prevent that result, and for the same reason they have allowed an amendment of the continuances entered, (e) and likewise a writ to be amended if the defect has rendered it merely voidable, but not absolutely void. (f) The process to be issued as well in the first instance as in continuation should in all respects be regular, though we have seen that should it be defective, the Courts will in that, as an excepted case, permit an amendment; and where the writs as entered on the roll on which the continuances were entered appeared to be regular, although it appeared from the writs themselves that the second writ was improperly tested, the Court said, that as the roll was right, they would not look to any thing else to contradict it. (g) The Courts will not allow

(c) See the practice, 2 Arch. K. B. 3d ed. 700, 701; and see the *form* of entry and continuances, 2 Chitty's Forms, 636 to 642.

(d) *Nicholson v. Rowe and others*, 2 Crompt. & Mee. 469. But in cases where the issuing and regular continuance of process to save the statute is not required,

an alias or pluries capias may be sued out at any time, *id. ibid.*; ante, 218.

(e) *Taylor v. Gregory*, 2 Barn. & Adol. 257.

(f) 2 Arch. K. B. 3d ed. 701; ante, 235.

(g) *Dickenson v. Teague*, 1 Crompt. M. & R. 241.

CHAP. XII.  
PROCEEDINGS  
TO SAVE  
STATUTE OF  
LIMITATIONS.

process to be served at the house of an agent of the defendant out of the jurisdiction in order to save the statute of limitations, but will leave the plaintiff to proceed according to the before stated direction of the 2 W. 4, c. 39, s. 10. (h)

The process to save the statute must be the *proper basis* of the subsequent proceedings, and the form of action must be described therein as the plaintiff would *afterwards declare*. If the proceeding should be by *writ of summons*, then the plaintiff or his attorney must return "non est inventus," and enter the same of record in due time, i. e. within one calendar month after the execution, or four months from the *teste*. (i) The form of entry of any process in any Court will be found in Mr. Tidd's Supplement of A.D. 1833, (k) and in the recent edition of Mr. T. Chitty's Forms. If it be necessary to *continue* the first writ of summons, then an alias and pluries may be issued into the same or another county; (l) and it is very essential to take care that the *first writ*, whether of summons or capias, be in due time returned non est inventus, and that *every continued* process to save the statute of limitations *must* have a *memorandum indorsed or subscribed*, specifying the *date* of the *first writ*, for otherwise by the express terms of 2 W. 4, c. 39, s. 10, no such first writ is to be available to prevent the operation of any statute of limitations. (m) The form of such memorandum as regards an alias or pluries writ of summons may be as subscribed. (n)

(h) *Frith v. Lord Donegal*, 2 Dowl. 527.

(i) See the form of such return, *ante*, 272 note (x).

(k) Page 252 to 255.

(l) See forms Tidd's Supplement, A.D. 1833, p. 264.

(m) Tidd's Supplement, 1833, p. 51, 77 and 265.

Form of memorandum of date of first writ.

(n) "The writ of summons which is continued by this writ was dated the — day of — in the — year of the reign of his present Majesty."

**THE  
PRACTICE OF THE LAW**

**IN  
ALL ITS DEPARTMENTS;**

**WITH A VIEW OF  
RIGHTS, INJURIES, AND REMEDIES,**

**AS AMELIORATED BY RECENT STATUTES, RULES, AND DECISIONS;**

**SHewing**

**THE BEST MODES OF CREATING, PERFECTING, SECURING, AND TRANSFERRING RIGHTS;**

**AND**

**THE BEST REMEDIES FOR EVERY INJURY, AS WELL BY ACTS OF PARTIES THEMSELVES,  
AS BY LEGAL PROCEEDINGS; AND EITHER TO PREVENT OR REMOVE INJURIES;  
OR TO ENFORCE SPECIFIC RELIEF, PERFORMANCE, OR COMPENSATION:**

**AND**

**THE PRACTICE**

**IN ARBITRATIONS; BEFORE JUSTICES; IN COURTS OF COMMON LAW;  
EQUITY; ECCLESIASTICAL AND SPIRITUAL; ADMIRALTY;  
PRIZE; COURT OF BANKRUPTCY; AND COURTS OF  
ERROR AND APPEAL.**

**WITH NEW PRACTICAL FORMS.**

**INTENDED AS**

**A COURT AND CIRCUIT COMPANION.**

**IN THREE VOLUMES.**

**VOL. III.—PART VI.**

**BY J. CHITTY, ESQ.  
BARRISTER, OF THE MIDDLE TEMPLE.**

---

**LONDON:**

**S. SWEET, CHANCERY LANE; STEVENS AND SONS, 39, BELL YARD;  
AND A. MAXWELL, 32, BELL YARD;  
And Booksellers and Publishers:  
MILLIKEN AND SON, GRAFTON STREET, DUBLIN.**

**1835**

**LONDON :**  
**C. ROWORTH AND SONS, BELL YARD,**  
**TEMPLE BAR.**

# ADVERTISEMENT

TO THIS

## SIXTH CONCLUDING PART.

---

THE following pages complete my undertaking. The Table of Contents preceding each part show the analytical arrangement, *embracing every subject essential to be familiarly known to Students and Practitioners*; and the *general Index* concluding this part will render every point readily accessible. When it is considered that the recent alterations in the law have affected almost every branch, it will be admitted that so extensive a range has demanded no inconsiderable labour and consideration, and I hope it will be found that they have been bestowed with care. The *fifth* and *sixth* parts relate more particularly to *the practical mode of conducting an Action and Defence, and other practical proceedings in the Superior Courts*, at least until after verdict, and which parts of a suit have required most particular consideration; and here I have endeavoured to introduce numerous suggested improvements that must place the *Client* on the vantage ground, and relieve the *Practitioner* from the risk of liability or censure, and certainly redound to the honour of the Profession. In other words, I have attempted to intersperse a system of *Legal Ethics*, which, if adopted in practice, will inevitably advance the best interests as well of clients as of practitioners.

The seventeenth Chapter relative to *Irregularities, Affidavits, Summons, Judge's Orders, Motions and Rules*, and the twenty-sixth, twenty-seventh, twenty-eighth, and twenty-ninth Chapters relating to *Evidence and*

*Witnesses, Preparing for Trial, Briefs and Trials*, are it is believed, *new*, and will, I trust, be found of considerable utility in enabling Practitioners to try a cause with more security of success. (a)

In concluding this work, I cannot refrain from thanking my professional friends for their kind and flattering reception of the preceding Parts, a reception of a *law* work, indeed, so unprecedented, that although I have certainly anxiously exerted myself to introduce the best results of forty years' study and practice, yet I cannot but think is to be attributed in no small degree to that *friendly feeling* and *Esprit de Corps*, which I am proud to say are pre-eminent amongst the members of the Legal Profession. Indeed, the kindness of my Professional friends has cheered me when I might otherwise have been borne down by no common affliction, cutting me off from a more active and ambitious career, and confining me to the laborious and monotonous pursuit of Chamber Practice.

J. C.

*Chambers, 6, Chancery Lane,  
October 20, 1835.*

---

(a) It may be objected that, instead of concluding with the trial and verdict in an action, I ought to have written on the subjects of *New Trials, Judgments, Executions, Writs of Error, Proceedings against Bail, &c.* I have not done so, because the alterations on those parts of practice are not numerous, and the subjects have already been elaborately considered by Mr. Tidd in his work, and in other Treatises, and I have been unwilling to increase the bulk or expense of this work, at least, until I know the wishes of my Professional Friends.



# TABLE OF CONTENTS

OF

## PART VI.

[See Table of Contents of Part V. at Commencement thereof.]

## CHAPTER XIII.

A space of twelve pages was purposely left at the commencement of this part, in which it was proposed to introduce the expected enactment respecting the qualification of the *Law of Arrest*, but the consideration of which has been postponed till the next session of parliament.

## CHAPTER XIV.

INTRODUCTORY OBSERVATIONS ON THE PROCEEDINGS BETWEEN APPEARANCE OR BAIL ABOVE, AND THE CONCLUSION OF AN ACTION.

	<i>Page</i>
Division of the subjects of this Part .....	421
I. Enumeration of the ordinary regular proceedings .....	<i>id.</i>
II. Enumeration of the occasional proceedings .....	423
III. Enumeration of the defective or irregular proceedings, whether in pleadings or practice .....	425
IV. Modes of proceeding relating to each .....	426
V. Enumeration of the principal recent alterations and improvements in practice and pleading .....	427

## CHAPTER XV.

OF THE INSTRUCTIONS FOR DECLARATION AND THE DECLARATION ITSELF, AND PROCEEDINGS THEREON AS PRACTICALLY AFFECTED BY THE RECENT STATUTES AND RULES.

I. Instructions for declaration, and professional duty in this respect .....	429
II. Knowledge of pleading why essential to an attorney; considerations how far it may be advisable for him to draw pleadings, and whom he should retain for that purpose .....	431
III. How to enforce inspection and copy of a written document, to enable the plaintiff to declare .....	433
IV. Time of declaring in general .....	436
1. How soon formerly and at present plaintiff may declare .....	437
2. Practice of declaring de bene esse on serviceable process impliedly abolished .....	438
3. May declare de bene esse on bailable process, &c. ....	439
4. Unless indorsed debt and costs paid within four days, how soon after plaintiff will be entitled to costs of preparing declaration .....	440
5. When should declare de bene esse .....	441
6. Consequences of defendant perfecting or not perfecting bail after declaration de bene esse .....	442

CHAPTER XV. <i>Of the Instructions for Declaration, &amp;c.—(continued.)</i>	Page
7. Difference in the form of proceeding when a declaration is delivered or filed <i>de bene esse</i> .....	442
8. Plaintiff cannot deliver or file declaration between 10th August and 24th October, and other excepted days .....	<i>id.</i>
9. Hour of day when declaration to be delivered .....	443
10. Within what time the plaintiff <i>should</i> and must regularly declare, and consequences of neglect .....	<i>id.</i>
11. How the limited time for declaring is calculated .....	444
12. If no judgment of nonpros signed, may declare within a year .....	445
13. Of plaintiff's obtaining by rule further time to declare .....	446
V. Proceedings by a defendant to compel the plaintiff to declare, and of judgment of nonpros .....	
1. No rule to compel plaintiff to declare necessary, except one peremptory rule .....	448
2. Written demand of declaration, when requisite before nonpros .....	<i>id.</i>
3. Written form of demand of a declaration .....	<i>id.</i>
4. Of signing judgment of nonpros .....	449
Defendant must have duly appeared .....	<i>id.</i>
If a declaration has in fact been delivered, judgment of nonpros cannot be signed .....	450
5. Of setting aside judgment of nonpros .....	<i>id.</i>
VI. Of the declaration itself <i>in general</i> .....	<i>id.</i>
First, Chronological statement of the recent statutes and rules affecting declarations, &c. ....	451
1. Reg. Gen. Trin. T. 1 W. 4, limiting length and prescribing forms of declarations on bills of exchange, promissory notes, common counts, account stated, and general conclusion .....	452
2. Reg. Gen. Hil. T. 2 W. 4, reg. 1, r. 40, that laying venue in declaration different to that in original writ shall not discharge the bail .....	453
3. Reg. Gen. Hil. T. 2 W. 4, r. 4, prohibiting long recitals of writs in declaration. ....	<i>id.</i>
4. Reg. Gen. Mich. T. 3 W. 4, reg. 15, prescribing forms of commencing a declaration .....	454
Declarations to be intitled of the proper Court, and of the very day of filing or delivering same .....	<i>id.</i>
Prescribed form of commencement of a declaration on a writ of summons .....	<i>id.</i>
The like on a <i>capias</i> .....	<i>id.</i>
The like on a writ of <i>detainer</i> .....	<i>id.</i>
The like against several defendants, one <i>arrested</i> or detained, and the other <i>served</i> with a copy of <i>capias</i> ....	455
Pledges at conclusion to be omitted .....	<i>id.</i>
5. Reg. Gen. Hil. T. 4 W. 4, reg. 1, all pleadings to be entitled of the day when pleaded, and shall be entered on record accordingly, unless otherwise ordered .....	<i>id.</i>
6. Reg. Gen. Hil. T. 4 W. 4, reg. 5, prohibiting more than one count or plea, unless there be actually two distinct subjects-matter of complaint, or two distinct grounds of defence to be established ..	<i>id.</i>
Instances as illustrations when or not several counts may be admitted .....	<i>id.</i>
But count upon an account stated allowed to be added .....	457
And several breaches of the same contract are still admissible. <i>id.</i>	<i>id.</i>
Instances as illustrations, when or not several pleas shall be admissible .....	<i>id.</i>

CHAPTER XV. <i>Of the Instructions for Declaration, &amp;c.—(continued.)</i>	Page
But the examples are to be considered as merely illustrative and not restrictive of principles of the rules .....	457
7. Reg. Gen. Hil. T. 4 W. 4, r. 6, if rule 5 be violated, the opponent may obtain a judge's order for striking out the second count or plea, with costs, unless, &c.....	458
8. Reg. Gen. Hil. T. 4 W. 4, r. 7, the party who has pleaded several counts or pleas, and fails in proving a distinct matter in support of each, shall pay the opponent costs; and if he shall not bona fide have retained a second count or plea, under pretence that he could prove a distinct cause of action, or ground of defence, and fail in establishing the same, and the judge who tries the cause shall so certify, then the party so improperly pleading shall even lose the costs of the issues upon which he succeeds .....	id.
9. Reg. Gen. Hil. T. 4 W. 4, r. 8, venue in margin shall suffice, and prohibiting repetition of venue in body .....	459
10. Reg. Gen. Hil. T. 4 W. 4, r. 20, prescribed form of commencement of declaration in fresh action, after a plea of nonjoinder.....	id.
11. <i>Id.</i> reg. 4, statement in a declaration on a policy of insurance of the interest in several persons, or some of them in the alternative.	id.
12. <i>Id.</i> reg. 5. In trespass the name of close or abutments must be stated in declaration in trespass, or defendant may demur specially.....	460
13. Alteration in form of declaration by stat. 3 & 4 W. 4, c. 42, s. 12, when defendant described by initial or contraction of Christian name in a written document.....	id.
14. Analytical summary of the several recent alterations in declarations .....	id.
15. Consequences of deviations from the rules.....	461
<i>Secondly</i> , Practical summary of, and observations upon, the parts of a declaration as altered or affected by the recent statutes and rules.....	462
<i>First</i> , Parts in particular.....	463
1. Title of the Court .....	id.
2. Title of declaration as to time of filing or delivery.....	id.
3. The venue in margin .....	464
4. The commencement.....	465
Parties and their names .....	466
5. Body of declaration; statement of time of cause of action.....	470
No statement of venue, or place, except in trespass quare clausum fregit, when local description requisite.....	id.
What other express alterations .....	472
6. Conclusion.....	id.
7. Statement of pledges to be discontinued.....	473
8. Other matters to be observed .....	id.
<i>Secondly</i> , Prohibitions of unnecessary length in declarations by former rules and practice .....	id.
<i>Thirdly</i> , Impolicy of over statement in pleading .....	474
<i>Fourthly</i> , Origin of several counts for the same cause of action.....	475
<i>Fifthly</i> , Alteration by Reg. Gen. Trin. T. 1 W. 4, reducing length of counts on bills and notes, and indebitatus counts in assumpsit and debt, and abolishing quantum meruit and valebant counts.....	476
<i>Sixthly</i> , Alteration by Reg. Gen. Hil. T. 2 W. 4, r. 74, &c. Plaintiff to be allowed costs only on issue on which he succeeds, and costs of issues found for the defendant to be deducted or paid .....	id.
<i>Seventhly</i> , Practical consequences affecting the structure of declaration, plea, &c. ....	479

CHAPTER XV. <i>Of the Instructions for Declaration, &amp;c.—(continued.)</i>	Page
<i>Eighthly</i> , The pleading rules of Hil. T. 4 W. 4, r. 5, 6, 7; viz. Reg. 5, prohibiting more than <i>one count</i> on same subject-matter, and giving instances, and permitting <i>several breaches</i> .....	479
<i>Ninthly</i> , When or not <i>several counts may still be inserted</i> .....	481
<i>Tenthly</i> , Pleading influenced by consideration of costs .....	486
<i>Eleventhly</i> , The rule how far <i>imperative</i> on a judge at chambers or at nisi prius .....	<i>id.</i>
<i>Twelfthly</i> , Observations on the practical effect of these rules .....	487
<i>Thirdly</i> , Other practical matters connected with declarations .....	489
1. Mode of engrossing or writing the declaration .....	<i>id.</i>
2. Number of copies of declaration in case of a prisoner .....	490
3. Declaration in what cases to be <i>delivered</i> .....	<i>id.</i>
4. When to be <i>filed</i> and notice thereof given .....	491
5. Notice of declaration, when filed .....	<i>id.</i>
6. Requisites of such notice of declaration, when filed .....	492
7. Time within which defendant must plead, <i>may</i> be stated in notice of declaration filed .....	494
8. Form of notice of declaration having been <i>filed</i> on serviceable process, and to plead in the King's Bench, Common Pleas, or Exchequer, where the plaintiff has entered an appearance for defendant <i>sec. stat.</i> .....	<i>id.</i>
9. The like <i>de bene esse</i> onailable process .....	495
10. Of declaring by the bye .....	<i>id.</i>
11. Particulars of demand, when required, &c. ....	496
VII. Of accompanying particulars of demand when requisite .....	<i>id.</i>

## CHAPTER XVI.

## OF PROCEEDINGS TO COMPEL DEFENDANT TO PLEAD, VIZ. NOTICE TO PLEAD, RULE TO PLEAD, AND DEMAND OF PLEA.

Proceedings to compel defendant to plead, or enable plaintiff to sign judgment by default in general .....	497
I. Notice to plead .....	498
General regulations respecting .....	<i>id.</i>
The time to plead to be stated therein .....	499
How long plaintiff may delay serving notice to plead .....	501
Modes or forms of giving notice to plead .....	<i>id.</i>
Forms given .....	502
II. Rule to plead, when necessary .....	<i>id.</i>
General regulations respecting same .....	503
Time of entering rule to plead .....	<i>id.</i>
Mode of ruling to plead .....	504
Forms of .....	<i>id.</i>
III. Demand of plea .....	505
General regulations respecting .....	<i>id.</i>
Time of demandnig plea .....	506
When time expires and judgment may be signed after demand ....	507
Form and mode of demand .....	<i>id.</i>
Must be in writing .....	<i>id.</i>
Form of indorsed demand .....	<i>id.</i>
Separate demand of .....	<i>id.</i>
How demand of plea served .....	<i>id.</i>

## CHAPTER XVII.

OF IRREGULARITIES, NULLITIES, AND NON-OBSERVANCE OF MERE DIRECTORY REGULATIONS, TIMES AND MODES OF OBJECTING TO THE SAME;—WAIVERS OF OBJECTIONS;—NOTICES OF IRREGULARITIES, AND NOTICES OF APPLICATIONS, BEFORE SUMMONS OR MOTIONS;—OF PLAINTIFF'S NOTICE OF HAVING ABANDONED HIS IRREGULAR PROCEEDING, OR HIS OFFER TO PAY COSTS;—OF AFFIDAVITS, SUMMONS, AND OF JUDGE'S ORDERS;—OF MOTIONS, OF RULES NISI;—SHEWING CAUSE;—RULES ABSOLUTE;—COSTS;—ATTACHMENTS, &c.

## SECT. I.

*Of Irregularities, Nullities, Non-observance of mere Directory Regulations, &c.*

	Page
1. Of these in general .....	509
2. Why objectionable to take advantage thereof .....	510
3. Time of application in respect of .....	512
1. Summary of the general rules relating to .....	515
2. Chronological table of irregularities, &c. ....	id.
4. Distinction between irregularities and nullities .....	522
5. When the Court will <i>ex mero motu</i> object .....	527
6. Of deviations from directory rules .....	id.
7. Of notices of irregularities .....	id.
8. Of notices of motions, &c. ....	531
1. In cases of irregularity .....	id.
2. In other cases .....	533
9. Of opponent's notice, and proceedings thereupon .....	id.
10. Notices of motions in cases of <i>certiorari</i> , and before motion for criminal information, &c. ....	534

## SECT. II.

*Of Affidavits in support of or against Applications to a Judge or Court, by Summons or Motion.*

1. When or not an affidavit is necessary .....	535
2. By whom to be made .....	537
3. Title of Court .....	id.
4. Title of the cause .....	538
5. Addition of deponent .....	539
6. The commencement .....	540
7. The body or substance of the affidavit .....	id.
8. Deponent's signature to affidavit .....	545
9. Before whom sworn .....	id.
10. Of the jurat .....	546
11. At what time an affidavit must be sworn, produced, and filed .....	id.
12. Documents to be annexed to, and exhibited with, affidavit .....	548
13. Affidavits previously used, when they must be re-sworn or not .....	549
14. Consequences of affidavit not being sufficient in first instance .....	id.
15. When or not an amendment in affidavit is permitted, or supplemental one received .....	550

	Page
SECT. II. <i>Affidavits in support of or against Applications to a Judge, &amp;c.—(continued.)</i>	
16. When or not objection waived .....	550
17. Of delivering copies of affidavits to opponent's attorney .....	551
18. Of opponent's taking office copies .....	id.
19. Affidavit in answer to a summons or rule nisi .....	552
20. Time of swearing the same .....	553
21. Affidavit in answer, when defective merely in form, may be amended .....	554

## SECT. III.

*Of Summonses and Judge's Orders.*

1. Of summary applications in general .....	554
2. When a summons proper .....	555
3. Summons of what judge .....	556
4. Summons during vacations .....	557
5. When summons to be supported by affidavit .....	id.
6. Form and substance of a judge's summons .....	558
Usual form of summons .....	id.
7. Summons how far a stay of proceedings .....	559
8. How many summonses are necessary .....	561
In case of a prisoner one summons only necessary .....	id.
One summons only necessary for delivery or taxing an attorney's bill ....	id.
One appointment to tax suffices .....	id.
9. Service of summons and affidavit thereof .....	id.
Form of affidavit of service of two summonses, and of applicant's attendance and opponent's non-attendance .....	562
10. Place of serving notices, summonses, orders, and rules, &c. ....	563
11. Hour of day of serving a judge's summons, &c. ....	564
12. When not necessary to produce original summons .....	565
13. Of indorsing a consent .....	id.
14. Proceeding on opposing a summons, and of the judge's hearing the summons, and his order thereon .....	id.
15. Form and terms of order, and when it should be <i>peremptory</i> , and not merely <i>conditional</i> , of drawing it up and serving the same .....	566
Form of a judge's order <i>ex parte</i> when the applicant only has attended ....	id.
The like where both parties have attended .....	id.
16. A judge's power to award costs .....	567
17. Order how far conclusive or binding until rescinded or set aside .....	568
18. Judge's order, though imperative, may yet be abandoned .....	id.
19. Of making judge's order a rule of Court .....	id.
20. Of setting aside a judge's order .....	569

## SECT. IV.

*Of Motions, Rules Nisi, Shewing Cause, Rules Absolute or Discharged, Costs, Attachment, &c.*

1. Notice of motion when or not necessary .....	570
2. Brief to counsel with affidavits .....	571
3. Motion to what Court .....	572
4. Motion by whom to be moved .....	573
5. ——— time of moving .....	id.
6. Second motion, when or not permitted .....	574
7. Conduct of counsel upon moving for a rule nisi .....	575
8. When a rule is absolute in the first instance, or only nisi .....	576

<b>SECT. IV. Of Motions, Rules Nisi, Shewing Cause, &amp;c.—(continued.)</b>	<b>Page</b>
9. When costs allowed or refused when rule nisi absolute in the first instance ..	577
10. Forms and requisites of rule nisi .....	<i>id.</i>
Forms of rules nisi in cases of irregularity .....	578
11. Statement in rule nisi of the time or day when the party is to shew cause....	579
12. Rule nisi to be drawn up "on reading documents, &c." .....	<i>id.</i>
13. In rule nisi for irregularity, the precise objection to be stated .....	<i>id.</i>
14. All objections to be stated at one time, and not successively.....	581
15. Rule nisi to state to whom payment to be made or deed, &c. delivered ....	<i>id.</i>
16. As to rule nisi praying costs .....	582
17. When an immediate stay of proceedings to be prayed .....	<i>id.</i>
18. Of amending a rule nisi, when or not allowed, or when a fresh rule is requisite and may be permitted .....	583
19. Of service of copy of rule nisi; affidavit of such service .....	<i>id.</i>
20. When service need not be personal .....	584
21. When service must be personal.....	585
22. The time of serving rule nisi.....	<i>id.</i>
23. Of enlarging and reviving rules.....	586
24. Notices to be given by a party against whom a rule has been obtained, and of his intention not to resist the same, or to resist only in part .....	587
25. What party to shew cause.....	588
26. Of shewing cause in first instance against a motion or a rule nisi .....	589
27. <i>Seem</i> , no necessity for obtaining office copy of the rule nisi, or of affidavits in support of rule, before shewing cause .....	<i>id.</i>
28. Of swearing affidavits in opposition, and shewing the same to the counsel in support of the rule .....	<i>id.</i>
29. Brief to counsel to move that rule nisi be absolute .....	590
30. Brief to oppose rules .....	591
31. When or at what time a rule nisi should be made absolute .....	592
32. The conduct of counsel on each side in preparing to support or oppose a rule	<i>id.</i>
33. Of discharging a rule.....	593
34. Professional conduct of barristers in disposing of rules nisi.....	594
35. Arguments upon affidavits and documents in support of rules nisi .....	<i>id.</i>
36. Formal objections when to be taken .....	595
37. How the Court or judge decides upon conflicting affidavits.....	597
38. Of making a rule nisi absolute, or discharging the same.....	<i>id.</i>
39. Of the interlocutory costs of motions and rules .....	<i>id.</i>
40. Of the Court imposing terms.....	601
41. Terms of the rule absolute.....	<i>id.</i>
42. Notice of and appointment for taxing interlocutory costs.....	602
43. The master's allocatur of costs.....	<i>id.</i>
44. Of enforcing payment of interlocutory costs by attachment.....	<i>id.</i>
45. Care essential in served copies.....	603
46. Personal service of rules and allocatur, and leaving copies of each.....	<i>id.</i>
47. Personal demand by a party entitled to receive payment .....	605
48. Affidavit of service, and motion and rule for attachment when nisi only, or when absolute in first instance.....	606
49. Execution of attachment, and who exempt or discharged.....	607
50. Interlocutory costs, when recoverable by action .....	<i>id.</i>
51. Of setting off interlocutory costs .....	<i>id.</i>

## CHAPTER XVIII.

THE PRINCIPAL PROCEEDINGS BY A DEFENDANT BETWEEN  
DECLARATION AND PLEA.

	<i>Page</i>
<i>Of the adoption of one of the following occasional proceedings between declaration and plea</i> .....	609
I. <i>Of taking the declaration when filed out of the office</i> .....	610
II. <i>Of obtaining particulars of plaintiff's demand</i> .....	611
III. <i>Of demanding oyer, &amp;c.</i> .....	618
IV. <i>Of inspection of public and private documents, &amp;c.</i> .....	619
V. <i>Of proceedings under interpleader act</i> .....	690
VI. <i>Of bills of interpleader in equity</i> .....	627
VII. <i>Of injunction bills to stay proceedings at law</i> .....	<i>id.</i>
VIII. <i>Of bills for discovery, &amp;c.</i> .....	<i>id.</i>
IX. <i>Motions and rules at law for staying proceedings on ground of plaintiff's ignorance of the proceedings, or his incapacity, &amp;c.</i> .....	628
X. <i>Do. staying proceedings on penal statute not authorized</i> .....	<i>id.</i>
XI. <i>Do. staying proceedings, want of authority to attorney to act</i> .....	<i>id.</i>
XII. <i>Do. staying proceedings on ground that no debt is due</i> .....	630
XIII. <i>Do. staying proceedings when several concurrent actions pending for same cause</i> .....	631
XIV. <i>Do. staying proceedings in a second action, after former recovery or defeat</i> .....	632
XV. <i>Do. when or not proceedings at law stayed to render available a defence or relief in equity</i> .....	<i>id.</i>
XVI. <i>Do. staying proceedings when contrary to agreement or good faith</i> .....	633
XVII. <i>Do. staying proceedings on ground of claim or action being frivolous, or for too small a sum</i> .....	<i>id.</i>
XVIII. <i>Do. staying proceedings until security for costs, plaintiff being abroad</i> ..	<i>id.</i>
XIX. <i>Do. staying proceedings until security for costs, plaintiff being insolvent</i> ..	635
XX. <i>Do. staying proceedings in ejectment or penal action till plaintiff's residence be stated or security for costs</i> .....	636
XXI. <i>Do. until payment of costs of a prior action</i> .....	<i>id.</i>
XXII. <i>Do. for staying proceedings under other particular statutes</i> .....	637
XXIII. <i>Staying proceedings in other cases not before enumerated</i> .....	<i>id.</i>
XXIV. <i>When without consent, the Court or a judge has no power to stay proceedings on unusual terms, &amp;c.</i> .....	<i>id.</i>
XXV. <i>Of summons and motion to strike out superfluous or scandalous matter, or second counts</i> .....	638
XXVI. <i>Of reducing the length of pleadings by agreement, and rule thereon</i> ..	642
XXVII. <i>Of motions to consolidate and of consolidation rules</i> .....	643
XXVIII. <i>Of proceedings by defendant to change venue</i> .....	646

## CHAPTER XIX.

PROCEEDINGS BY A DEFENDANT BETWEEN DECLARATION AND PLEA  
WHEN HE HAS NOT EVEN A PARTIAL DEFENCE.

I. <i>Of defending for time and proceeding in a cross action and setting off the claims after judgment</i> .....	660
II. <i>Of payment of debt and costs</i> .....	<i>id.</i>
III. <i>Of obtaining time by agreement, and by rule for that purpose</i> .....	662
IV. <i>Of cognovits</i> .....	664
V. <i>Of warrants of attorney</i> .....	669
VI. <i>Of judgment by default</i> .....	671
General observation .....	672



<b>CHAPTER XIX. Proceedings by a Defendant, &amp;c.—(continued.)</b>	<b>Page</b>
Utility of a plea as to part, &c. ....	674
Recent enactments and rules relating to judgments by default, writs of inquiry, &c. ....	675
The practical proceedings on signing judgment by default and executing inquiry ....	677
Before whom inquiry to be executed ....	678
Notice of ....	<i>id.</i>
Continuance of notice ....	<i>id.</i>
Countermand of ....	<i>id.</i>
Of setting aside judgment ....	680
<b>VII. Reference to Master or Prothonotary</b> ....	681

## CHAPTER XX.

### PROCEEDINGS BETWEEN DECLARATION AND PLEA, WHERE THE DEFENDANT ADMITS THE ACTION TO BE IN PART SUSTAINABLE.

<b>I. Of paying money or damages into Court</b> .....	684
The recent alteration and improvement by 3 & 4 W. 4, c. 42, s. 2, as to personal actions ....	685
By 3 & 4 W. 4, c. 42, s. 21, as to torts ....	686
Salutary effect of this enactment ....	<i>id.</i>
Recent general rules relating to payment of money into Court.....	687
Prescribed plea of payment into Court ....	688
Prescribed replication to such plea.....	<i>id.</i>
Decisions on form and requisites of plea of payment into Court.....	<i>id.</i>
Consequences of paying money into Court ....	689
Time of payment into Court and practical proceedings.....	<i>id.</i>
<b>II. Of restoring deeds, goods, &amp;c. with costs</b> .....	691
<b>III. Of compounding penal actions</b> .....	693

## CHAPTER XXI.

### OF THE PRACTICE AS TO PLEAS.

<b>Introductory observations</b> .....	694
<b>I. Instructions for plea</b> .....	695
<b>II. What the duty of defendant's attorney as to plea and defence</b> .....	697
What defence or plea may be pleaded or advanced ....	698
Considerations whether to plead, or suffer judgment by default ....	699
Occasional conduct on behalf of a defendant collateral to pleading ....	<i>id.</i>
<b>III. Time of pleading and of imparlances</b> .....	700
Imparlances, how far abolished ....	<i>id.</i>
Of suggestions on record in lieu of entry of imparlance or continuance..	<i>id.</i>
Usual times of pleading.....	701
After delivery of particulars ....	702
In cases of prisoners ....	703
Before what hour of night plea to be delivered ....	<i>id.</i>
<b>IV. Of obtaining further time to plead</b> .....	<i>id.</i>
In what cases time given to plead in bar, and what length of time, and on what terms ....	704
Order for time, how obtained ....	<i>id.</i>
Form of summons for time to plead ....	<i>id.</i>
Comprehensive form of order thereon.....	705
Usual terms, meaning of those words in an order for time.....	<i>id.</i>

CHAPTER XXI. <i>Of the Practice as to Pleas—(continued.)</i>	Page
Construction of the terms .....	705
<i>Pleading issuably</i> .....	706
What such a plea or not .....	<i>id.</i>
Special demurrer .....	<i>id.</i>
<i>Rejoining gratis</i> .....	707
<i>Taking short notice of trial</i> .....	708
Time in order, how construed .....	710
How soon plaintiff may sign judgment for want of a plea .....	<i>id.</i>
V. <i>Practice as to pleas</i> .....	<i>id.</i>
Taking declaration out of office when filed .....	<i>id.</i>
Practice relating to <i>pleas in abatement</i> .....	711
Time of swearing the affidavit in support of a plea in abatement, and of pleading such plea .....	712
Of pleas in bar .....	714
Forms and requisites of pleas in bar in general .....	<i>id.</i>
Form of a plea of non assumpsit, or other plea denying the whole or part of a declaration, and concluding to the country .....	715
The like to part of the cause of action, and another plea to other part or residue .....	<i>id.</i>
Commencement of a second plea to same matter .....	<i>id.</i>
<i>Formal parts of, in general</i> .....	<i>id.</i>
1. The title or date at top .....	716
2. Marginal title of cause .....	<i>id.</i>
3. Introduction or commencement of plea .....	<i>id.</i>
4. Body and general requisites .....	718
5. Conclusion .....	719
6. Signature of counsel .....	720
Delivering of plea .....	722
Of waiving or adding a plea, when .....	<i>id.</i>
Of pleading <i>de novo</i> to an amended declaration .....	<i>id.</i>
VI. <i>What plea may or must be pleaded</i> .....	723 to 731
What matters must be traversed or pleaded, or when a special plea is necessary .....	723
Denial of character or right in which plaintiff sues or defendant is sued, must be pleaded specially .....	<i>id.</i>
The new rules and decisions relating to pleas .....	724
Of sham or false pleas .....	729
Plea of judgment recovered .....	730
VII. <i>Of pleading double or several pleas</i> .....	731 to 737
Of double pleas, when allowed, and how to obtain leave to plead the same .....	731
Mode of obtaining leave, when necessary .....	732
Practice as respects a summons, &c. to obtain leave to plead double ..	733
What double pleas allowed .....	734
VIII. <i>Of applications to set aside plea</i> .....	737
IX. <i>Of several defendants joining or separating in their pleas</i> .....	<i>id.</i>

## CHAPTER XXII.

OF DISCONTINUING;—OF THE REPLICATION, REJOINDER, AND SUBSEQUENT PLEADINGS BETWEEN PLEA AND DELIVERY OF ISSUE;—OF PLEAS OF MATTER OF DEFENCE THAT HAS ARISEN PENDING THE ACTION;—AND OF SPECIAL CASES AFTER ISSUE AND BEFORE TRIAL.

	<i>Page</i>
I. Of Discontinuing .....	739
II. Of Replications.....	741
III. Of Rejoinders, &c. ....	746
IV. Of Pleas of Matter of Defence arising pending Action.....	749
V. Of Special Cases for the opinion of Court .....	750

## CHAPTER XXIII.

OF DEMURRERS, AND RECENT IMPROVED PRACTICE RESPECTING THEM.

I. Of demurrers in general, and when or not proper or advisable .....	752
II. The recent rules respecting demurrers .....	755
III. Summary of the recent improvements in the practice relating to demurrers .....	756
IV. Proceedings on argument .....	760
V. Of withdrawing demurrer or amending .....	761
VI. Of costs .....	762

## CHAPTER XXIV.

OF THE ISSUE AND NOTICE OF TRIAL.

I. OF THE ISSUE, &c. ....	763
General observations relating to .....	<i>id.</i>
Who to make up the issue .....	764
Time of making up and delivering the issue .....	<i>id.</i>
Form of the issue .....	765
Trial of issues and suggestions before the sheriff.....	770
Of the defendant's returning the issue when defective .....	<i>id.</i>
Of the defendant's ruling the plaintiff to enter the issue .....	771
Of the plaintiff's entering the issue.....	772
II. OF NOTICE OF TRIAL, &c. ....	773
When requisite .....	<i>id.</i>
Time of giving it .....	<i>id.</i>
Time to be thereby given to defendant .....	775
What in general .....	<i>id.</i>
What short notice of trial .....	776
Form of notice of trial .....	777
To whom to be given .....	778
Of continuing notice of trial.....	779
Of countermanding notice of trial .....	780
Of fresh notice of trial, when necessary .....	781
Conduct of defendant's attorney, when an insufficient issue or notice of trial has been served .....	<i>id.</i>
III. OF MOTIONS FOR COSTS OF DAY FOR PLAINTIFF NOT TRYING.....	782
IV. OF MOTIONS FOR JUDGMENT AS IN CASE OF NONSUIT.....	784
In general .....	<i>id.</i>
Reasons for and against that proceeding .....	785

<b>CHAPTER XXIV. <i>Of the Issue and Notice of Trial—(continued.)</i></b>	<b>Page</b>
The practice as to time of moving, &c. ....	786
What a sufficient excuse .....	791
What not .....	792
Of peremptory undertakings .....	793
Of enlarging same .....	794

## CHAPTER XXV.

### OF THE JURY AND JURY PROCESS, VIEWS, THE NISI PRIUS RECORD, AND ENTERING AND PASSING SAME.

I. Of the necessity for inquiry respecting the qualification, &c. of each juror ..	795
II. Of the jury process in general .....	796
Form of venire facias juratores .....	797
Distringas juratores .....	<i>id.</i>
Habeas corpora juratorum .....	798
Of the venire facias in particular .....	<i>id.</i>
Of the distringas and habeas in particular .....	<i>id.</i>
The practice in issuing and proceeding on each .....	799
Of the panels of jurors .....	800
What communications with jurors improper .....	<i>id.</i>
Of special juries .....	801
III. Of a view .....	803
IV. Of the record of nisi prius .....	804
Prescribed form of .....	<i>id.</i>
Suggestions in, when necessary .....	<i>id.</i>
Of making up and passing record .....	805
Times of entering same with marshal, &c. ....	806

## CHAPTER XXVI.

### OF THE EVIDENCE AND WITNESSES TO BE ADDUCED, AND CONDUCT TO- WARDS THE LATTER;—SUBPŒNA DUCES TECUM;—NOTICES TO PRO- DUCE;—NOTICES OF GROUNDS OF DEFENCE, AND ADMISSIONS, &c.

I. Necessity for what enquiry into the evidence before delivery of briefs ..	807
II. The rules of evidence coeval with the common law, and only modified by statutes .....	808
III. Considerations respecting evidence must be .....	809
First, what must be proved .....	<i>id.</i>
Secondly, how, or the modes of proof .....	<i>id.</i>
The best evidence essential .....	<i>id.</i>
When or not secondary evidence admissible .....	<i>id.</i>
Proof by witnesses .....	810
1. <i>Viva voce</i> .....	<i>id.</i>
2. On Interrogatories .....	<i>id.</i>
3. What witnesses incompetent .....	<i>id.</i>
Proof by documentary evidence .....	<i>id.</i>
Propriety of objection on account of interest considered .....	<i>id.</i>
Statute 46 G. 3, chap. 3, compelling a witness to give evidence against his interest .....	811
Consideration of rule preventing a witness from voluntarily giving evidence in favour of his interest .....	<i>id.</i>
Exceptions by statutes enumerated .....	814

<b>CHAPTER XXVI. <i>Of the Evidence and Witnesses, &amp;c.—(continued.)</i></b>	<b>Page</b>
In particular 3 & 4 W. 4, c. 42, sect. 26, 27, and decisions thereon .....	814
Examination of witnesses on interrogatories, or on commission under 1 W. 4, c. 22 .....	816
Thirdly, other recent improvements relating to witnesses and evidence .....	817
<b>IV. Professional conduct towards witnesses antecedent to the trial .....</b>	<b>821</b>
<i>Who</i> to examine them, and <i>how</i> as to their expected testimony .....	<i>id.</i>
Examination of all documentary evidence .....	825
Expediency of subpœnaing even doubtful witness or evidence .....	826
Improving education of a witness when practicable .....	<i>id.</i>
Readiness to release if necessary .....	827
Number of witnesses, or quantity of evidence to adduce .....	<i>id.</i>
<b>V. The practical proceedings to compel attendance of witness with documents .....</b>	<b>828</b>
Of the subpœna, and subpœna duces tecum .....	<i>id.</i>
The form and requisites thereof .....	829
The course of practice .....	<i>id.</i>
The copy of subpœna, and service .....	830
Time of serving .....	831
Tender of expenses .....	832
Expediency of instructing witnesses .....	<i>id.</i>
<b>VI. Notices to produce .....</b>	<b>834</b>
<b>VII. Notices of grounds of defence, &amp;c. ....</b>	<b>835</b>
<b>VIII. Of agreed admissions .....</b>	<b>837</b>

## CHAPTER XXVII.

### OF PREPARING FOR TRIAL, AND FINAL EXAMINATION OF THE EVIDENCE AND WITNESSES, AND DIRECTING THEIR CONDUCT.

<b>. OF PREPARING FOR TRIAL, FINAL EXAMINATION OF THE EVIDENCE AND WITNESSES. AND ASCERTAINING THEIR EXACT TESTIMONY .....</b>	<b>839</b>
1. How evidence and witnesses to be examined, and consequent utility ..	<i>id.</i>
2. Of releasing or removing the interest of witnesses .....	842
3. Consideration of the character and temperament of each witness .....	843
4. Instructions or directions to witnesses, when or not proper .....	<i>id.</i>
5. Directions to witnesses respecting their conduct just before the trial ..	845
6. Conduct of witnesses pending and after the trial .....	<i>id.</i>

## CHAPTER XXVIII.

### OF BRIEFS IN GENERAL—MODE OF PREPARING THE SAME—DELIVERY OF BRIEFS—CONSULTATION WITH COUNSEL—AND EXCLUSION OF WITNESSES.

<b>I. BRIEF FOR PLAINTIFF .....</b>	<b>847</b>
1. General observations as to the modes of preparing briefs .....	<i>id.</i>
2. Statement of the pleadings with marginal abstract .....	848
3. Observations on the effect of the pleadings as admitting or leaving it requisite to prove certain material facts .....	<i>id.</i>
4. Expediency in a declaration for slander, of a statement on a separate sheet of the words declared upon with and without innuendoes, and why .....	849

CHAPTER XXVIII. <i>Of Briefs in general, &amp;c.—(continued.)</i>		Page
5. Expediency of an early consideration of sufficiency of pleadings with view to immediate amendment . . . . .		849
6. A copy of the pleadings, with marginal analysis, and of the particulars of demand and of set-off, for the use of the judges . . . . .		850
7. Statement of the particulars of demand or set-off in the briefs with observations on the same . . . . .		<i>id.</i>
8. Great utility of a preliminary analysis of the facts of the plaintiff's case, and of the supposed defence, and of the answer to the same . . . . .		<i>id.</i>
9. Full statement of the case . . . . .		851
10. Statement of written documents, letters, &c. maps, plans, and models . . . . .		852
11. Utility of maps and plans . . . . .		<i>id.</i>
12. An analysis of the dates of all material facts to follow . . . . .		853
13. Observations on facts and points of law, and evidence relating to the plaintiff's case, and on the probable defence, and proofs in support thereof, and the answer to the same . . . . .		<i>id.</i>
14. Previous opinions of counsel or pleader to be stated at length, and not to be abbreviated or incorporated . . . . .		<i>id.</i>
15. Analysis of proposed proofs . . . . .		854
16. Mode of stating the proofs . . . . .		<i>id.</i>
17. Formal proofs . . . . .		855
18. Evidence of the merits . . . . .		<i>id.</i>
19. All the evidence to be given by the same witness to be stated consecutively . . . . .		<i>id.</i>
20. Age, character, inclination, &c. of each witness to be stated . . . . .		<i>id.</i>
21. Arrangement or order of the witnesses . . . . .		857
22. The proofs should state in detail the whole of the facts in the words of the witness, and not merely in reference to a prior part of the brief . . . . .		<i>id.</i>
23. Proofs in a brief for a tradesman's bill . . . . .		858
24. Statement of the expected defence, and evidence and witnesses in support thereof, and comments upon the same . . . . .		<i>id.</i>
25. Indorsement on the brief—fees, &c. . . . .		859
II. BRIEF FOR DEFENDANT . . . . .		<i>id.</i>
Statement of his proofs, and how obtained . . . . .		861
When defendant's counsel to be required to give evidence for defendant . . . . .		<i>id.</i>
III. WHEN A DIFFERENT STRUCTURE OF BRIEFS NECESSARY . . . . .		862
IV. BRIEF MERELY TO WATCH PLAINTIFF'S PROCEEDINGS . . . . .		863
V. DELIVERY OF BRIEFS TO COUNSEL . . . . .		<i>id.</i>
VI. OF THE CONSULTATION JUST BEFORE THE TRIAL . . . . .		864
Witnesses not to be present, and why . . . . .		865
VII. OF NEW DISCOVERIES JUST BEFORE THE TRIAL, &c. . . . .		<i>id.</i>

## CHAPTER XXIX.

### OF THE TRIAL AND ITS INCIDENTS.

1. General observations on trials . . . . .	867
2. Necessity for the attendance of the principal attorney during the trial, his early attendance with witnesses, and of the early attendance of the junior counsel, and why . . . . .	869
1. Caution not to try a cause out of turn . . . . .	870
2. Of calling witnesses on their subpoenas . . . . .	<i>id.</i>
3. Of withdrawing the record . . . . .	<i>id.</i>
4. Of postponing the trial . . . . .	871
3. Object and utility of opening speeches, and advantage of a reply . . . . .	<i>id.</i>

CHAPTER XXIX. <i>Of the Trial and its Incidents—(continued.)</i>	Page
4. When plaintiff's or the defendant's counsel are to begin .....	872
1. In general the counsel who has to prove the <i>affirmatives</i> of the <i>issue</i> .....	<i>id.</i>
2. Exceptions in actions for personal injuries .....	874
3. The practice in ejectment .....	876
4. Incorrect ruling of the judge, as to who is to begin, is no ground of motion for a new trial .....	877
5. Of the junior's opening the pleadings, and his conduct in general .....	<i>id.</i>
6. Of the leading counsel's opening speech .....	880
General considerations respecting the same .....	<i>id.</i>
The parts of such speech .....	881
<i>First</i> , Statement of the plaintiff's several claims and consequences of omission of a part .....	<i>id.</i>
<i>Secondly</i> , Statement of plaintiff's expected evidence .....	884
<i>Thirdly</i> , Anticipation of points of law .....	885
<i>Fourthly</i> , Anticipation of the expected defence and evidence in support of it, and observations on the same .....	886
<i>Fifthly</i> , Counsel's privilege of speech, and by what consideration it should be qualified .....	887
<i>Sixthly</i> , Junior counsel and attorney to observe such speech, and give hints as to omissions .....	888
7. Of plaintiff's giving evidence and calling witnesses, and the usual course of adducing the same .....	<i>id.</i>
8. Of defendant's counsel examining plaintiff's witnesses <i>on voir dire</i> , &c. and objecting to their competency or to the mode of examining them .....	889
9. Of the examination of evidence for the plaintiff in chief .....	890
1. Usual course of examination .....	<i>id.</i>
2. Right of leader to take the examination out of his junior's hands ..	891
3. Mode of examining in chief, and what questions to be put .....	892
1. They must be pertinent to issue .....	<i>id.</i>
2. Not leading questions and exceptions .....	<i>id.</i>
4. Order of proof .....	895
5. Whether counsel can discredit his own witness, and how .....	896
10. Of the cross-examination of witnesses, and rules respecting .....	897
1. Of the <i>right</i> to cross-examine, and utility thereof .....	<i>id.</i>
2. What disparaging questions may be asked on cross-examination ...	899
3. Mode of cross-examination and of leading questions .....	<i>id.</i>
11. Of the re-examination of the witnesses .....	901
12. Of calling back a witness in chief .....	<i>id.</i>
13. Of acquittal of one of several defendants at the close of plaintiff's case .....	902
14. The speech of defendant's counsel .....	903
1. In general .....	<i>id.</i>
2. Consideration when or not defendant's counsel should open and call evidence in support of a defence .....	<i>id.</i>
3. When no statement of new facts in favour of defendant to be made ..	905
15. Of several defendants defending separately, and several counsel and separate speeches to the jury for each .....	907
16. Of examining witnesses in direct contradiction of the evidence in chief ...	908
17. Of the <i>plaintiff's</i> counsel giving <i>evidences</i> in reply, and of the speeches and proceedings thereupon .....	909
18. Of the reply or concluding speech to the jury .....	<i>id.</i>
Of voluntary nonsuits .....	910
19. Of the Judge's summing up .....	911
His directions to the jury respecting costs .....	913
20. At what time to object to the judge's summing up .....	914
Misdirection of judge, when or not a ground of motion for a new trial ..	915

CHAPTER XXIX. <i>Of the Trial and its Incidents, &amp;c.—(continued.)</i>	Page
21. Of the jury withdrawing .....	916
22. Of discharging the juror .....	917
23. Of withdrawing a juror .....	<i>id.</i>
24. Of the verdict .....	918
25. Of defendant's compelling verdict on a particular count or issue .....	921
26. Of applications to correct verdict .....	922
27. Other occasional incidents of a trial .....	<i>id.</i>
28. Variances and amendments during trial .....	923
29. Of judge's certificates for immediate execution .....	924

---



## CHAPTER XIV.

INTRODUCTORY OBSERVATIONS ON THE PROCEEDINGS BETWEEN  
APPEARANCE OR BAIL ABOVE, AND THE CONCLUSION OF AN  
ACTION.

Division of the subjects of this Part	421	practice	425
I. Enumeration of the ordinary regular proceedings	id.	IV. Modes of proceeding relating to each	426
II. Enumeration of the occasional proceedings	423	V. Enumeration of the principal recent alterations and improvements in practice and pleading	427
III. Enumeration of the defective or irregular proceedings, whether in pleadings or			

THE proceedings in an action after the defendant's appearance to serviceable process, or bail above have been put in and perfected to bailable process, may be arranged under four *principal heads*, viz.

## CHAP. XIV.

Division of the subjects of this part.

- I. The *ordinary regular proceedings* in a contested action.
- II. *Occasional proceedings* in an action; and under which division may also be arranged the occasional proceedings without any pending action.
- III. *Proceedings attributable to some informality or substantial defect* in the *pleadings* or *judicial* proceedings, or to some *irregularity* in the *practical* proceedings, or in the conduct of the ordinary or occasional proceedings.
- IV. The *modes of proceeding*, whether on the part of the plaintiff or defendant, in either of those three cases.

I. The *usual regular proceedings* in an action relate to the *pleadings*, whether declaration, plea, replication, rejoinder, surrejoinder, rebutter, or surrebutter, and to the *issue* joined upon an affirmative on one side, and negative on the other; or to the *delivery* of the *issue* and *notice of trial*; or the making up and passing the *record of nisi prius*; or the causing the *jury process* to be issued and executed, so as duly to convene the *jury* before the *judge*, (or now sometimes the *sheriff*;) appointed to try causes at *nisi prius* in London or Middlesex, or

I. Enumeration of the ordinary regular proceedings.

(a) N. B. The last part concluded with page 408. It has been deemed advisable in commencing this part, to leave a space between that page and this chapter, for the introduction hereafter of any

enactments and decisions relative to the proposed alterations in the law of arrest, and which, when enacted, will be supplied to the purchasers of this part.

CHAP. XIV. on the circuit, (or if the debt do not exceed £20, the writ of trial before the under-sheriff or local judge); or to the subpoenaing *witnesses*, or examining them on interrogatories, if they be going abroad or actually abroad, and adducing the *evidence*; or to preparing and delivering the *briefs* to counsel, *consultation* with them thereon, and *conduct pending the trial*, to the *verdict*, taxing the *costs*, and signing the *judgment*; and lastly the *execution*.

Between each of these there frequently are numerous regular but less important steps, principally of a practical nature, to compel the opponent to proceed; as, on the part of the *defendant*, a rule peremptorily requiring the plaintiff to declare by a certain time, and a demand of declaration before a judgment of non-pros can be signed; and on the part of the *plaintiff*, a *notice* to plead, *rule* to plead, and *demand* of plea; and again on the part of the defendant, a demand of replication, or a motion for judgment as in case of a nonsuit, to compel the plaintiff to try, or a trial by proviso, where the defendant himself takes down the record for trial.

Of the different warnings on each side in the course of an action.

We have seen that in the case of process, a defendant is bound, without any *further notice* than that given by the process itself, to enter his appearance, or put in bail above, within the limited time; but in the *subsequent stages* of an action, it appears to have been in general considered just, that two, or even three, additional warnings or notices should be given before either party shall be allowed to take an adverse measure in consequence of his opponent's neglect. (a) Thus formerly, although a plaintiff was bound to declare before the expiration of a certain time after the return of process, unless he had by leave of the Court or a judge obtained further time, yet a defendant could not sign judgment of non-pros until he had *ruled the plaintiff to declare*; and in the Courts of Common Pleas and Exchequer he must also have *demanded* a declaration four days before he could sign such judgment. So although a defendant was bound to plead within a certain time after he had notice of the plaintiff's declaration, yet the plaintiff could not sign judgment by default for want of a plea, without first giving the defendant *a notice to plead*, and also *ruling him to plead*, and further

(a) And yet if inadvertently a special plea, though in fact settled by counsel, be not signed by him when requisite, and be delivered without such signature, the plaintiff, although he knows the defendant has a just defence on the merits, may treat

it as a nullity, and without any intimation or notice may sign judgment as for want of a plea, and issue execution in an action of debt. A practice which unquestionably demands alteration. See *post* as to irregularity.

*demanding* a plea twenty-four hours before signing judgment. These and numerous other, perhaps redundant, warnings, certainly considerably increase the expense of an action, and not unfrequently, instead of being received, as originally intended, friendly and liberal warnings, or intimations of the necessity for the party to whom they are given taking some step in the cause, are, on account of some trifling deviation from the established practice, treated as irregular, and made the subject of vexatious and expensive motions also occasioning delay; and, therefore, the recent *rules* have dispensed with *some* of such superabundant warnings, as in the instance of the rule to declare, and the rule to reply, &c. which are no longer necessary; but still there are too many useless proceedings, which, if abolished, would not only lessen the costs of an action, but also diminish the risk of irregularity incident to every step; and if a defendant, on the service of a writ, is to be bound without further caution to enter his appearance in eight days, it may be inquired, why should he not be equally bound to plead at a specified time, without expecting also a *notice* to plead, a *rule* to plead, and a *demand* of plea?

II. The *occasional* proceedings are very numerous, and may be subdivided under several heads; as *first*, before any defence is made, a summons or motion *to stay the proceedings* until the plaintiff, who is abroad, or is in insolvent circumstances, has given security to pay costs; or to stay proceedings on the ground that another action is depending for the same subject-matter, or because the action is frivolous, as for too small a debt, or is vexatious, or contrary to good faith. Under this head also may be arranged applications under the interpleader act, 1 & 2 W. 4, c. 58, in cases of actions or proceedings against a sheriff, or a stakeholder, or party who claims no interest in the subject-matter, but only seeks to be indemnified, and to compel the real claimants to contest the matter inter se, and not at his expense. Various other applications either of a general or of a particular nature, and founded either on the common law or on a particular statute, as under the annuity act, or mortgage act, or landlords' act, &c. may also here be classed. Applications to consolidate several actions that may properly be joined, are also of this description.

II. Enumeration of the occasional proceedings.

*Secondly*, are applications preparatory to a defence; as for particulars of demand, demand of oyer, or inspection of public or private documents, &c.

## CHAP. XIV.

*Thirdly*, are the *occasional proceedings where there is no defence*, or only a partial defence; as first, when the defendant, to prevent an increase of costs, proposes, and the plaintiff accepts, a *cognovit* or a *warrant of attorney*, either before or after plea, and agrees to *withdraw* such plea or enter a *re-traxit*, as it is technically termed, or proposes and the plaintiff assents to compound a penal action, if the Court will give leave; or where a defendant, having no defence, suffers *judgment by default*, upon which there is in an action of debt an immediate final judgment and execution, and in other actions either a *writ of inquiry*, and an inquisition or verdict thereon, judgment and execution; or in cases of bills of exchange, promissory notes, checks, or actions for rent or mortgage money in arrear, a *reference to the master* to compute the principal money and interest remaining due.

Proceedings, where there is only a *partial defence* to the action, are, when it is expedient to *pay money into Court*, either of right at common law, or under the 3 & 4 W. 4, c. 42, sect. 21, even in actions for torts to personal or real property, by leave of the Court or a judge; or to apply to stay the proceedings on restoring to the plaintiff the chattels, or a part, in an action of detinue or trover.

Pleas of matter of defence, arising *pending the suit*, before the late rules putting an end to the entry of continuances, termed pleas *puis darrien continuance*, though they may be of matter before or after issue joined, may also here be classed.

*Special cases*, either stated by consent after issue joined under the 3 & 4 W. 4, c. 42, to save the costs of a trial when there are no disputed facts, or stated on or after the trial at common law by the direction or recommendation of the judge or Court, in order to settle a question of law arising upon admitted facts, may also be classed amongst the occasional proceedings.

*Special verdicts* also are occasionally given, and obviously fall under the same arrangement; and in each of these the Court in banc hear arguments and decide deliberately what judgment shall be given.

Applications by a plaintiff for leave to *discontinue*, or his voluntary entry of a *nolle prosequi*, or submitting to a *non-pros*, judgment as in case of a nonsuit, or a *nonsuit*, are also occasional proceedings when a plaintiff, in the course of his action, discovers that it is not sustainable either in part or the whole, and submits to one of these modes of determining the same.

The instance of a judge *discharging* a jury who cannot come

to a decision, or of the parties consenting to *withdraw a juror*, CHAP. XIV.  
may also be arranged under this head of *occasional proceedings*.

III. The *third principal division* relates to *incorrect pleadings*, or *irregular practical proceedings*, arising pending a suit, and to the *modes of objecting* to the same.

III. Enumeration of the defective or irregular proceedings, whether in pleadings or practice, and modes of objecting.

The first of these are defects in the *pleadings*, and which are to be taken advantage of by *demurrer*. These may arise in any stage of pleading, as in the declaration, plea, replication, rejoinder, surrejoinder, rebutter, surrebutter, or plea pending the action, formerly called *puis darrien continuance*, in respect of some *informality* or *substantial defect*, either in stating the plaintiff's cause of action, or the defendant's ground of defence, and which, if the objection be a mere technical defect, must, under the statute 4 Ann. c. 16, be stated or assigned *particularly* as cause of *special* demurrer; and according to the recent rule of Court, Hil. T. 4 W. 4, r. 2, the points or substance of which must in all cases, whether of general or special demurrer, be *concisely stated in the margin*, and if frivolous the opponent may *with leave* sign judgment; the party whose pleading is objected to, thereupon either applies for leave to amend, or if he be advised that his pleading is sustainable, or that the previous pleading of his opponent is substantially defective, he *joins in demurrer*, and thereupon one of the parties *sets down* the demurrer for argument, and *paper books* are to be delivered to each of the four judges presiding during that term, who, on the two appointed days in each week during the term, hear the arguments of counsel, and give judgment upon the matter of law thus brought before them.

When the defect in the *pleadings* is substantial, or not aided either by the common law or by the above or any other statute of amendment or jeofail, then, even after verdict, the party may *move in arrest of judgment*, or for judgment in his favour *non obstante veredicto*, or notwithstanding the verdict, or may sustain a writ of error in the Exchequer Chamber or the House of Lords.

So, *pending* a trial, if the learned judge should inadvertently admit evidence by law inadmissible, and which is objected to at the time, a *bill of exceptions* may be tendered by the party who supposes he may be thereby prejudiced, and if the judge should misdirect the jury upon the *effect* of the evidence, then the party may tender a demurrer *to the evidence*, and by either of these proceedings the question of *admissibility* of the evidence or on its *effect*, may be formally brought before the Court

CHAP. XIV. *in banc*, and even afterwards discussed in a *Court of Error*, viz. the Exchequer Chamber or House of Lords, though in actions of small importance, to save expense, it is more usual for the judge expressly to reserve the point or give the parties liberty to move to enter a nonsuit, or for a new trial, or to state a special case.

*Irregularities* arising either in *practical forms* or in the *time or manner of conducting* the *practical* proceedings in an action for the plaintiff or the defendant, and in every stage from the affidavit to hold to bail, and the issuing process, whether serviceable orailable, to the levy of execution, and even the entry of satisfaction of the judgment on the record, constitute unhappily too frequent subjects of application to a judge, or to the Court, and until professional men shall have become more liberal, or the temptation of obtaining *costs*, however small, from the opponent, shall have been removed, or greatly limited by new regulations, it is to be feared will continue.

The judges who would introduce a general imperative rule, that no irregularity or objection, either in pleading or practice, should be taken advantage of, unless the party objecting shall have first given to his opponent notice of the objection, and afforded him a reasonable opportunity of rectifying it, without great increase of expense, would deserve the thanks of the profession and of the public; of the former, in consequence of being rendered more respectable; and of the public in respect of the amelioration in the administration of justice.

IV. Modes of proceeding relating to each.

IV. As regards the *modes* of proceeding, very little consideration will demonstrate that, as it is a principle in the administration of justice that the parties to a suit shall in most cases have the benefit not only of the decision of a single judge, but also of the Court *in banc*, and even of a Court or Courts of appeal, upon their *substantial rights*, all parts of the proceedings in which the *right or defence* is stated, viz. the *pleading*, together with bills of exceptions, demurrers to evidence, and special verdicts, and judgments, must be stated *with formality on the record*, so that there may not afterwards in a Court of appeal be any difficulty in ascertaining the precise point that has arisen and is to be discussed, and any supposed insufficiency in the *pleadings* must, for the same reason, be pointed out by demurrer, and if a mere technical objection to the pleading, by *special* demurrer, so as to notify the objection to the opponent, and afford an opportunity of amending.

With respect to the *practical proceedings*, or modes of conducting the action or defence, and which are certainly of minor importance to the *pleadings*, they do not appear on the face of the record; and if there be any objection, there are two modes of bringing it forward for decision, viz. by *summons* before a judge, or by *motion* to the Court in *banc*. The general rule is, that when the defect in a *practical proceeding* is of comparatively *small importance*, then, to avoid the costs of *affidavits*, *briefs* to counsel, rules nisi, affidavits and briefs to counsel in answer, and rules absolute, the application should be made to a *single judge at chambers* by *summons*, and his *order* be obtained, though sometimes particular statutes expressly require matters much of course to be disposed of *in banc*, and in those cases a single judge has no jurisdiction at chambers. (b)

As many questions of *irregularity*, especially those affecting the practice of *all* the Courts, require considerable discussion and consideration, there are numerous points that must be, or usually are, decided upon in *banc*. Indeed *the costs of proceedings* are now frequently even more important than the principal subject-matter in dispute, and therefore the parties are usually anxious to obtain the decision of the higher tribunal, i. e. *the judges in banc*. (c) In the first chapter of this volume, we concisely considered what proceedings usually take place in *banc*, what in the Practice Court, what before a single judge at chambers, what before the master or prothonotary, what before a judge at nisi prius, and what before the sheriff or his deputy upon a writ of inquiry or writ of trial. All those subjects will in the following pages be more fully considered in distinct chapters.

V. *Enumeration of recent improvements*.—In the present reign, *great improvements* in practice and pleading have been established; 1st, In assimilating the process and practice in the three superior Courts, before very multifarious, contradictory, perplexing, and consequently hazardous. 2ndly, By abolishing many useless proceedings pending an action, occasioning unnecessary expense. 3rdly, In very materially shortening the pleadings, and simplifying the issue to be tried. 4thly, In requiring all pleadings to be *delivered* to the opponent or his attorney, instead of being filed. (d) 5thly, In

V. Enumeration of the principal recent alterations and improvements.

(b) *Ante*, vol. iii. 24, 26, 27.

(c) See *ante*, vol. iii. 7, as to the advantages resulting from a discussion in *full Court*; and see *Beck v. Young*, 1 Crom. M. & Ros. 44, and 3 Dowl. 280, where a very learned judge candidly ad-

mitted that he had erroneously decided, *Beck v. Young*, 2 Dowl. 462.

(d) Reg. Gen. Hil. T. 4 W. 4, r. 1. Except in cases where the plaintiff has entered an appearance for the defendant, in consequence of his neglect, and neither

CHAP. XIV. reducing the number of witnesses, and the expense of evidence on a trial. 6thly, In enabling a judge or sheriff to *amend* variances appearing during a trial. The practice has in these and some other respects been altered, and in many respects improved, during the few years of the present king's reign, in a manner unparalleled at any other period of history, and to a degree entitling the judges to the warmest thanks of the community.

Proposed arrangement of the subjects.

It is proposed in the following pages to examine most of these several proceedings, as well those which are ordinary, or only occasional, or which are attributable to informalities in the pleading, or irregularities in the practical proceedings, in one continuous view, introducing each at the stage in the cause when it usually occurs; and sometimes suggesting when or not it may be advisable to resort to a Court of equity, or to adopt some cross adverse proceeding.

With respect to the *arrangement* of these subjects, authors have differed. Mr. Tidd has, in his justly admired treatise, considered as well the *ordinary* proceedings as the *occasional* proceedings, and those which are *defective* or *irregular*, and the modes of objecting *in the usual and natural order of a suit, and at the times when each of these proceedings usually arise*; whilst in Mr. Serjeant Sellon's Practice and other more recent treatises, the *ordinary* and *regular* proceedings are *first separately* considered, and the *occasional* and *irregular* proceedings are examined in a second part or volume. In this summary of the *present* practice, Mr. Tidd's arrangement will be preferred.

---

the residence of the defendant or of his attorney be known, in which case, though only *with leave* of the Court or a judge, the declaration may be *filed*, and notice

thereof stuck up in the office. *Martin v. Colvil*, 2 Dowl. 694; *Watson v. Delcroix*, *id.* 396.



## CHAPTER XV.

## OF THE INSTRUCTIONS FOR DECLARATION AND THE DECLARATION ITSELF, AND PROCEEDINGS THEREON AS PRACTICALLY AFFECTED BY THE RECENT STATUTES AND RULES.

SECT. I. Instructions for declaration, and professional duty in this respect.....	429	ment of nonpros.....	448
II. Knowledge of pleading why essential to an attorney; considerations how far it may be advisable for him to draw pleadings, and whom he should retain for that purpose.....	431	SECT. VI. Of the declaration itself in general. (a)	450
III. How to enforce inspection and copy of a written document, to enable the plaintiff to declare.....	433	First, Chronological statement of the recent statutes and rules affecting declarations, &c.....	451
IV. Time of declaring in general. (a) .....	436	Secondly, Practical summary of, and observations upon, the parts of a declaration as altered or affected by the recent statutes and rules .....	462
V. Proceedings by a defendant to compel the plaintiff (a) to declare, and of judg-		Thirdly, Other practical matters connected with declarations .....	489
		VII. Of accompanying particulars of demand when requisite (a) .....	496

## SECT. I.—OF THE INSTRUCTIONS FOR DECLARATION, AND PROFESSIONAL DUTY IN THIS RESPECT.

IMMEDIATELY after the defendant has been served with process, or arrested, (and indeed even before issuing the writ in cases of difficulty,) it is advisable on the behalf of the plaintiff to *expedite* his action by causing his declaration to be *prepared*. And for that purpose, whether such declaration is to be drawn or settled by the plaintiff's attorney, or by a pleader, or barrister, it is always advisable, first, to prepare *full written instructions*, by stating with great care, accuracy, and consideration, all the facts, as well relating to the *plaintiff's cause of action*, as to the *expected defence*, because the very act of

CHAP. XV.  
INSTRUCTIONS  
FOR  
DECLARATION,  
&c.

## I. Of the Instructions for Declaration, and professional duty in this respect.

(a) At the head of each of the last four divisions in this analytical table there will be found numerous subdivisions, in or-

der to render the arrangement more perspicuous and the points more readily accessible.

CHAP. XV.  
INSTRUCTIONS  
FOR  
DECLARATION,  
&c.

---

reducing the statement *into writing* will necessarily secure more particular examination and a more accurate view and deliberation upon the facts. (b) The instructions *to sue*, if obtained before issuing the writ in the manner already stated, (c) together with a statement of any subsequent discoveries, and a copy of the *præcipe* for the writ, or at least a statement of the exact *form of action* named in the latter, would in general suffice. In preparing the instructions for the declaration, practitioners are to keep in view two very serious and responsible duties to which the law subjects them. *First*, They must not be satisfied with receiving and communicating to the pleader or barrister the statement merely of the client, but they should exert a diligent and acute inquiry into the *evidence* in support of the statement of every fact that might either substantially or technically affect either the plaintiff's cause of action, or the form of the declaration or the defence. (d) And the barrister settling the declaration also should exercise similar care, and, until he be satisfied, should require *further instructions*. Thus, in a recent case, although the client instructed his attorney that his claim was so much for use and occupation, and the attorney caused the declaration to be framed in *assumpsit* for *use and occupation*, and it afterwards appeared that the rent was due upon a *lease*, of which the defendant had executed a counterpart *under seal*, and thereupon it became necessary to commence a fresh action of *covenant*, the Court held that the attorney had been guilty of *crassa negligentia*, for that it was his duty pressingly to have inquired of his client whether there was a lease, and to have examined it. (e) *Secondly*, it is the duty of the plaintiff's attorney, even after the declaration has been settled by counsel, to examine the same with care, and he is bound well to know every count therein, (f) and to consider, not only whether the declaration, as a whole, has been properly framed, but whether there are too many counts, or one which would subject the plaintiff to any costs if he did not succeed; (f) and if he doubt, he should suggest such doubt to the barrister who settled the draft, and in pru-

---

(b) *Ante*, part v. vol. iii. 117—123.

(c) *Ante*, vol. iii. 117—123.

(d) It would afford no excuse to say, How can it be expected that I should incur the trouble and expense of a minute inquiry and examination of perhaps distant witnesses for the trifling fee of 6s. 8d. allowed in taxing costs for instructions for a declaration? The answer is, that the

plaintiff's attorney should suggest to his client the necessity for full inquiries, and in the presence of a witness obtain instructions to examine each witness, and then he might sustain charges for his actual journeys, attendances, and expenses.

(e) *Cliffe v. Prosser*, 2 Dowl. 21.

(f) Per Lord Lyndhurst in *Tomlinson v. Nanny*, 2 Dowl. 17.

dence obtain his decided opinion that the declaration is proper. A similar duty attaches on the attorney for a defendant.

CHAP. XV.  
KNOWLEDGE  
OF PLEADING  
WHY ESSENTIAL  
TO AN  
ATTORNEY,  
&c.

SECT. II.—KNOWLEDGE OF PLEADING WHY ESSENTIAL  
TO AN ATTORNEY:

It would be desirable for every attorney, by his attention to the subject during his pupilage, or by subsequent study, to render himself *competent* not only to save his client some expense, but in all cases *to secure the accuracy of the pleadings by studying* the subject of *pleading*, now so intimately connected in several respects with practice; and thus to *qualify himself to draw declarations*, at least in actions upon bills of exchange, promissory notes, and for small and common debts, whether in assumpsit or debt, or even in those actions where the forms are generally fixed, as upon a policy of insurance, warranty of a horse, covenant for rent, and a few others; and in most cases at all events to be able to judge of the due application of pleadings framed by a barrister or pleader to the facts of the case; and if he doubt, to suggest alterations. (g) The ablest pleader may occasionally *misunderstand facts*, or *misapply* the best *precedents*; and a client's success, or at least his liability to some, if not all the *costs*, may frequently depend on the suggestions of his attorney. But, with the exception of the most common debts, as upon a tradesman's or workman's bill against his customer or employer, or a claim for money lent, the modern rules have certainly rendered it most prudent for the plaintiff's attorney to avoid censure and personal responsibility by laying full and accurate instructions for the declaration before a barrister of some standing, (h) either to prepare or settle the draft already prepared as before suggested, or an *experienced pleader*. (i) And where the prin-

II. Knowledge of pleading essential to whom; and considerations how far it is advisable for an attorney to interfere in drawing pleadings, and whom to retain.

(g) I have purposely prepared the sixth edition of my Treatise on Pleading on a plan adapted not merely for the assistance of special pleaders, but also for the use of all practitioners in the Common Law Courts. The new rules of pleading, especially those of HIL. T. & W. 3, have rendered such adaptations essential; and it will be found that in future every attorney must make pleading a part of his study and attainments, or he will be incompetent to conduct an action with safety to its conclusion.

(h) In general, if an attorney has caused

the pleadings to be settled by counsel, and they should turn out defective, without any fault in the instructions, the attorney will thereby be protected from personal liability to his client, and may even recover his fees, *ante*, vol. ii. 22, 32, 33; *Polls v. Sparrow*, 6 Car. & P. 749; *Harris v. Dalby*, K. B. 9 Feb. 1835, MS. Another advantage results, viz. that the counsel who has settled pleadings necessarily considers himself more particularly called upon to support them.

(i) In using the term *experienced* it must be understood that after a student

CHAP. XV.  
KNOWLEDGE  
OF PLEADING  
WHY ESSENTIAL  
TO AN  
ATTORNEY,  
&c.

cipal attorney, or an intelligent clerk, who has fully examined into the facts and evidence, is in or near the metropolis, it may be advisable to have a *conference* with the gentleman who is to settle the draft, by which frequently important facts or evidence may be elicited that would otherwise escape attention until too late. (*k*)

In general *copies*, and not original documents, should accompany the instructions, unless the making copies would occasion considerable expense. It is desirable to give full copies, and not mere abstracts, for an experienced pleader, without regard to increase of labour, will always, in order to secure accuracy, prefer the *fullest* instructions, however voluminous, to a mere analysis, so as to enable him to frame and complete the declaration in the *first instance*; for if not *then* perfectly applicable to the real state of facts, it will frequently occur that adequate alterations cannot, or at least may not, afterwards be so well introduced as in the original structure. For the same reason it is preferable (with the exception of copies in draft size of the parts of written agreements, leases, charter-parties, or other documents which it may be confidently expected will be set forth in the declaration, and which would therefore save time,) not to attempt to assist the pleader by laying before him a ready prepared draft, unless in the most ordinary cases, but rather to leave him to frame the entire declaration according to his own uninfluenced original view and judgment. (*l*)

has seen practice in the office of a barrister or special pleader known to have had *considerable* business for an *adequate time*, and has also *very sedulously* studied the law in general for two or three years, his zealous and anxious attention to any business confided to him will probably make up for his want of *great* experience, and the amiable and friendly desire to encourage a beginner may with propriety be indulged. But it should be understood that no practitioner who justly attends to his *client's interest*, or who duly regards his own responsibility, will be justified in countenancing the scarcely honourable practice, of late too prevalent, of some persons assuming to practise as pleaders without having been pupils or seen practice in a pleader's office *for more than a year, or even half a year, when at least two years, besides considerable private reading, are indispensable*. It is degrading to the profession, and dangerous to suitors, that any person, merely because he has professional connection, should convert a scientific profession into a mere venial trade, and assume to practise when he must

know that he possesses too little theoretical and still less practical knowledge. If this practice should continue to be tolerated by practitioners, there will be no limit to vexatious nonsuits and illjudged defences. In the recent reports of decisions numberless cases of manifestly defective pleadings, even in actions on bills of exchange, will be found evidently drawn by persons who scarcely knew the name of that instrument, and some cases in which, by the mispleading, the parties were deprived of a valid and just defence.

(*k*) It may be proper to intimate, that such a conference, merely more effectually to secure accuracy in the pleadings, should be without additional fee or expense to the client.

(*l*) I have known pleaders under the bar less careful, if not slovenly, in their drafts, when they have ascertained that they are to be settled by counsel; whilst some counsel, relying too much on the supposed accuracy of the pleader, have overlooked the previous want of care, and the client has in the result suffered.

## SECT. III.—HOW TO ENFORCE INSPECTION AND COPY OF DOCUMENTS, IN ORDER TO PREPARE DECLARATION.

Anciently, if a plaintiff had neglected to secure in his possession a part of a deed or agreement, wanted in order to frame his declaration, he was obliged to file a *bill in a Court of equity for a discovery*, (n) and this is still sometimes necessary; but now, to save the expense and delay of that proceeding, it is an *established* practice in most cases, when essential for the purposes of justice, that if a defendant has in his possession the only original document executed by him, and he upon due application has refused to produce the same for inspection, or to deliver a copy, a judge at chambers will make an order, or the Court a rule, for the defendant to produce the document, and give a copy to the plaintiff, at his expense, *in order that he may declare thereon*, and even to produce the same before the commissioners of the Stamp Office, to be stamped, or to the plaintiff's attorney, in order that he may ascertain the names of the witnesses, so as to subpoena them. (o) And it has been further ordered, that the defendant shall produce the original document on the trial; (p) and a defendant has no right to impose terms on the plaintiff, as to admit a tender, or that he shall refer to arbitration. (q) Indeed it is said that Lord Mansfield laid down a rule that *whenever* a party would be entitled to a *discovery*, he should have it at *law*, without going *into equity*, (r) but that position is much too broad and unqualified; and recently a bill, in which it was proposed to compel extensive discovery at law, was negatived in the House of Lords. (s) And in an action against the marshal for an escape, the Court compelled him or his officer to permit the plaintiff to inspect the writ of habeas corpus and return, and the commitment thereon. (t) But in an action of debt against the bailiff of Dover Castle, for extortion on taking a bail bond under a warrant, a learned judge at chambers refused an order for a copy

III. How to enforce an inspection and copy of a written document in possession of a defendant, in order to declare thereon. (m)

(m) See in general Tidd, 9 ed. 589 to 596; 2 Arch. K. B. 4 ed. 870 to 874.

(n) See *ante*, vol. ii. 48 to 55; and see the Newspaper Act, 38 Geo. 3, c. 78, sect. 28.

(o) Tidd, 9 ed. 487, 589 to 596; 2 Arch. K. B. 870 to 874; *Wright v. Cross*, 2 Dowl. 651, n. (a); *Reid v. Colman*, 2 Cr. & M. 456; 4 Tyr. 274; 2 Dowl. 354, S. C.; *Vaughan v. Trewent*, 2 Dowl. 299.

(p) *Morrow v. Saunders*, 1 Brod. & B. 318; 2 Arch. K. B. 4 ed. 871; but

see *Doe v. Slight*, 1 Dowl. 163.

(q) *Read v. Coleman*, 2 Dowl. 354; 2 Cr. & M. 456; *Vaughan v. Trewent*, 2 Dowl. 299, S. P.

(r) *Barry v. Alexander*, Mich. 25 Geo. 3; K. B. Tidd, 9 ed. 592.

(s) Lord Wynford's Bill in Lords, A. D. 1833; and see the practice and instances, Tidd, 9 ed. 589 to 596; 2 Arch. K. B. 4 ed. 870 to 874.

(t) *Fox v. Jones*, 7 Bar. & Cres. 732; 1 Man. & Ry. 570, S. C.; *Cooper v. Jones*, 2 Maule & Sel. 202.

CHAP. XV.  
ENFORCING IN-  
SPECTION OF  
DOCUMENTS.

or inspection of the warrant to enable the plaintiff to declare accurately, stating such warrant. (u) The last, and some other contradictory cases, appear to render it expedient, in support of a summons of this nature, *by affidavit*, (x) very distinctly to show that every other expedient to obtain the requisite information has been tried without effect, and that an order is essential for the purpose of justice, and also to be prepared with a reported decision precisely in favour of the particular application. (y) In order to support an application to a judge or the Court, *a civil letter*, requesting an inspection of the document, and a copy, at the expense of the plaintiff, and stating the necessity for a copy, in order to declare, should first be written to the defendant or his attorney, and if refused, then every other means should be adopted to obtain a copy, as by applying to the attorney who prepared the document, for a copy of his draft. If all exertions should fail, then an affidavit, shortly stating the nature of the action, and that it is for a just demand, and that the defendant has in his possession the only document, (showing under what circumstances, if favourable to the application, as that at the time the original was delivered to him it was agreed that the plaintiff should at all times have access to it,) and that the defendant has refused, upon a civil

(u) *Ante*, vol. III. 358, note (o); *sed quære*, the cases in the last note were not cited.

(z) In the K. B. [or "C. P.," or "Exch. of Pleas,"]

Between { A. B. Plaintiff,  
and  
C. D. Defendant.

Affidavit to  
ground an ap-  
plication to ob-  
tain inspection  
of an agreement.

A. B. of —, [builder,] the above-named plaintiff, and P. A. of —, his attorney, severally make oath and say, and first this deponent, the said A. B., for himself saith, that on or about the — day of —, he this deponent entered into a contract in writing with the above-named defendant, for [the building of a house, No. —, in — street, in the county of —], which said contract was left in the custody of the said defendant; and the said A. B. and P. A. severally say, that they verily believe that the said contract is still in the custody of the said defendant, or his attorney, and that the plaintiff is entitled to recover in this action. And this deponent P. A. says, that he did, on, &c. apply to and request the said defendant to allow an inspection of the said contract by him, as the attorney of the said plaintiff, and to give him a copy thereof, at the same time offering to pay the charges so to be incurred on that account, and that the said defendant did not give either the said inspection or copy [but referred this deponent to his attorney, Mr. —, of, &c.] And this deponent further saith, that he did, on, &c. apply to the said Mr. —, and request inspection and copy of the said contract, and then offered payment for the same, but that he could not obtain either an inspection or copy, and that this deponent did then inform the said Mr. —, that unless the same was supplied on or before the — day of, &c. instant, he should consider that such inspection and copy were refused. And these deponents severally say, that the said inspection and copy have not, nor hath either of them been yet granted to them, or either of them, or to any other person on the account of the said plaintiffs. [State any other fact that may induce the Court to grant the application, as that the plaintiff has no counterpart or copy, &c.] Sworn, &c.

A. R.  
P. A.

(y) See the decisions collected in Tidd, 9th ed. 589, &c.; 2 Arch. K. B. 4 ed. 870, &c.

application, (annexing a copy of the letter,) to comply therewith, and that all other means to obtain a copy have been used without effect, and then showing that the plaintiff has been advised, and verily believes, that a copy is essential to enable him to declare. (x) It has however been held not to be necessary that the affidavit should disclose the nature of the action, (a) though still it will be advisable to show that it is justly sustainable.

The application now ought in the first instance to be *by summons*, and not even to the Practice Court, or still less the Court in banc, (b) though formerly it was certainly the practice to apply to the Court. (c) And although the Court in banc unquestionably *may* interfere and make a rule to the same effect, yet unless there has been a previous application to a judge at chambers, they will either refuse the costs of the application, or direct that no more costs shall be allowed than if the application had been made to a judge at chambers, or direct that the expenses shall be costs in the cause. (d) It is usual, when the document has not been stamped, to make it part of the application that it be produced at the Stamp Office; but as the proper stamp and penalty must in that case be immediately paid by the plaintiff, so much of the application seems premature, for the expense of the stamp and penalty might be saved by the subsequent course of pleading, or by admissions; and therefore it is advisable not to make the production at the Stamp Office, or the stamping, part of the application for a copy, but to delay an application for the latter purpose until a reasonable time before the trial. (e)

(x) As to this affidavit, see *Rundle v. Beaumont*, 1 M. & P. 396; *Morrow v. Saunders*, 3 Moore, 871; 1 Brod. & B. 318, S. C.

(a) *Morrow v. Saunders*, 3 Moore, 871; 1 Brod. & B. 318, S. C.

(b) *Wright v. Cross*, 2 Dowl. 651, note (a); *Reid v. Coleman*, 2 Cr. & M. 456; 3 Dowl. 354; *Vaughan v. Trewent*, 3 Dowl. 299. The terms of the summons, or rule, when necessary, will be "to show cause why the defendant shall not produce to the plaintiff or his attorney an agreement between the plaintiff and the defendant, supposed to bear date on, &c. and at the expense of the said plaintiff, deliver to him a copy of such agreement, to enable him to declare thereon, and forthwith produce the said

"agreement at the Stamp Office at Somerset House, to be stamped at the expense of the plaintiff, and be produced in evidence by the said defendant, on the trial of this cause." But the stamping, as suggested in the context, may be delayed until a subsequent stage in the cause.

(c) Tidd, 9 ed. 589, 590.

(d) *Reid v. Coleman*, 2 Crompt. & Mee. 456; 3 Dowl. 354; *Vaughan v. Trewent*, 2 Dowl. 299; *Wright v. Cross*, 3 Dowl. 651, (a); 2 Arch. E. B. 4 ed. 872.

(e) Especially as the proceedings under Reg. Gen. Hil. T. 4 W. 4, r. 20, would now probably lead to an admission of the written document, or that an unstamped copy shall be read in evidence. *Post*.

Form of summons to produce, &c.

CHAP. XV.  
TIME OF  
DECLARING.

SECT. IV.—TIME OF DECLARING.

1. How soon formerly and at present plaintiff may declare ..	437	delivered or filed de bene esse .....	442
2. Practice of declaring de bene esse on serviceable process impliedly abolished .....	438	8. Plaintiff cannot deliver or file declaration between 10th August and 24th October, and other excepted days....	<i>id.</i>
3. May declare de bene esse on bailable process, &c. ....	439	9. Hour of day when declaration to be delivered .....	443
4. Unless indorsed debt and costs paid within four days, how soon after plaintiff will be entitled to costs of preparing declaration .....	440	10. Within what time the plaintiff <i>should</i> and must regularly declare, and consequences of neglect.....	<i>id.</i>
5. When should declare de bene esse .....	441	11. How the limited time for declaring is calculated .....	444
6. Consequences of defendant perfecting or not perfecting bail after declaration de bene esse .....	442	12. If no judgment of non-pros signed, may declare within a year .....	445
7. Difference in the form of proceeding when a declaration is		13. Of plaintiff's obtaining by rule further time to declare....	446

IV. Of the  
time of de-  
claring in ge-  
neral.

The *Declaration* being the full statement of the plaintiff's complaint, or cause of action, is by far the most important part of the formal proceedings in an action. It may here be considered as regards the *time* of declaring and the *mode or form* of declaring.

There is a striking dissimilarity between the practice of Courts of equity, and ecclesiastical and spiritual, and some other Courts, and that of Courts of law, as regards the *time* of fully stating the *complaint* of the suitor, and as it seems in favour of the former on principle. In Courts of equity the complainant must in general *first* file his *bill*, which is equivalent to a declaration at law; and there is an express enactment that no subpoena or any other process for appearance do issue out of any Court of equity till after the bill is filed with the proper officer, except in cases of bills for injunctions to stay waste, or stay suits at law commenced. (*f*) So in the ecclesiastical and spiritual Courts, the complainant's *libel* is first exhibited, and the *citation* (which answers to the process at law and subpoena in equity) is subsequently issued. But at law, in all cases of *personal* actions, especially now that original writs have been abolished, the process to bring the defendant into Court, we have seen, is very general, at most stating the *form* of action very concisely, as "to answer the plaintiff in an action upon promises," and the plaintiff's full statement of his complaint, called his *declaration*, cannot, according to the present practice, be filed or delivered, until eight days after

(*f*) 4 Ann. c. 16, s. 22.



the process has been executed by service or arrest; nor in the instance of mere serviceable process, until the defendant has actually appeared, or the plaintiff has entered an appearance for him; and although the defendant resides in or within twenty miles of London, he is unnecessarily allowed *eight days* merely to prepare for the very simple act of entering what is termed a common appearance; and though the modern practice has been professedly altered so as to *expedite* the proceedings in an action in other respects, yet the plaintiff's proceedings are, as it is submitted unnecessarily, suspended during that time, when before a plaintiff was allowed to hasten a plea by declaring *de bene esse*. But the practice as to the time of declaring requires more particular examination.

CHAP. XV.  
TIME OF  
DECLARING.

*First, how soon a Plaintiff may declare.*—We have before intimated the expediency of having the declaration *prepared* as early as practicable, so as to be *ready* for delivery or filing as soon as the rules of practice will permit, and thus to expedite the trial of the action. It is a general maxim *vigilantibus non dormientibus leges subservient*, and the very fact of a plaintiff declaring, as he is permitted, induces a presumption and feeling in his favour, in many instances productive of actual practical advantage.

1st. How soon formerly and at present plaintiff may declare.

According to the *natural course* of proceedings, and especially with reference to the period of legal history, when the pleadings were *ore tenus*, there could be no declaration, until after the defendant had *actually appeared*, and was in Court *to hear the complaint*. But in modern times, in order to expedite the proceedings, a plaintiff was, before the uniformity of process act, 2 W. 4, c. 39, allowed in certain cases, as well of serviceable asailable process, to declare, as it was technically termed, *de bene esse*, *i. e. conditionally*, not only before the defendant had appeared to serviceable process, or put in bail toailable process, but also before the time for either purpose had expired; by which means the defendant, being in possession of the plaintiff's full statement of his cause of action, was enabled to prepare his plea, and the proceedings were expedited by a *part of the time allowed for pleading being current during the time allowed for appearing or putting in or perfecting bail*, and this advantage still prevails, though to a diminished extent, in *ailable process*; and there was nothing unreasonable in that practice, because the defendant, having received the declaration, might immediately be preparing his plea, and deliver the same before the expira-

CHAP. XV.  
TIME OF  
DECLARING.

tion of the requisite time, provided he resolved to defend. But it seems that this liberty of expediting the suit having been vexatiously abused by practitioners issuing process returnable on the very day it was served, and then declaring *de bene esse* even on the same day, and thus subjecting the defendant to the expense of a declaration, before he could consult his attorney and tender the debt and costs; rules, therefore, were promulgated, restraining a plaintiff from declaring *de bene esse* until the expiration of *several days* after the service of process. (g)

2. The practice of declaring *de bene esse* on serviceable process impliedly abolished.

And now as the 11 G. 4, and 1 W. 4, c. 70, and the uniformity of process act, 2 W. 4, c. 39, have, by enabling a plaintiff to enter an appearance for the defendant on the ninth day after he has been actually served with process, and immediately afterwards, to declare and further proceed, and also to declare and insist on a plea pending the *vacations*, as well as in the terms, (excepting between the 10th August and 24th October,) and has in other respects greatly expedited the proceedings in an action, it has been considered that there became less occasion for the practice of declaring *de bene esse*, and that mode of declaring is now *confined to bailable process*, and a plaintiff cannot in any case declare on mere *serviceable* process against a *single* defendant before an *actual appearance has been entered* by the defendant himself, or by the plaintiff for him, and then the declaration must be delivered or filed *absolutely* and not *conditionally*. (h) By the terms of the 2 W. 4, c. 39, s. 1,

(g) Reg. Gen. Trin. T. 1 W. 4, reg. 10, prohibiting a declaration being delivered until the expiration of *six days* after the service of *serviceable* process, or *six days* after arrest on bailable process; and see Jervis's Rules, 30, note (u).

(h) So decided, *Fish v. Palmer*, 2 Dowl. 460. In Tidd's Supp. 1833, p. 123, it is merely said, there is *no occasion* to declare *de bene esse* on serviceable process. In 1 Arch. Prac. C. P. 68, and in 1 Arch. K. B. 4th edit. §16, it is laid down peremptorily that the plaintiff *cannot* so declare on serviceable process: but see Atherton, 102. The technical reason why a plaintiff cannot now declare *de bene esse* on serviceable process is, that the present serviceable process under 2 W. 4, c. 39, by writ of summons or distringas, is not like the former bill of Middlesex, writs of latitat, capias, and quo minus, (now abolished,) to be considered process against the *person*, within the meaning of the rules allowing a plaintiff to declare *de bene esse*; see R. T.

22 G. 3; R. M. 10 G. 2; 1 Sellon, Prac. 226, 227. Another reason was, that formerly no declaration *de bene esse* could regularly be delivered before the return day of process, and now there is *no return day*. It is submitted, however, that at least after the expiration of the *four days* allowed for the payment of the debt and costs of writ and service, without further expense, a plaintiff might with propriety, subject to a qualification by a *new rule of Court*, be allowed to declare *de bene esse*; for otherwise, in the case of *serviceable* process, the defendant is allowed more time than is necessary to appear, and before he can be compelled to plead, viz. *eight days* after service of process, and *eight more* after declaration; i. e. *four days* in a town cause, and *eight days* in a country cause, before he can be required to plead. It is submitted that such twelve or sixteen days are unnecessary, and occasion useless delay in an action.

and the form of the writ of summons thereby prescribed, *all* proceedings are impliedly suspended during the first eight days after the service of the writ, (*i*) and as on the ninth day the plaintiff may enter an appearance for the defendant, and immediately declare absolutely, there could be little if any utility in permitting a declaration *de bene esse* on such ninth day, nor any occasion for such proceeding. (*k*) Indeed, now the delivery of a declaration before an appearance has been entered, either by the defendant or the plaintiff for him, is such a nullity, that a subsequent judgment by default would be set aside, notwithstanding delay in the application and a subsequent step taken by defendant. (*l*)

The defendant, we have seen, is in all cases, without regard to the distance from London where he was served, entitled to eight days, inclusive of the day of service, to enter his appearance, and during that time the plaintiff *cannot* increase the expense by *actually delivering* a declaration, and if he do, it would be irregular, though in the mean time the declaration may be *prepared*, as presently noticed. If the defendant appear on the eighth day, then immediately afterwards the plaintiff may deliver his declaration *absolutely*; and if the defendant do not appear, the plaintiff may enter an appearance for him, and then declare, and thereby press on the suit.

In *bailable* process, we have also seen, that the defendant ought, in eight days inclusive of the day of arrest, to put in bail above; but as the plaintiff cannot effectually on the ninth day *put in or perfect bail above for the defendant*, the Reg. Gen. Michaelmas Term, 3 W. 4, reg. 11, justly allows the plaintiff in this case of *bailable* process, to avoid the consequences of the defendant's neglect to put in or perfect bail on the eighth day, by allowing the plaintiff on the ninth day after the arrest, inclusive thereof, to *file* (*m*) his declaration *de bene esse*, so that the defendant's time for pleading immediately begins to run from such ninth day. This rule orders that upon all writs of *capias*, where the defendant shall not be in actual custody, the plaintiff, at the expiration of eight days after the execution of the writ, inclusive of the day of such execution, shall be at liberty to *declare* (*n*) *de bene esse* in case

3. But may now declare *de bene esse* on bailable process on eighth day after arrest under Reg. Gen. M. T. 3 W. 4, r. 11.

(*i*) 1 Arch. C. P. 67, 68.

(*k*) Tidd's Supp. 1833, p. 123.

(*l*) *Roberts v. Spurr*, 1 Har. & W. 201.

(*m*) *File*, but not *deliver*, as the defendant is not completely in Court until bail above have been put in and justified

when excepted to, *Rex v. Sheriff of Middlesex*, 3 Dowl. 188; see Reg. Gen. 3 W. 4, Reg. 11.

(*n*) Not saying whether the declaration is to be *filed* or *delivered*, see note, *supra*.

CHAP. XV.  
TIME OF  
DECLARING.

special bail shall not have been perfected; and if there be several defendants, and one or more of them shall have been served only, and not arrested, and the defendant or defendants so served shall not have entered a common appearance, the plaintiff shall be at liberty to enter a common appearance for him or them, and declare against him or them *in chief* (o) (i. e. *absolutely*) and *de bene esse* against the defendant or defendants who shall have been arrested, and shall not have perfected special bail; and upon this rule it has been considered that, although no bail has been *put in*, yet the plaintiff may equally declare *de bene esse*, as where they have been put in and have not yet justified, and that the plaintiff have neglected so to declare, neither the bail-bond nor attachment were to stand as a security. (p)

Upon a prior rule it was held that a plaintiff may declare *de bene esse* at any time after the eighth day, and after bail above have been put in, provided they have not yet *perfected*; (q) and if plaintiff were to declare *absolutely* before bail has been perfected, he would waive their justification. If a plaintiff should declare *absolutely*, either on serviceable orailable process, before the defendant has appeared or put in bail above, the defendant might obtain a summons to set aside such declaration and all subsequent proceedings for irregularity, (r) unless the defendant should have waived the irregularity by taking the declaration out of the office; (s) but the defendant's merely examining the outside of the declaration, or inquiring the form of action therein, when filed, would not waive such irregularity; for so far a defendant has a right to examine and inquire, without any admission that the plaintiff's proceeding is correct. (t) If the plaintiff declare *absolutely* after bail above have been put in, but before they have justified, although his proceeding is regular, yet he thereby waives the justification, because, by so declaring, he admits the defendant to be perfectly in Court. He ought in such case to have declared conditionally, until such bail should have perfected.

4. Unless indorsed debt

Unless, however, a defendant pays the debt and costs in-

(o) It has been correctly observed that instead of the words "*in chief*," the expression should have been "*absolutely*."

(p) Per Parke, B. in *Rex v. Essex*, 2 Dowl. 648.

(q) *Wendover v. Cooper*, 10 Bar. & Cres. 614; and see *Rex v. Sheriff of Middlesex*, 3 Dowl. 188; *Rex v. Sheriff*

of *Essex*, 2 Dowl. 648.

(r) *Gilbert v. Kirkland*, 1 Dowl. 153; Bagley, Chamber Prac. 191, 192.

(s) *Gilbert v. Kirkland*, 1 Dowl. 153, where it seems also to have been considered irregular to declare conditionally after the time for appearance had expired.

(t) *Id.*; *Robins v. Richards*, *id.* 379.

dorsed on the writ *within the four days*, as intimated by the indorsement made in pursuance of Reg. Gen. Hil. Term, 2 W. 4, reg. 2, and Reg. Gen. Mich. T. 3 W. 4, Reg. 5, the plaintiff is entitled to prepare and be paid for his *affidavit* of the service of the writ. If the defendant were to apply by summons to stay proceedings on payment of debt and costs on the sixth day, returnable on the seventh day, inclusive of the day of service, the plaintiff would not be allowed the charges of drawing the declaration or pleader's fee, unless in cases where the sitting after term or the assizes are so near as to render a day's expedition very essentially important. If the application should be made on the seventh day by summons, returnable on the eighth day, then instructions for declaration and drawing declaration, if actually drawn, and pleader's fee, in cases where his preparing the declaration would be reasonable and proper, would in general be allowed; but the allowance of the costs of declaration varies according to the discretion of the taxing officer. The defendant will, as well in cases of serviceable as bailable process, be *liable to pay the costs* actually incurred after such four days in *preparing* the draft of the declaration, although he offer to pay the debt and costs on the fifth or subsequent day, because it is reasonable that if the defendant omit to pay within such four days, the plaintiff should be at liberty to *prepare* and perfect his declaration ready for delivery immediately after the eighth day. Hence the practice is that if the defendant, after *the fourth day* after service or arrest, obtain a summons to stay proceedings on payment of debt and costs, no order will be made, except on the terms of his paying the costs of preparing declaration when actually incurred.

## CHAP. XV.

TIME OF  
DECLARING.

and costs paid within four days, how soon plaintiff will be entitled to costs of preparing declaration after that time.

It is advisable, and in general the duty of the plaintiff's attorney, to declare *de bene esse* in bailable process, on, or as soon as he can after the *eighth day* after the arrest, (which must now first expire under Reg. Gen. Mich. T. 3 W. 4, reg. 11,) not only with the view of expediting the suit, but also because an express rule renders it essential that the plaintiff should have so declared in order to induce the Court to order that a bail bond, or an attachment against the sheriff, shall stand as a security, for otherwise it will not be considered that the plaintiff has lost a trial. (u)

5. Should declare *de bene esse* when admissible.

(u) *Ante*, vol. iii. 388, 389, 391; Reg. Gen. Hil. T. 2 W. 4, reg. 5.; *Call v. Thelwall*, 1 Gale, 16; 3 Dowl. 445, S.C.; *R. v. Middleses*, 3 Dowl. 194; *R. v.*

*Middleses*, 2 Dowl. 434; *R. v. Essex in cause Alexander v. Barrington*, 2 Dowl. 648; *R. v. Sheriff of Middleses*, 3 Dowl. 188; *ante*, vol. iii. 389, 391.

CHAP. XV.  
TIME OF  
DECLARING.

6. Consequences of defendant perfecting or not perfecting bail after declaration de bene esse.

If the defendant put in or perfect bail after the plaintiff has declared *de bene esse*, then that declaration thereupon becomes absolute, and the plaintiff may proceed accordingly; but if the defendant do not put in or perfect bail when excepted to, the plaintiff cannot proceed on his declaration de bene esse to sign judgment for want of a plea, but can only take an assignment of and proceed in an action upon the bail bond, or proceed to rule the sheriff to return the writ and bring in the body, and move for an attachment in case of default, though the latter proceedings may be stayed upon terms, and afterwards the principal action proceeded in.

7. Difference in the form of proceeding when a declaration is delivered or filed de bene esse.

The *form* of the declaration *itself* is precisely the same, whether delivered or filed absolutely or de bene esse; and the only difference in any part of the proceeding is in the *notice* of the declaration and the *notice to plead*, to be served on the defendant. When the declaration has been filed de bene esse, the notice thereof and to plead, after stating the filing of the declaration, adds, "*conditionally* until special bail be put in [if not already done] and perfected, and unless you appear and plead thereto in *four* days [if the venue be laid in London or Middlesex, and the defendant live within twenty miles of London, or "in *eight* days," if the venue be laid in any other county than London or Middlesex, or the defendant live above twenty miles from London, (x)] judgment will be signed against you by default." When the declaration is *delivered* conditionally, the notice to plead, which in that case may be *indorsed*, runs thus: "This declaration is *delivered conditionally* until special bail be put in and perfected, [or if bail above has already been put in, then only say 'perfected.'] And the defendant is to plead," &c. (as in the preceding form.)

8. By 2 W. 4, c. 39, sect. 11, a plaintiff cannot deliver or file declaration between 10th August and 24th October.

Although under the acts of 11 Geo. 4, and 1 W. 4, c. 70, and 2 W. 4, c. 39, a plaintiff may now deliver his declaration and call for a plea at any time, whether in term or *vacation*, there is in section 11 of the last act an express exception introduced, with a view to secure to legal practitioners and their clients some small vacation, directing that "no declaration shall in any case, either de bene esse or absolutely, be filed or delivered between the 10th August and 24th October." And it would seem that it would be of no avail to deliver a declaration with a notice to plead in Easter Term immediately before

And other excepted days.

(x) R. T. 22 G. 3; R. T. 1 W. 4.

the Thursday before and the Wednesday after Easter day, because those days are excluded as days of business, and are not to be reckoned or included in any rules or *notices* or *other proceedings*, except notices of trial or inquiry. (y)

CHAP. XV.  
TIME OF  
DECLARING.

The general rule of Hil. T. 2 W. 4, r. 50, we have seen, requires the service of all *rules*, *orders*, and *notices*, before nine o'clock at night. (x) But if delivered after that hour, it would not be a nullity, though irregular. (a)

9. Hour of the day when declaration to be delivered.

According to the existing practice, the plaintiff *should* declare before the end of the term *next after* that in which, or in the vacation of which, the defendant was served with process or was arrested, if the defendant entered his appearance, or put in bail, *in the vacation* of such first term, or if the defendant do not appear, then the plaintiff must declare *before the end of the term expiring next after the eighth day inclusive from the execution of the writ*, provided the service or arrest was before the second term; (b) and that if the plaintiff do not so declare, and has not obtained a rule or consent for further time, then the defendant, *having duly appeared*, may sign a judgment of non-pros, without ruling the plaintiff to declare, or doing more than *demanding* a declaration in writing, and waiting four days, as hereafter stated; (c) or as observed in another work, a plaintiff, to prevent being non-prossed, must declare within *two terms* after the return of the writ, (of which the term in which the writ was *returnable* was one,) that is now (that writs have no return day) after the execution of the writ by *actual service or arrest*, and if the writ be executed in a vacation, the plaintiff must declare before the end of the following term, or a non-pros may be signed; (d) but the plaintiff may still have a rule for time to declare, as heretofore. (d) In another work it is suggested, that probably the Court, in analogy to the above rule, would not allow the defendant to make a four day's demand of declaration in anticipation of a judgment of non-pros; *until the expiration of the term next after the service or ar-*

10. Within what time the plaintiff *should* and *must* regularly declare, and consequences of neglect.

(y) Reg. Gen. East. T. 2 W. 4, and 11 G. 4, and 1 W. 4, c. 70, s. 6, and 1 W. 4, c. 3, s. 3.

(z) *Ante*, vol. iii, 110; 1 Arch. K. B. 4 ed. 227.

(a) *Id.*; *Horsley v. Pardon*, 2 Dowl. 228; but a case of a plea, not a declaration.

(b) Tidd's Supp. A. D. 1833, p. 120;

see the statute 13 Car. 2, stat. 2, c. 2, s. 3, allowing a plaintiff two terms before judgment of non-pros, Dax Prac. 54; 2 Salk. 455; 7 T. R. 27; Reg. Mich. 10 G. 2, reg. 2, b.; *Wynne v. Clarke*, 5 Taunt. 649.

(c) Tidd's Supp. A. D. 1833, p. 125.

(d) See Mr. Chapman's second addenda to the new rules, page 115.

CHAP. XV.  
TIME OF  
DECLARING.

*rest, (e)* and that process would be deemed to be returnable within the rule Hil. T. 2 W. 4, on the day on which it was served or executed. *(e)* But if the writ was not executed until towards the end of a term, it would seem that the plaintiff still ought to have until the end of the next or second term to declare.

Against prisoners.

As respects *prisoners*, the Reg. Gen. Trin. T. 3 W. 4, reg. 1, is explicit that the plaintiff shall declare "against such defendant" before the end of the next term after the *arrest, or detainer, or render, and notice thereof; (f)* otherwise such defendant "shall be entitled to be discharged from such arrest or detainer, on entering an appearance according to the form in 2 W. 4, c. 39, schedule No. 2, unless further time to declare shall have been given to such plaintiff by rule of Court, or order of a judge." Since which rule it is necessary for the plaintiff, before the appointed time for declaring has expired, to apply for and obtain a sufficient extension of the time, or the defendant may be discharged. *(g)*

11. How the limited time for regularly declaring is now to be calculated.

It will be remembered, that by the statute 13 Car. 2, stat. 2, c. 2, s. 3, as to a non-pros for not declaring, and according to the long established practice, whether the defendant was at large or a prisoner, the plaintiff in all the Courts had until *the end of the second term* inclusive after that in which the writ was returnable, and in or of which the defendant's appearance was entered, or his bail put in, or his detention or render made, *(h)* and the recent statutes or rules do not appear to have intended to compel the plaintiff to declare *sooner* than before; and, therefore, as writs in personal actions now have no return day, and the time for declaring is calculated from the *execution* of the writ by service or arrest, yet it would seem, that as well in the case of an actual prisoner or of a defendant at large, the plaintiff is entitled to a *full term after* the service or arrest before a prisoner will be supersedable, or a declaration can be demanded by a defendant, or a non-pros signed; but if a defendant be served with a writ or arrested, or detained or rendered on only a day before a term, then the plaintiff must declare against him before the end of such following term, the same as here-

*(e)* 1 Arch. C. P. [68, 69.]

*(f)* See the rule 2 Dowl. 211, 212. Before this rule, the term of commitment or surrender was to be accounted one, although the defendant was not committed or surrendered till the last day of vacation. Reg. Trin. 2 G. 1, a. K. B., Tidd,

354.

*(g)* And see the course of proceeding and requisite affidavit, 1 T. Chitty's Arch. 220.

*(h)* Tidd, 9th ed. as to prisoners, 354, to 356; and as to defendants at large, *id.* 420, 422:



tofore was the case if a defendant were rendered on the last day of a vacation.<sup>(i)</sup> So that if a defendant were served or arrested, or rendered, or detained immediately after the first day of *Hilary* term, or at any time between the first day of that term and the end of the succeeding vacation, the plaintiff would equally be in time if he declared before the end of the following *Easter* term.

CHAP. XV.  
TIME OF  
DECLARING.

Supposing that no judgment of non-pros has been signed, nor an extension of time obtained, then by the express terms of Reg. Gen. H. T. 2 W. 4, r. 35, a plaintiff in all *personal* actions *shall be deemed out of Court*, unless he declares *within one year* after the process is *returnable*,<sup>(k)</sup> (i. e. now there is no return, after the day of service or arrest); and thereby implying, that according to the ancient practice, extending also to real and mixed actions, that a plaintiff, unless previously non-prossed, may declare within a year;<sup>(l)</sup> and in an action of *quare impedit* against several defendants, although the plaintiff has not been able to serve one of them, yet, unless he obtain a rule for further time to declare, he will, after the lapse of a year from the *return day* of the first process, be out of Court as to all the defendants who duly appeared;<sup>(m)</sup> and, therefore, in an action for a malicious arrest, the declaration necessarily averring that the former action was at an end, it was held, that proof that no declaration in that action had been filed or delivered within a year after the return of the writ, sufficiently established the determination of the suit.<sup>(n)</sup> The defendant himself also is so far out of Court, that he cannot sign judgment of non-pros for not declaring after the year has expired.<sup>(o)</sup> The year was computed from the return day of the writ, when writs were returnable at a particular time, and not from the time of the defendant's appearance;<sup>(p)</sup> and where a writ of *quare impedit* was returnable on 8th Jan. 1834, a declaration on 10th Jan. 1835, was holden too late, although one of the defendants had not appeared, because the plaintiff should have obtained further time to de-

12. If no judgment of non-pros signed, then within a year.

(i) Reg. Trin. 2 G. 1, in *K. B. Tidd*, S. C. 354.

(k) See the rule, 8 Bing. 293; and prior decisions, Jer. Rules, 51, note (k); *Tidd*, 421, 422; 3 Barn. & Ald. 272; 5 Taunt. 649; *Cook v. Allen*, 3 Tyr. 378; Price's Prac. 211.

(l) *Barnes v. Jackson*, 1 Hodge's Rep. 59; 1 Bing. N. C. 545; 3 Dowl. 404.

S. C.

(m) *Barnes v. Jackson and others*, 1 Hodge's Rep. 59; 1 Bing. N. C. 545; 3 Dowl. 404.

(n) *Pierce v. Street*, 3 Barn. & Adol. 397.

(o) *Cooper v. Nias*, 3 Barn. & Ald. 271.

(p) *Id. ibid.*; 1 Bing. N. C. 548.

CHAP. XV.  
TIME OF  
DECLARING.

clare. (q) It has been suggested that process would now be deemed to be *returnable* within the meaning of this rule requiring the plaintiff to declare within a year afterwards, on the day on which it is served or executed. (r) This rule impliedly extends the time for declaring in Common Pleas and the Exchequer to a *year*, though before that rule a plaintiff must in Common Pleas have declared before the third term, (s) and in the Exchequer before the essoin day of the fourth term. (t) And although proceedings be stayed by rule, plaintiff must declare within the year, or be out of Court. (v)

After an injunction.

A declaration delivered after injunction obtained in a Court of Equity is considered regular *at law* without regard, in a Court of law, to any consequences of disobedience to which the plaintiff may have subjected himself in the Court of Equity, and therefore a rule to set aside a declaration under such circumstances was itself set aside. (u)

13. Of plaintiff's obtaining further time by rule to declare.

If the plaintiff be not ready to declare before the end of the term next after the term or vacation in or of which the defendant entered his appearance, (within which time we have seen it is probable it would be held that he ought regularly to declare;) (x) or if in an action against several, all have not appeared, or one or more has not been served or arrested, (y) or if the plaintiff be doubtful whether it is expedient to proceed any farther in the action, then, provided the defendant *has appeared in due time*, so as to be in a situation to sign judgment of non-pros, but not otherwise, (z) the plaintiff should now in all the Courts, on or before the last day of such second term, obtain from the Clerk of the Rules in King's Bench, or from the Secondary in Common Pleas, a *side bar rule for time to declare*

(q) *Barnes v. Jackson*, 1 Bing. N. C. 545; 3 Dowl. 404. And yet in such case the defendants who had appeared could not have non-prossed the plaintiff, *Palmer v. Feistal and another*, 2 Dowl. 507.

(r) 1 Arch. C. P. [68]; *sed quare*, see 2 Arch. K. B. 4th ed. 893, citing Price's Prac. 283.

(s) 5 Taunt. 649; Tidd, 417, 422.

(t) Tidd, 299.

(u) *Horne v. Took*, 2 Dowl. 776.

(v) *Unite v. Humphrey and others*, 3 Dowl. 532.

(x) *Ants*, 443, 444; and see 1 Arch. C. P. [68].

(y) *Richardson v. Pollen*, 1 Hodge's Rep. 75.

(z) Rule Hil. 9 Anne; 13 Car. 2, stat. 2, c. 2, s. 3, which only authorizes a

defendant to sign judgment of non-pros when he has appeared in the term wherein the process is returnable. A defendant cannot sign a non-pros for not declaring, if the plaintiff entered an appearance for him. In 2 Arch. K. B. 4th ed. 893, it is suggested, that now the defendant may perhaps be considered entitled to sign judgment of non-pros on entering his appearance by the last day of the term in which the plaintiff should have declared, or even at any time after, provided the plaintiff had not in the meanwhile entered an appearance for him according to the statute, see Price's Prac. 283. But in 1 Arch. C. P. [68], it is suggested that process would now be deemed to be *returnable* at least within the rule of H. T. 2. W. 4, as to declaring *de bene esse* on the day on which it is served or executed.

until the first day of the ensuing term, (a) or, as is now more frequent, a rule for a *month's* or even two months' *time*, and paying for the same in King Bench, 1s. 6d., or in Common Pleas, 2s. 6d. (b) A copy of this should, to save the expense of a demand of declaration, be immediately served upon the defendant or his attorney; (c) and if at the expiration of that time the plaintiff be still not ready to declare, he may from time to time obtain similar rules for *further time*; and if he declare before the expiration of the time given by any existing rule, a subsequent judgment of non-pros would be irregular. (d) It will be observed, that the rule is only drawn up on the terms of the defendant not being in custody, and therefore it would seem, that unless some special circumstances, and upon a rule to show cause why time could not be obtained in an action against a single defendant, time to declare could not be obtained if he be a prisoner. But we have seen, that in an action against *several* defendants, as the plaintiff cannot declare absolutely against all, in consequence of his not having been able to execute process against one, he *may*, (e) and indeed must, (f) apply for, and obtain by summons an order or rule for further time to declare against the defendant, who is a prisoner, or he will otherwise be supersedable; and if one of several defendants has not been served or arrested, yet unless the plaintiff obtain a rule for time to declare against the others, he would be out of Court as to the other defendants at the end of a year after the return day of the first writ to which they had duly appeared. (g)

(a) In K. B. Reg. Gen. H. T. 2 W. 4, r. 30, expressly orders, "that the plaintiff may have a rule for time to declare in the Court of Exchequer as well as in other Courts," see *Jervis's Rules*, 52, n. (a), according to which, previous to this rule, the course in the Exchequer was to obtain time to declare by summons and order of a baron. The form of a rule is thus:—

Tomkins } On the — day of — A.D. 1835.  
v. } It is ordered, that the plaintiff have time [or in case of a second or  
Jackson. } subsequent application, "further time"] to declare until the first day inclusive of the next term, [or "last day inclusive of the present term,"] if the defendant is not in custody.

Form of a rule for time to declare.

By the Court.

*Side bar.* (or in Common Pleas, here say,) "In the Treasury Chamber, at the plaintiff's instance."

(b) 1 Arch. K. B. 4th ed. 219. Two months in *Richardson v. Pollen*, 1 Hodge's Rep. 75.

(c) *Tomes v. Powell*, 1 H. Bla. 87.

(d) *Gray v. Pennell*, 1 Dowl. 120.

(e) Reg. Gen. T. T. 3 W. 4, r. 1; *Jer. Rules*, 85, 86.

(f) *Morton v. Gray and another*, 9 B.

& Cress. 544; *Williams v. Mainwaring*, Barnes, 401; *Barnes v. Jackson and others*, 1 Hodge's Rep. 59; 1 Bing. N. C. 545; 3 Dowl. 404.

(g) *Barnes v. Jackson*, 1 Hodge's Rep. 59; 1 Bing. N. C. 545; 3 Dowl. 404, S. C.; *ante*, 443, 446; *Richardson v. Pollen*, 1 Hodge's Rep. 75.

CHAP. XV.  
TIME OF  
DECLARING.

SECT. V.—PROCEEDINGS BY A DEFENDANT TO COMPEL PLAINTIFF  
TO DECLARE, OR ENABLE DEFENDANT TO SIGN NON-PROS.

- |   |            |  |            |
|---|------------|--|------------|
| 1. No rule to compel plaintiff to declare necessary, except one peremptory rule . . . . . | 448        | Defendant must have duly appeared . . . . .  | 449        |
| 2. Written demand of declaration, when requisite before nonpros. . . . .                  | <i>id.</i> | If a declaration has, in fact, been delivered, judgment of non-pros cannot be signed . . . . . | 450        |
| 3. Written form of demand of a declaration . . . . .                                      | <i>id.</i> | 5. Of setting aside judgment of non-pros. . . . .  | <i>id.</i> |
| 4. Of signing judgment of non-pros. . . . .   | 449        |  |            |

V. Proceedings by a defendant to compel the plaintiff to declare and to enable defendant to sign non-pros.

1. When no rule to compel declaration necessary.

When an action has been *removed* from an inferior Court, the defendant may and must, in order to compel the plaintiff to proceed in the Court above, obtain and serve a rule to declare, and Reg. Gen. Hil. T. 2 W. 4, r. 37, orders, that such rule may be given within four days after the end of the term in which the writ (i. e. of habeas corpus, or re. fa. lo. in replevin, &c. is returned). (*h*) But the following rule expressly orders that it shall not be necessary for a defendant in any case to give a *rule to declare, except upon removals from inferior Courts.* (*i*) Still, however, in order to limit the number of rules extending the time to declare on behalf of the plaintiff, the Reg. Gen. Hil. T. 2 W. 4, r. 39, orders, that the defendant may in all the Courts obtain a *rule to declare peremptorily*, and that the same may be *absolute* in the first instance, and such a rule binds the plaintiff to declare before the end of the term in which such rule is made. (*k*)

2. Written demand of declaration, when requisite before non-pros.

However, the Reg. Gen. Trin. T. 1 W. 4, r. 8, orders, that no judgment of non-pros shall be signed for want of a *declaration*, replication, or other subsequent pleading, until *four days* next after *demand* thereof shall have been made *in writing* upon the plaintiff, or his attorney, or agent, as the case may be. (*l*) We have seen that probably the Court would not allow such a

(*h*) See former practice, Jervis's Rules, 52, note (*m*).

(*k*) Jervis's Rules, 52, note (*o*); see form of such peremptory rule, T. Chitty's Forms, 2d edit. 94, 95.

(*i*) Reg. Gen. Hil. T. 2 W. 4, r. 38, and Jervis's Rules, 52, note (*o*).

3. Form of demand of a declaration.

(*l*) Jervis's Rules, 29, note (*s*). The form of demand may be thus :—  
In the K. B., [or "C. P.," or "Exch."]

Between { A. B., plaintiff,  
and  
C. D., defendant.

The defendant *demands* a declaration in this cause, otherwise judgment of non-pros.  
Dated this — day of —, A.D. 1835.

To Mr. E. F., plaintiff's attorney,  
[or "agent,"]

Yours, &c.  
G. H., defendant's attorney,  
[or "agent,"]

demand to be made until the expiration of the term next after that in which, or the vacation of which, the service or arrest was made, or rather a previous demand would be irregular as premature. (m)

A defendant's attorney should not, by this or any other means, in any case urge a plaintiff to declare, unless it be certain that the action is not sustainable, for otherwise, as in case of motions for judgment in case of a nonsuit, a defendant's attorney might injudiciously frequently occasion a judgment against his client, which, if he had remained passive, would never have been obtained.

No defendant can sign judgment of non-pros when he, having himself neglected to appear on or before the eighth day after service of the writ, has suffered the plaintiff to enter an appearance for him, nor in bailable process, where he has neglected to put in bail in eight days after the arrest. (o) And in an action against several defendants a judgment of non-pros cannot be signed until all have appeared. (p) But if the defendant has duly appeared in eight days after service of a writ of summons, or has duly put in bail above in eight days after arrest, then he may after the expiration of the following term deliver a written demand of declaration, and after the expiration of *four days* he may, without any rule to declare except in cases of removal of actions from an inferior Court, sign judgment of non-pros, unless the plaintiff has previously obtained a rule for further time to declare. (q)

If further time should be obtained after such written demand of declaration, the defendant may sign judgment of non-pros without a fresh demand of declaration, in case the plaintiff does not declare within the enlarged time. (r)

But a defendant cannot in any case sign judgment of non-pros for not declaring after the expiration of a year from the return day, (or, perhaps, now from the day of executing of the process,) (s) unless indeed the plaintiff has obtained further time to declare by rule or express terms, and omits to declare within such extended time; and when writs had a return day, judgment of non-pros must have been signed within a year after

CHAP. XV.  
TIME OF  
DECLARING.

4. Of signing  
judgment of  
non-pros. (n)

Defendant must  
have duly ap-  
peared.

(m) 1 Arch. C. P. 69, *ante*, 443, 444.

(n) See in general Tidd, 9th edit. 459, 460; 2 Arch. K. B. 4th edit. 892.

(o) 1 Arch. C. P. [69]; Arch. K. B. vol. ii. 4th edit. 893; Price's Prac. 283.

(p) *Palmer v. Ferstel and another*, 2 Dowl. 507.

(q) In Price's Prac. of A.D. 1833, p. 253, it is suggested, that a defendant might

sign judgment of non-pros, provided he appeared before the end of second term, in case plaintiff has not previously entered appearance; see 2 Arch. K. B. 4th edit. 893, *sed quere*.

(r) *Wells v. Hare*, 1 Dowl. 366.

(s) *Cooper v. Nias*, 3 Bar. & Ald. 271; 1 Chitty's Rep. 669, S. C.; Reg. Gen. 2 W. 4, r. 35.

CHAP. XV.  
TIME OF  
DECLARING.

If a declaration  
in fact delivered,  
judgment of  
non-pros cannot  
be signed.

such return day, and the defendant had not a year from the time of his putting in or justifying bail. (f)

If, in fact, a declaration has been delivered, although by an attorney not competent to act in the Court in which the action is pending, that is no ground for signing judgment of non-pros, but the defendant should move to stay the proceedings until a proper attorney has been appointed. (u)

5. Of setting  
aside judgment  
of non-pros.

If the plaintiff has inadvertently suffered judgment of non-pros for not declaring, the Court will in general on motion set it aside on payment of costs, upon an affidavit that *the plaintiff*, at the commencement of the action, had and continues to have a good and just cause, or causes of action, or a right of action on the merits, and it is advisable also, according to the facts, to show indulgence towards the defendant, at his request, pending the action and any express promises, letters, &c. And unless the defendant swear in terms, in answer to the rule, that he has a good defence on the merits, or that he paid the debt, the Court will in general set aside the judgment. (x)

SECT. VI.—OF THE DECLARATION ITSELF.

First, Chronological statement of the recent statutes and rules affecting declarations, &c. . . . . 451  
Secondly, Summary and observations upon the parts of a declaration,

as practically altered or affected by the recent statutes and rules . . 462  
Thirdly, Other practical matters connected with declarations . . . . . 489

The declaration  
itself as affected  
by the recent  
statutes and  
rules in general.

We have next to examine the *declaration* itself, but in that attempt we shall only notice those few alterations in *practice* affecting declarations, which have either expressly or impliedly been introduced by the *recent statutes and rules of Court* in the present reign; and it will be found that they leave *untouched* the prior established *principles* which I have attempted to collect in a previous publication, (y) and (with the exception of the *new forms of commencements* and *more concise forms of counts on bills of exchange, promissory notes, and indebtedness counts*, and that upon *an account stated*, and the total omission of the quantum meruit and quantum valebant counts, and the avoidance of repetition of *venue* or *place*, and a few other very small alterations), *the substance of each entire count will continue the same as heretofore, and as in the precedents con-*

(f) *Cooper v. Nias*, 3 Bar. & Ald. 271; 1 Chitty's Rep. 669; Tidd, 459; Dax, 50.  
(u) *Bayley v. Thompson*, 2 Dowl. 655.  
(x) *Cortessos v. Hume*, 2 Dowl. 134.  
There is an indistinctness in the report of Lord Lyndhurst's observation, and the

word now seems a misprint for not.

(y) See Chitty on Pleading, 5th edit. three volumes, and see the 6th edition, more particularly adapted for the use of students and practitioners.

tained in the work alluded to. And it will be found to be a general rule that the nonobservance of these new rules, or of the forms thereby introduced, do not constitute a defect in pleading that could be taken advantage of by a demurrer, but would be merely an irregularity to be objected to by summons or motion to the Court, as will be established by the decisions that the variance in the commencement of or in the body of the declaration of the form of action varying from the writ, (z) or the improper introduction in the body of the declaration of a venue, (a) are not grounds of demurrer, but merely of application to a judge or the Court. Pleadings, however, should not only observe the alterations expressly prescribed, but also in future adopt, on all occasions, a more concise mode of describing facts, so that, upon the whole, pleadings properly framed will be more concise than of late they have been. One general observation affecting all declarations in mere personal actions may here be made, viz. that in consequence of the uniformity of process act, 2 W. 4, c. 39, having abolished all prior process in personal actions, and prescribed new forms of writs, it has become necessary not only in the commencement but in the body of each count to abandon the previous names and descriptions of process, and accurately to describe the new writs either by name or in substance according to their very terms; and, therefore, the statement in a declaration in scire facias on a recognizance of bail, that the action had been commenced by bill (instead of stating by writ, or by scire facias,) was holden irregular and open to a special demurrer, although not to a general demurrer or a writ of error. (b)

The following is a chronological statement of the recent rules and enactments affecting declarations:—

First, Chronological statement of the recent statutes and rules affecting the form of declarations.

*First.—Chronological Statement of the recent Statutes and Rules affecting Declarations, &c.*

- |  |  |
|--|--|
| <p>1. Reg. Gen. Trin. T. 1 W. 4, limiting length and prescribing forms of declarations on bills of exchange, promissory notes, common counts, account stated, and general conclusion ..... 452</p> <p>2. Reg. Gen. Hil. T. 2 W. 4, reg. 1,</p> | <p>r. 40, that laying venue in declaration different to that in original writ shall not discharge the bail ..... 453</p> <p>3. Reg. Gen. Hil. T. 2 W. 4, r. 4, prohibiting long recitals of writs in declaration ..... id.</p> |
|--|--|

(z) *Marshall v. Thomas*, 9 Bing. 678; 3 Moore & Scott, 98, S. C., post.

(a) There is, however, an express exception in trespass quare clausum fregit, for if the declaration do not state the name of the close or abutments there may

be a special demurrer.

(b) *Darling v. Gurney*, 2 Dowl. 235, overruling prior decision in same case in 2 Dowl. 101; and 2 Crompt. & M. 226, S. C.; and see *Peacock v. Day*, vol. iii. 291.

CHAP. XV. OF THE DECLARATION ITSELF.	4. Reg. Gen. Mich. T. 3 W. 4, reg. 15, prescribing forms of commencing a declaration ..... 454	opponent may obtain a judge's order for striking out the second count or plea, with costs, unless, &c. .... 458
	Declarations to be entitled of the proper Court, and of the very day of filing or delivering same ..... <i>id.</i>	8. Reg. Gen. Hil. T. 4 W. 4, r. 7, the party who has pleaded several counts or pleas, and fails in proving a distinct matter in support of each, shall pay the opponent costs; and if he shall not <i>bona fide</i> have retained a second count or plea, under pretence that he could prove a distinct cause of action, or ground of defence, and fail in establishing the same, and the judge who tries the cause shall so certify, then the party so improperly pleading shall even lose the costs of the issues upon which he succeeds ..... <i>id.</i>
	Prescribed form of commencement of a declaration on a writ of summons ..... <i>id.</i>	9. Reg. Gen. Hil. T. 4 W. 4, r. 8, venue in margin shall suffice, and prohibiting repetition of venue in body ..... 459
	The like on a <i>capias</i> ....	10. Reg. Gen. Hil. T. 4 W. 4, r. 20, prescribed form of commencement of declaration in fresh action, after a plea of nonjoinder. <i>id.</i>
	The like on a writ of detainer ..... <i>id.</i>	11. <i>Id.</i> reg. 4, statement in a declaration on a policy of insurance of the interest in several persons, or some of them, in the alternative ..... <i>id.</i>
	The like against several defendants, one arrested or detained, and the other served with a copy of <i>capias</i> ..... 455	12. <i>Id.</i> reg. 5. In <i>trespass</i> the name of close or abutments must be stated in declaration in trespass, or defendant may demur specially ..... 460
	Pledges at conclusion to be omitted ..... <i>id.</i>	13. Alteration in form of declaration by stat. 3 & 4 W. 4, c. 42, s. 12, when defendant described by initial or contraction of Christian name in a written document <i>id.</i>
	5. Reg. Gen. Hil. T. 4 W. 4, reg. 1, all pleadings to be entitled of the day when pleaded, and shall be entered on record accordingly, unless otherwise ordered <i>id.</i>	14. Analytical summary of the several recent alterations in declarations ..... <i>id.</i>
	6. Reg. Gen. Hil. T. 4 W. 4, reg. 5, prohibiting more than one count or plea, unless there be actually two distinct subjects matter of complaint, or two distinct grounds of defence to be established ..... <i>id.</i>	15. Consequences of deviations from the rules ..... 461
	Instances as illustrations when or not several counts may be admitted ..... <i>id.</i>	
	But count upon an account stated allowed to be added 457	
	And several breaches of the same contract are still admissible ..... <i>id.</i>	
	Instances as illustrations, when or not several pleas shall be admissible ..... <i>id.</i>	
	But the examples are to be considered as merely illustrative and not restrictive of principles of the rules .. <i>id.</i>	
	7. Reg. Gen. Hil. T. 4 W. 4, r. 6, if rule 5 be violated, the	

Reg. Gen. Trin. T. 1 W. 4, limiting the length and prescribing the forms of declarations on bills of exchange, promissory notes, common counts, account stated, and general conclusion.

The first modern step towards improvement will be found in the Reg. Gen. of Trin. T. 1 W. 4, which was promulgated by all the judges, under the assumption that the 11 G. 4 and 1 W. 4, c. 70, s. 11, empowered them to make rules affecting *pleadings* as well as practice. The rules and orders are as follows.

"Whereas declarations in actions upon bills of exchange, promissory notes, and the counts usually called the common counts, occasion unnecessary expense to parties by reason of their length, and the same may be drawn in a more concise form: Now for the prevention of such expense, it is ordered, that if any declaration in *assumpsit*, hereafter filed or



“ delivered, and to which the plaintiff shall not be entitled to a  
“ plea as of this term, being for any of the demands mentioned  
“ in the schedule of forms and directions annexed to this order,  
“ or demands of a like nature, shall exceed in length such of  
“ the said forms set forth or directed in the said schedule, as  
“ may be applicable to the case, or if any declaration in debt  
“ to be so filed or delivered for similar causes of action, and  
“ for which the action of *assumpsit* would lie, shall exceed  
“ such length, no costs of the excess shall be allowed to the  
“ plaintiff if he succeeds in the cause, and such costs of the  
“ excess as have been incurred by the defendant shall be  
“ taxed and allowed to the defendant, and be deducted from  
“ the costs allowed to the plaintiff; and it is further ordered,  
“ that on the taxation of costs, as between attorney and client,  
“ no costs shall be allowed to the attorney in respect of any  
“ such excess of length, and in case any costs shall be payable  
“ by the plaintiff to the defendant, on account of such excess,  
“ the amount thereof shall be deducted from the amount of  
“ the attorney’s bill.” The rule then prescribes the forms of the  
counts on bills of exchange, promissory notes, and of the com-  
mon counts for goods, work, money lent, money paid, money had  
and received, and on an account stated, with the *common con-*  
*clusion*, and concludes by recommending that counts on bills and  
notes be placed first in the declaration, and that the common  
conclusion shall apply to them also. These forms, as well in as-  
sumpsit as in debt, are still to be observed, with the exception  
that since Reg. Gen. Hil. T. 4 W. 4, reg. 8, all the statements  
of *venue in the body* of each count are to be omitted.

The next improvement was introduced by Reg. Gen. Hil.  
Term, 2 W. 4, Reg. I. rule 40, ordering that “ a declaration,  
“ laying the venue in a different county from that mentioned in  
“ the process, shall not be deemed a waiver of the bail.” But  
that rule only applied to actions in the King’s Bench *by origi-*  
*nal writ*, now abolished by 2 W. 4, c. 39. (c)

2. Reg. Gen.  
Hil. T. 2 W. 4,  
rule 40, that  
every venue or  
declaration, dif-  
ferent to that  
in writ, shall  
not discharge  
the bail.

The Reg. Gen. r. 4, of the same term, also ordered, that the  
rules heretofore made in the Courts of King’s Bench and Com-  
mon Pleas respectively, *for avoiding long and unnecessary re-*  
*petitions of the original writ in certain actions* therein men-  
tioned, “ shall be extended and applied in the Courts of King’s

3. Reg. Gen.  
Hil. T. 2 W. 4,  
r. 4, prohibit-  
ing long recital  
of original writs  
in declaration.

(c) Jervia’s Rules, 53, note (p).

CHAP. XV.  
OF THE  
DECLARATION  
ITSELF.

" Bench and Common Pleas, and Exchequer of Pleas, to all "*personal* and *mixed actions*, (d) and that in none of such "*actions* shall the original writ be repeated in the declaration, (d) but only the nature of the action stated in manner following, viz. ' A. B. was attached to answer C. D. in a plea " ' of trespass,' [or ' in a plea of trespass in ejectment,' or as " the case may be,] and any further statement shall not be allowed in costs." This rule still applies to and in effect shortens declarations in *ejectment* in the Courts of King's Bench and Common Pleas; but as the uniformity of process act, 2 W. 4, c. 39, abolished the proceeding by original writ in *personal* actions, the utility of this last rule has now in a great measure been superseded.

4. Reg. Gen. Mich. T. 3 W 4, reg. 15, prescribing forms of commencing a declaration.

Declarations to be entitled of the proper Court and of the very day of filing or delivering declaration.

The uniformity of process act, 2 W. 4, c. 39, having abolished all the prior writs, and introduced others in lieu, it became expedient, in order to secure uniformity in declaring, for the judges to prescribe *new forms of commencing declarations*, and therefore the rule Mich. T. 3 W. 4, I. r. 15, was promulgated as follows: " It is further ordered, that *every declaration* shall in future be *intituled in the proper Court*, and of "*the day of the month and year* on which it is filed or delivered, and shall commence as follows."

*Declaration after Summons.*

Form of commencement of declaration on a writ of summons.

" [*Venue.*] A. B. by E. F. his attorney [or ' in his own person'] complains of C. D. who has been *summoned* to " answer the said A. B. &c."

*Declaration after Arrest, where the Party is not in Custody.*

Do. on a capias.

" [*Venue.*] A. B. by E. F. his attorney [or ' in his own person'] complains of C. D. who has been *arrested* at " the suit of the said A. B. &c."

*Declaration where the Party is in Custody.*

Do. on a writ of detainer.

" [*Venue.*] A. B. by E. F. his attorney [or ' in his own person'] complains of C. D. being detained at the suit " of A. B. in the custody of the sheriff [or ' the Marshal of the " ' Marshalsea of the Court of King's Bench,' or the ' Warden " ' of the Fleet.]"

(d) Including therefore declarations in *ejectment*, and therefore it would be irregular to recite the supposed writ in

such declaration; see the proper forms of declarations in *ejectment*, Chitty on Pleading, 6th edit, vol. ii.

*Declaration after the Arrest of one or more Defendant or Defendants, and where one or more other Defendant or Defendants shall have been served only and not arrested.*

CHAP. XV.  
OF THE  
DECLARATION  
ITSELF.

"[*Venue.*] A. B. by E. F. his attorney [or 'in his own proper person'] complains of C. D. who has been arrested at the suit of the said A. B. [or 'being detained at the suit of the said A. B.' &c. *as before*] and of G. H. who has been served with a writ of *capias* to answer the said A. B. &c."

Do. against several defendants, one arrested or detained, and the other served with a copy of *capias*.

"And that the entry of pledges to prosecute, at the conclusion of the declaration, shall in future be discontinued."

Pledges at conclusion to be omitted.

Under the authority of 3 & 4 W. 4, c. 42, s. 1, which enabled the judges to promulgate rules affecting pleadings, several very important rules relating to declarations and pleadings were promulgated in Hil. Term, 4 W. 4, viz. by Reg. 1, "*Every pleading, as well as the declaration, (e) shall be intituled of the day of the month and year when the same was pleaded, and shall bear no other time or date, and every declaration and other pleading shall also be entered on the record made up for trial, and on the judgment roll, under the date of the day of the month and year when the same respectively took place, and without reference to any other time or date, unless otherwise specially ordered by the Court or a judge.*"

5. Reg. Gen. Hil. T. 4 W. 4, reg. 1. All pleadings to be intituled of the day when pleaded, and shall be entered on record accordingly, unless otherwise ordered.

Reg. 5 recites thus: "And whereas by the mode of pleading hereinafter prescribed, the several disputed facts material to the merits of the case will, before the trial, be brought to the notice of the respective parties more distinctly than heretofore, and by the said act of the 3 & 4 W. 4, c. 42, s. 23, the powers of amendment at the trial in cases of variance in particulars not material to the merits of the case, are greatly enlarged." And then the rule orders that "*Several counts shall not be allowed, unless a distinct subject-matter of complaint is intended to be established in respect of each; nor shall several pleas, or avowries, or cognizances be allowed, unless a distinct ground of answer or defence is intended to be established in respect of each.*"

6. Reg. Gen. Hil. T. 4 W. 4, reg. 5.

Prohibiting more than one count or plea, unless there be actually two distinct subject-matters of complaint, or two distinct grounds of defence.

"Therefore counts founded on one and the same principal matter of complaint, but varied in statement, description, or circumstances only, are not to be allowed."

"Ex. gr. Counts, founded upon the same contract, described

Illustrative instances.

(e) See the prior rule as to declarations, *ante*, 454.

CHAP. XV.  
OF THE  
DECLARATION  
ITSELF.

---

" in one as a contract without a condition, and in another as  
" a contract with a condition, are not to be allowed, for they  
" are founded on the same subject-matter of complaint, and are  
" only variations in the statement of one and the same contract.

" So counts for not giving, or delivering, or accepting a bill  
" of exchange in payment, according to the contract of sale for  
" goods sold and delivered, and for the price of the same  
" goods to be paid in money, are not to be allowed.

" So counts for not accepting and paying for goods sold,  
" and for the price of the same goods, as goods bargained and  
" sold, are not to be allowed.

" But counts upon a bill of exchange or promissory note,  
" and for the consideration of the bill or note in goods, money,  
" or otherwise, are to be considered as founded on distinct  
" subject-matters of complaint; for the debt and security are  
" different contracts, and such counts are to be allowed.

" Two counts upon the same policy of insurance are not to  
" be allowed.

" But a count upon a policy of insurance, and a count for  
" money had and received, to recover back the premium upon  
" a contract implied by law, are to be allowed.

" Two counts on the same charter-party are not to be al-  
" lowed.

" But a count for freight upon a charter-party, and for  
" freight pro rata itineris, upon a contract implied by law, are  
" to be allowed.

" Counts upon a demise, and for use and occupation of the  
" same land for the same time, are not to be allowed.

" In actions of tort for misfeasance, several counts for the  
" same injury, varying the description of it, are not to be  
" allowed.

" In the like actions for nonfeasance, several counts, founded  
" on varied statements of the same duty, are not to be allowed.

" Several counts in trespass, for acts committed at the same  
" time and place, are not to be allowed.

" Where several debts are alleged in *indebitatus assumpsit*  
" to be due in respect of several matters, ex. gr. for wages, work  
" and labour as a hired servant, work and labour generally,  
" goods sold and delivered, goods bargained and sold, money  
" lent, money paid, money had and received, and the like, *the*  
" *statement of each debt is to be considered as amounting to a*  
" *several count, within the meaning of the rule which forbids*  
" the use of several counts, though one promise to pay only is  
" alleged in consideration of all the debts.

Indebitatus  
counts.

CHAP. XV.  
OF THE  
DECLARATION  
ITSELF.

*Account stated*  
allowed to be  
added.  
*Several breaches*  
admissible.

*Instances by*  
way of illustration  
when or  
not *several*  
pleas shall be  
admissible.

“ Provided that a count for money due on *an account stated* may be joined with any other count for a money demand, though it may not be intended to establish a distinct subject-matter of complaint in respect of each of such counts.

“ The rule which forbids the use of several counts is not to be considered as precluding the plaintiff from alleging *more breaches* than one of the same contract in the same count.

“ *Pleas, avowries, and cognizances*, founded on one and the same principal matter, but varied in statement, description, or circumstances only, (and pleas in bar in replevin are within the rule,) are not to be allowed.

“ Ex. gr. Pleas of solvit ad diem, and of solvit post diem, are both pleas of payment varied in the circumstances of time only, and are not to be allowed.

“ But pleas of payment, and of accord and satisfaction, or of release, are distinct, and are to be allowed.

“ Pleas of an agreement to accept the security of A. B. in discharge of the plaintiff's demand, and of an agreement to accept the security of C. D. for the like purpose, are also distinct, and to be allowed.

“ But pleas of an agreement to accept the security of a third person in discharge of the plaintiff's demand, and of the same agreement, describing it to be an agreement to forbear for a time, in consideration of the same security, are not distinct, for they are only variations in the statement of one and the same agreement, whether more or less extensive, in consideration of the same security, and not to be allowed.

“ In trespass quare clausum fregit, pleas of soil and freehold of the defendant in the locus in quo, and of the defendant's right to an easement there, pleas of right of way, of common of pasture, of common of turbary, and of common of estovers, are distinct, and are to be allowed.

“ But pleas of right of common at all times of the year, and of such right at particular times, or in a qualified manner, are not to be allowed.

“ So pleas of a right of way over the locus in quo, varying the termini or the purposes, are not to be allowed.

“ Avowries for distress for rent, and for distress for damage feasant, are to be allowed.

“ But avowries for distress for rent, varying the amount of rent reserved, or the times at which the rent is payable, are not to be allowed.”

The *examples* in this and other places specified are given as some *instances only* of the application of the rules to which

The *examples*  
not to limit the  
principle of the  
rules.

CHAP. XV.  
OF THE  
DECLARATION  
ITSELF.

they relate, but the *principles* contained in the rules are not to be considered as restricted by the examples specified.

7. Reg. Gen. Hil. T. 4 W. 4, rule 6. If rule 5 be violated the opponent may obtain a *judge's order for striking out a second count or plea* with costs, unless, &c.

In order to enforce this fifth rule, reg. 6 orders as follows:—  
 “Where more than one count, plea, avowry, or cognizance, shall have been used in apparent violation of the preceding rule, the opposite party shall be at liberty to apply to a *judge*, suggesting that two or more of the counts, pleas, avowries, or cognizances, are founded on the same *subject-matter of complaint*, or *ground of answer or defence*, for an order that *all the counts, pleas, avowries, or cognizances* introduced in violation of the rule be struck out *at the cost of the party pleading*; (f) whereupon the judge shall order accordingly, unless he shall be satisfied upon cause shown, that some distinct *subject-matter of complaint* is *bonâ fide* intended to be established in respect of each of such counts, or some distinct *ground of answer or defence* in respect of each of such pleas, avowries, or recognizances, in which case he shall *indorse* upon the summons, or state in his order, as the case may be, that he is so satisfied; and shall also specify the counts, pleas, avowries, or cognizances mentioned in such application, which shall be allowed.”

8. Reg. Gen. Hil. T. 4 W. 4, rule 7. The party who has pleaded several counts or pleas, and fails in proving a distinct matter in support of each, shall pay the opponent's costs; and if the party shall not *bonâ fide* retain a second count under pretence that he could prove a distinct cause of action or ground of defence, and fail in establishing the same, and the judge who

In order still more effectually to enforce the 5th rule, the 7th rule orders that “Upon the trial, where there is more than one count, plea, avowry, or cognizance upon the record, and the party pleading fails to establish a distinct subject-matter of complaint in respect of each count, or some distinct ground of answer or defence in respect of each plea, avowry, or cognizance, a verdict and judgment shall pass against him upon each count, plea, avowry, or cognizance, which he shall have so failed to establish, and he shall be liable to the other party for all the costs occasioned by such count, plea, avowry, or cognizance, including those of the *evidence* as well as those of the pleadings: (g) and further, in all cases in which an application to a judge has been made under the preceding rule, and any count, plea, avowry, or cognizance, allowed as afore-said upon the ground that some distinct subject-matter of complaint was *bonâ fide* intended to be established at the

(f) See post as to applications under this rule to strike out counts. It could scarcely have been anticipated that the mere introduction of venue in the body of a declaration or of a count thus, “And also in the sum of £—, for work and labour and materials found,” should, in

case of a judge's order to strike out such count, occasion to the plaintiff an expense of upwards of 4*l*.

(g) This part of this rule is the same in effect as Reg. Gen. Hil. T. 4 W. 4, r. 74, post, 476, 477.

“ trial in respect of each count so allowed, or some distinct  
 “ ground of answer or defence in respect of each plea, avowry,  
 “ or cognizance, so allowed, if the Court or judge before whom  
 “ the trial is had shall be of opinion that no such distinct sub-  
 “ ject-matter of complaint *was bonâ fide intended to be esta-*  
 “ *blished* in respect of each count so allowed, or no such distinct  
 “ ground of answer or defence in respect of each plea, avowry,  
 “ or cognizance, so allowed, and shall *so certify* before final  
 “ judgment; such party so pleading shall not recover any costs  
 “ upon the issue or issues upon which he succeeds arising out  
 “ of any count, plea, avowry, or cognizance, with respect to  
 “ which the judge shall so certify.”

CHAP. XV.  
 OF THE  
 DECLARATION  
 ITSELF.

shall try the cause shall so certify; then the party so improperly pleading shall lose the costs of the issues upon which he succeeds.

Reg. 8. orders—“ The *name* of a county shall in all cases be  
 “ stated in the margin of a declaration, and shall be taken to be  
 “ the venue intended by the plaintiff, and no venue shall be  
 “ stated in the body of the declaration, or in any subsequent  
 “ pleading: Provided, that in cases where local description is  
 “ now required, such local description shall be given.”

9. Reg. Gen. Hil. T. 4 W. 4, r. 8, ordering, when venue in margin shall suffice.

Reg. 20. orders—“ In all cases under the 3 & 4 W. 4, c. 42,  
 “ s. 10, in which, after a plea in abatement of the nonjoinder  
 “ of another person, the plaintiff shall, without having proceed-  
 “ ed to trial on an issue thereon, *commence another action*  
 “ against the defendant or defendants in the action in which  
 “ such plea in abatement shall have been pleaded, and the per-  
 “ son or persons named in such plea in abatement as joint con-  
 “ tractors, the *commencement of the declaration shall be in*  
 “ the following form:—

10. Reg. Gen. Hil. T. 4 W. 4, r. 20, prescribing form of commencement of Declaration in fresh action after a plea of non-joinder.

“ [Venue.] A. B., by E. F. his attorney, [or, ‘ in his own  
 “ proper person,’ &c.] complains of C. D. and G. H., who  
 “ have been summoned to answer the said A. B., and which  
 “ said C. D. has heretofore pleaded in abatement the non-  
 “ joinder of the said G. H.” &c. [The same form to be used  
 mutatis mutandis in cases of arrest or detainer.]

The prescribed form of Declaring in a second action after a plea in abatement.

Then the same general rule of Hil. T. 4 W. 4, reg. 4, pre-  
 scribes rules relative to pleadings in particular actions, and as  
 regards *declarations*, as follows:—Reg. 4. “ In actions on  
 “ *policies of assurance*, the interest of the assured may be  
 “ averred thus: ‘ That A. B. C. and D. or some or one of them,  
 “ ‘ were or was interested,’ &c. And it may also be averred  
 “ ‘ That the insurance was made for the use and benefit and on  
 “ ‘ the account of the person or persons so interested.’ Before

11. Reg. Gen. Hil. T. 4 W. 4, reg. 4. State-ment in a Declaration on a policy of assurance of the interest in several persons or some of them, in the alternative,

CHAP. XV.  
OF THE  
DECLARATION  
ITSELF.

this rule, such mode of averring the interest in several persons, or some of them, in the *alternative*, would have been demurrable.

12. Reg. Gen. Hil. T. 4 W. 4, name or abutals must be stated when. (g)

*In Trespass.*—"In actions of *trespass quare clausum fregit* "the close or place in which, &c. must be designated in the "declaration by name or abutals, or other description, in "failure whereof the defendant may demur specially." (g)

13. Alteration in form of Declaration by Statute 3 & 4 W. 4, c. 42, s. 12, as to initials.

There is one express regulation respecting the forms of declarations introduced by statute 3 & 4 W. 4, c. 42, s. 12, which enables a plaintiff in an action upon any written instrument to designate any party to it by the same *initial letter* or letters or *contraction* of the christian or first name or names in *such instrument*, instead of stating the christian or first name or names in full.

14. Analytical summary of the several recent alterations in Declarations.

The alterations introduced by these *recent rules and enactments*, as they affect the *forms* and *requisites* of *Declarations*, may be thus analyzed and abbreviated: in all other respects the preceding principles, rules, and forms, are to be strictly observed.

1. Declarations must be *intituled* in the particular Court; as thus: "In the King's Bench," "In the Common Pleas," "In the Exchequer of Pleas," and in K. B., not, as before, in the name of the chief clerk. Reg. Gen. Mich. T. 3 W. 4, r. 15, *ante*, 454.

2. Must be *intituled* of the particular day on which they are actually delivered or filed; as thus: "On the — day of — A.D. 1835." (h)

3. The *Venue* is to be stated in the *margin*, as heretofore, but is *not* to be stated in the *body* of the declaration, or the statement may be struck out on summons, but is not cause of demurrer. But in *trespass quare clausum fregit* the close must be designated by name or abutals, or the defendant may demur *specially*. Reg. Gen. Hil. T. 4 W. 4, *supra*.

4. The *Commencement* should be in one of the newly-prescribed concise forms, or the declaration may be set aside as irregular, though not demurred to on that ground. Reg. Gen. Mich. T. 3 W. 4, reg. 15, *ante*, 454, 455.

5. On written instruments, when the *first name is written by*

(g) As to the mode of describing by abutals, see Chitty on Pleading, vol. ii. Index—Abutals. In *Lempriere v. Humphrey*, 1 Harr. & Woll. 170, it appears to have been considered incorrect to describe

a close as abutting *towards*, &c.

(h) Reg. Gen. Mich. T. 3 W. 4, r. 15, and Reg. Gen. Hil. T. 4 W. reg. I. *ante*, 454, 455.



*initial or contraction*, the declaration may describe the party accordingly. 3 & 4 W. 4, c. 42, s. 12, *ante*, 460.

6. The declaration should *correspond with the process* as to the *number* of the defendants, or at least the plaintiff must abandon all proceedings against any other defendant or defendants then declared against. Reg. Gen. Mich. T. 3 W. 4, r. 1. *ante*, vol. iii. 183 to 185.

7. If a prior action has been defeated by *plea in abatement of nonjoinder*, the form of *commencing* the declaration in a second action is prescribed by Reg. Gen. Hil. T. 4 W. 4, r. 20, *ante*, 459.

8. The cause of action must be stated in *only one count*, and cannot be varied in *several*; and if a violation of that rule be persisted in to trial, the party may be punished not only by payment of costs on the counts found for the defendant, but also with loss of the costs of the issue *relative to the same matter*, although found in his favour. But *several breaches* of the same contract may still be assigned. Reg. Gen. Hil. T. 4 W. 4, r. 5.

9. The same form of *conclusion* of a declaration in a personal action is to be observed in all the courts, viz. "To the damage of plaintiff of £——, and therefore he brings his suit, &c.," except in penal actions, when the *ad damnum* is to be omitted.(i)

10. The statement of *Pledges to Prosecute* is to be discontinued. Reg. Gen. Mich. T. 3 W. 4, reg. 15, and *ante*, 455.

In general the non-observance of either of the preceding *rules*, although relating to and affecting the forms of *pleading*, cannot (except in the instance of the statement of abutments) be taken advantage of by *demurrer* as a *defect in pleading*; but must, if at all, be objected to by a *summons and order* of a judge, to set aside the *proceeding for irregularity*.(k) Thus, although the above rules expressly require a declaration to be intituled of the day and month when it is delivered, yet it has been decided that the omission of such date is not a ground of demurrer;(l) and although the statute, 2 W. 4, c. 39, requires that the form of action shall be expressed in the writ, and it seems that the declaration should accord, yet if it vary, such variance is not a ground of *demurrer*, (partly so because a *writ* cannot now appear on the *face of the pleadings or record*);

15. *Consequences of deviations from such rules, viz. that they are only irregularities, and not grounds of demurrer.*

(i) See the form of conclusion at end of forms in Reg. Gen. Trin. T. 1 W. 4.

*dereson v. Thomas*, 9 Bing. 678.

(l) *Neal v. Richardson*, 2 Dowl. 89.

(k) And see per Tindal, C. J. in *An-*

CHAP. XV.  
OF THE  
DECLARATION  
ITSELF.

and it can only be objected to by summons or motion for irregularity to set aside the declaration on account of such deviation. (m) So, if the commencement of a declaration, at the suit of an executor, be improperly in the debet and detinet, instead of more properly the latter only, the objection is not a ground of demurrer as part of the declaration, but may be rejected as surplusage. (n) So the improper insertion or repetition of the venue in the body of a declaration, contrary to the above rule, Hil. T. 4 W. 4, r. 8, is not a ground of demurrer, but merely of a summons to strike out the objectionable repetition; (o) and although it is absurd for any practitioner to neglect strict observance with either of these recent rules, yet it is obvious that it could never have been the intention of the judges that the unnecessary insertion in the *body* of a declaration of a venue should be constantly the subject of a summons to strike out these words, which occasions much more expense, and is infinitely more vexatious than the introduction of those few words. (p)

Secondly, Practical summary, and observations on the parts and structure of a declaration as altered or affected by the recent statutes and rules.

It may be of practical utility to subdivide and arrange the new regulations, and the decisions thereon, in natural order, as they at present affect the form, and relate to the declaration. The following analysis will show the order of the arrangement:—

First, Parts in particular .....	463	8. Other matters to be observed. ....	473
1. Title of the Court .....	<i>id.</i>	Secondly, Prohibitions of unnecessary length in declaration by former rules and practice .....	<i>id.</i>
2. Title of declaration as to time of filing or delivery .....	<i>id.</i>	Thirdly, Impolicy of over statement in pleading .....	474
3. The venue in margin .....	464	Fourthly, Origin of several counts for the same cause of action .....	475
4. The commencement .....	465	Fifthly, Alteration by Reg. Gen. Trin. T. 1 W. 4, reducing length of counts on bills and notes, and indbitatus counts in assumpsit and debt; and abolishing quantum meruit and valebant counts .....	476
Parties and their names. ....	466	Sixthly, Alteration by Reg. Gen. Hil. T. 2 W. 4, r. 74, &c. Plaintiff to be allowed costs only on issue on which he succeeds, and costs of issues found for the defendant to be deducted or paid .....	<i>id.</i>
5. Body of declaration; statement of time of cause of action .....	470		
No statement of venue, or place, except in trespass quare clausum fregit, when local description requisite. ....			
What other express alterations .....			
6. Conclusion .....	472		
7. Statement of pledges to be discontinued .....	473		

(m) *Thompson v. Dicus*, 2 Dowl. 93; *Scrivener v. Watling*, 1 Harrison, 8; *Ward v. Tennison*, 1 Adol. & El. 619; *Edwards v. Dignam*, 3 Cr. & M. 346; 2 Dowl. 240, S. C. ante, vol. iii. 197; and see *Marshall v. Thomas*, 3 Moore & S. 98; and *Anderson v. Thomas*, 9 Bing. 678; Tidd, Supp. A. D. 1833, p. 122.

(n) *Collett v. Collett*, 3 Dowl. 211.  
(o) *Farmer v. Champneys*, 1 Crom. M. & Ros. 369; 2 Dowl. 680, S. C.; *Fisher v. Snow*, 3 Dowl. 27; *Townsend v. Gurney*, *id.* 29.

(p) Per Cur. in *Brindley v. Bennett*, 2 Bing. 184; see post, "of striking out counts."

<i>Seventhly</i> , Practical consequences affecting the structure of declaration, plea, &c. ....	479	<i>Ninthly</i> , When or not <i>several counts</i> may still be inserted .....	481
<i>Eighthly</i> , The pleading rules of Hil. T. 4 W. 4, r. 5, 6, 7; viz. Reg. 5, prohibiting more than <i>one</i> count on same subject-matter, and giving instances, and permitting <i>several breaches</i> .....	<i>id.</i>	<i>Tenthly</i> , Pleading influenced by consideration of costs .....	486
		<i>Eleventhly</i> , The rule how far imperative on a judge at chambers or at nisi prius .....	<i>id.</i>
		<i>Twelfthly</i> , Observations on the practical effect of these rules .....	487

CHAP. XV.  
OF THE  
DECLARATION  
ITSELF.

**1st. Title of Court.**—With respect to the first, viz. the Title of Court, formerly, when the proceedings were by *bill*, the name of the prothonotary or chief clerk for enrolling pleas in civil causes, as “Ellenborough,” was inserted; and when the proceedings were by *original*, and in all cases in the Common Pleas and in the Exchequer of Pleas, the name of the Court was superscribed. By the above rule, Hil. T. 4 W. 4, r. 15, now in *all cases* the name of the court, as “In the King’s Bench,” “In the Common Pleas,” or “In the Exchequer of Pleas,” is to be inserted.

*First, Parts in particular.*

1. Title of the court.

**2ndly. By Title as to Time.**—Formerly, there were some minute distinctions relative to the title of the declaration, then always of some term, and either *generally* relating to the first day of the term, or *specially* of a particular day in such term. But now, in order to expedite the proceedings in a *personal* action, the declaration may be delivered or filed at any time even in vacation, (excepting between the 10th day of August and the 24th day of October, in the long vacation, during which excepted time it would be irregular to declare; ) (q) and by the above rules of Mich. T. 3 W. 4, r. 15, and Hil. T. 4 W. 4, r. 1, the declaration in *personal* actions is to be intituled of the day of the month and year when the same is filed or delivered. But those rules do not extend to real actions or *quare impedit*,(r) or actions of *scire facias* or *ejectment*,(s) nor to a declaration after a removal from an inferior court, as *replevin*, or after a removal by *habeas*, &c.

2. Title of declaration as to time of filing or delivery.

We have just seen that the neglect to intitle the declaration on the proper day, month, and year, is probably no ground of demurrer, but at most of summons to set aside the declaration for irregularity,(t) or of a summons to compel the plaintiff

(q) 2 W. 4, c. 39; b. 11, “Provided also that no declaration or pleading shall be filed or delivered between 10th August and 24th October.”

(r) *Miller v. Miller*, 1 Hodge’s Rep. C. P. 31; *Barnes v. Jackson*, *id.* 59.

(s) *Doe dem. Fry v. Roe*, 3 M. &

Scott, 370; *Atherton*, 8; *Doe dem. Giltett v. Roe*, 3 M. & Scott, 376; 1 Cr. M. & Ros. 19; 4 Tyr. S. C.; 1 Bing. N. C. 253; and see 1 Dowl. 4.

(t) *Neal v. Richardson*, 2 Dowl. 89, that it would be an irregularity, and perhaps a judgment for want of a plea set

CHAP. XV.  
OF THE  
DECLARATION  
ITSELF.

to insert the correct date of the delivery or filing of the declaration. (u) It is to be observed, that the rule of Court of Hil. T. 4 W. 4, No. 1, also not only requires the *issue* to state the *date* of the declaration, but also the actual date of the *first writ*. Care, however, should be observed in the *body* of the declaration to state that the cause of action accrued on a day before that of which the declaration is intituled, and also before the date of the *first writ*; which we have seen is now in all cases to be considered the commencement of the action, and not, as heretofore, when the proceedings were by bill or latitat, as mere process to bring the defendant into Court; (x) for otherwise perhaps a special demurrer, or motion in arrest of judgment, or writ of error on a judgment by default, might be sustainable. However, in a recent case, where the record in an action for verbal slander stated that the writ was issued on the 4th of June, and that the words were spoken on the 24th of June, it was held that this discrepancy on the record was no ground *after verdict* for arresting the judgment. (y) A declaration however need not in the top title, or in the commencement, or elsewhere, (as required in an issue,) state or show the time when the writ was issued; and a rule to set aside the declaration, on account of the omission of the statement of the date of the writ, was therefore refused. (z) Indeed any notice in the declaration of the date of the writ would be redundant; inasmuch as the defendant must already have had notice thereof by the delivery to him of a copy thereof.

3. The venue in margin, (a) and local descriptions in body.

3. *The Venue in Margin.*—The Rule 15 of Mich. T. 3 W. 4, prescribes that all declarations in personal actions shall commence in the forms then given. In these a blank is left for the venue, and there has been no substantial alteration as regards such venue from the previous law. But we have just seen that the general rule Hil. Term, 4 W. 4, r. 8, declares that the name of a county shall in all cases be stated in the margin of a declaration, and shall be taken to be the *venue* intended by the plaintiff; and that no venue shall be stated in the *body* of the declaration, or in *any subsequent* pleading. Provided that

aside for the omission. See *Topping v. Fuge*, 1 Marsh. 341, 344; 5 Taunt. 330, 771, S. C.; *Rowles v. Lawrence*, 11 Moore, 338.

(u) *Semble, Wilkes v. Halifax*, 2 Wils. 256; *Thompson v. Marshall*, 1 Wils. 304.

(z) *Ante*, vol. iii. 159; *Rees v. Morgan*, 3 Nev. & Man. 205.

(y) *Steward v. Layton*, 3 Dowl. 430.

(c) *Du Pre v. Langridge*, 2 Dowl. 584.

(a) As to the privilege of an attorney to lay and retain venue in Middlesex, and his waiver of that privilege by employing another attorney to sue for him, *Harrington v. Page*, 2 Dowl. 164.

in cases where local description was at the time of making such rules required, such local description shall be given, and which, as regards the descriptions of the name of a *close* or *abuttals* in an action of trespass, will be presently noticed. We have just seen that if, contrary to the rule, the venue should be repeated in the body of the declaration, it is not a ground of demurrer, but at most merely of a summons to strike out the useless allegation. (b) It seems, however, still to be considered, that if a venue be inserted in the *body* of a declaration in ejectment it may aid a defective or improper venue in the margin. (c) We have seen that whilst original writs were in force, the rule of Hil. T. 2 W. 4, r. 1. prescribed that the bail should not be discharged by the plaintiff's laying the venue in a declaration differently to that in the writ, (d) and now in all cases the venue may be laid in the margin of a declaration in any county when the venue is transitory, without regard to the county in which the process was issued, or the defendant was arrested.

The 3 & 4 W. 4, c. 42, sect. 22, enables the Court, even in local actions, to direct the *trial* to take place in another county; and it has been held, that if the venue has been laid or changed by consent into a different county to that where the cause of action accrued, neither party can afterwards object that the venue was improperly laid, or that the trial took place out of that county, on account of the defendant, as a justice or public officer, having been privileged to have the cause tried there. (e)

4. *The Commencement.*—It may be inferred that the learned judges promulgated the forms of the *commencements* of a declaration antecedent to the body or substance of the complaint, in consequence of the abolition of the writs in use prior to 2 W. 4, c. 39, which occasioned such great variety in the commencements descriptive of the mode in which the defendant had been summoned or brought into Court, (f) and in consequence of the new writs thereby introduced, and to *assist* and relieve suitors from any doubts on the proper forms to be adopted, and not on account of any supposed importance in such forms, and therefore they should be *liberally* and not strictly construed.

4. The commencement of declaration.

The prescribed commencements accurately describe the

(b) *Ante*, 462.  
(c) *Doe v. Roe*, 3 Dowl. 323; 9 Legal Obs. 301; and see 1 Chitty on Pleading, 5 ed. 305.

(d) *Ante*, 453.

(e) *Furnival v. Stringer*, 1 Bing. N. C.

68.

(f) See the great variety, 2 Chitty on Pleading, 5 ed.; and see the present forms, with every variation as respects parties, &c. *id.* 6th edit.

CHAP. XV.  
OF THE  
DECLARATION  
ITSELF.

*effect* of the process against the defendant; as that he had been *summoned* when he had been served with a writ of summons, or appeared to a distringas founded thereon, or that he had been *arrested* in case of a *capias*, or *detained* when still a prisoner. (g) The former allegations in K. B., that the defendant is in the custody of the marshal, or in C. P. that he had been attached, or in the Exchequer that the plaintiff was debtor to the king, (which in general were *mere fictions*,) would now be untechnical and irregular; (h) and in one case, since the uniformity of process act, 2 W. 4, c. 39, and rules thereon of Mich. T. 3 W. 4, r. 15, the statement in the commencement, that the plaintiff was a debtor to the king, was even holden *demurrable*. (i) But it seems that the statement in the commencement of a declaration, that the defendant was *summoned* or *arrested*, or is *detained*, if incorrect, in fact could at most be treated as *irregular*, and could not be traversed by plea, (k) nor would now be ground of demurrer; (l) and in one case, where the commencement incorrectly described the plaintiff as a debtor to the king, though the proceedings had been by writ of summons since the uniformity of process act, the Court desired that an application should be made to the plaintiff's attorney to strike out the improper allegation, and refused a rule upon such application, until it had been shown that the plaintiff's attorney had refused to amend. (m)

Of the statement in commencement of declaration of parties, and their names.

We have seen that the declaration should strictly *correspond with the process* as regards the *number of parties*, as well plaintiffs as defendants, and in their *exact names*, and that now even upon serviceable process against several defendants, the plaintiff cannot deliver *several* declarations separately against each, though he may deliver one declaration against one or more, provided he drop all proceedings against the other named defendants, though if the plaintiff should declare against each separately, the declaration might be set aside for irregularity. (n) The 3 & 4 W. 4, c. 42, sect. 12, authorizes a declaration upon a bill of exchange, promissory note, or other *written instrument*, to designate the party by the same *initial* letter or letters, or *contraction* of the Christian or *first* name therein written, in-

(g) *Barrett v. Harris*, 2 Dowl. 186.

(h) *Hart v. Dally*, 2 Dowl. 257.

(i) *Hirst v. Pitt*, 3 Tyr. 264; but *semble* being only in the commencement, the irregularity was not properly the subject of demurrer, *ante*, 461, 462, and *Hart v. Dally*, 2 Dowl. 257.

(k) *Rix v. Kingston*, M. T. 1834, 9 Legal Obs. 110, and 3 Dowl. 159.

(l) *Ante*, 461, 462.

(m) *Hart v. Dally*, 2 Dowl. 257.

(n) *Ante*, vol. iii. 183 to 185; *Pepper v. Whalley*, 1 Bing. N. C. 71; 2 Dowl. 84; *Knowles v. Johnson*, *id.* 653.

stead of stating the Christian or first name in full. (o) Where a prior action has been defeated by a plea of nonjoinder, we have seen that the Reg. Gen. of Hil. T. 4 W. 4, Reg. I. r. 20, prescribes a particular form of commencing the declaration in a fresh action. (p) When the plaintiff sues, or the defendant is sued in a representative or particular character or right, the declaration usually describes the same accordingly in the commencement. (q) But it would suffice to state such right or character in the body of the declaration; and the Gen. Rule Hil. T. 4 W. 4, r. 21, orders, "that in all actions by and against assignees of a bankrupt, or insolvent, or executors, or administrators, or persons authorized by act of parliament to sue or be sued as nominal parties, the character in which the plaintiff or defendant is stated on the record to sue or be sued, shall not in any case be considered as in issue, unless *expressly denied*."

When once the full Christian and surnames of the plaintiff and defendant have been stated in full in the commencement, it has for some years been the practice, after *once* stating the names at length in the declaration, subsequently to describe the parties as "the *plaintiff*" or "the *defendant*;" and although that form is not expressly recognized in the late rules, it is still advisable to continue it. (r)

It will be observed that the first and second forms of commencement prescribed by the rule Mich. T. 3 W. 4, conclude with an *&c.* (s) and hence it is probable that the present practice commenced of inserting in lieu of such, *&c.* a concise description of the form of action, the same as stated in the writ, as thus: "was summoned to answer the said A. B. 'in an action on promises,' or 'in an action of debt,'" or other form of action, precisely as in the writ, and as fully stated in a preceding page. (t) But it seems to be quite clear that it was not intended, by introducing the *&c.* in the above forms of commencement or otherwise, to require in the commencement of a declaration any statement whatever of the form of action mentioned in the writ; but on the contrary it was intended that in lieu of the *&c.* the *body* or substantial part of the declaration should *immediately* commence with the usual words, "For

Not necessary to state the form of action in the commencement.

(o) And see *ante*, vol. iii. 164 to 169, as to describing the name of defendant in general.

(p) *Ante*, 459.

(q) See the forms, 2 Chitty on Pleading, 6th ed.

(r) *Meeks v. Orslade*, 1 New R. 289;

*Stevenson v. Hunter*, 2 Marsh. 101; 6 Taunt. 406, S. C.; and see the pleading forms, Trin. T. 4 W. 4, and Hil. Term, 4 W. 4, which appear similar to that form.

(s) *Ante*, 454, 455.

(t) *Ante*, vol. iii. 197, 198.

CHAP. XV.  
OF THE  
DECLARATION  
ITSELF.

*that whereas, &c.*" or "*For that &c.*" stating the cause of action. (u) And the safest course seems to be to omit in the commencement any statement of the *form of action* named in the writ; for although, perhaps, if the subsequent *body* of the declaration should substantially correspond with the writ in a substantial statement of the same form of action as that stated in the writ, a mistatement in the commencement might be rejected as surplusage, and certainly would not be ground of *demurrer*; (x) yet the unnecessary statement in the commencement might invite observation and objection, and occasion expense; and where the intended form of action in the body would, from *ambiguity*, be doubtful, the *description* in the commencement might be deemed decisive. (y) It is clear that a variance or mistatement of the form of action in the body of the declaration being a mere nonobservance of a rule of Court, is not ground of demurrer, (z) because as the writ does not appear on the face of the record, there is not in any paper book, or record, any disclosure of the variance; but if at all, the variance must be established, as an *extrinsic* fact, to be verified by affidavit, but is only the subject of summons or motion to set aside the declaration for *irregularity*, and not of setting aside the writ or arrest, or for discharging the bail

(u) *Seemle*, and see Petersdorff, *Precedents on Pleading*, page 3, note 7, *id.* page 5, note 5, citing *Lord v. Houston*, 11 East, 62; *Pleader's Assistant*, 292; and see form of issue as prescribed by Reg. Gen. Hil. T. 4 W. 4, *post*.

(x) *Neal v. Richardson*, 2 Dowl. 89, citing *Marshall v. Thomas*, 3 Moore & S. 98; *Anderson v. Thomas*, 9 Bing. 678; and see *Lord v. Houston*, 11 East, 62. Before the uniformity of process act, 2 W. 4, c. 39, and the above rule of Mich. T. 3 W. 4, the Reg. Gen. Hil. T. 2 W. 4, reg. 4, ordered, "that the rules theretofore made in the King's Bench and Common Pleas, for avoiding long and unnecessary repetitions of the original writ in certain actions therein mentioned, should be extended and applied in the King's Bench, Common Pleas, and Exchequer, to all *personal and mixed actions*, and that in none of such actions shall the *original writ* be repeated in the declaration, but only the nature of the action stated, in manner following, viz. "A. B. was attached to answer C. D. in a plea of trespass [or "in a plea of trespass and ejectment,"] or as the case may be, and any further statement shall not be allowed in costs;" and see the former rules referred to and observed upon in Tidd, 433; 1 Saund. Rep. 318, note 3, and 339, note; Chitty

on Pleading, 5th edit. vol. ii. 848, 849. In *ejectment* the above rule will still apply in the King's Bench and Common Pleas. See form, Chitty's Addenda to Summary of Practice, 33, note 4. But in the Exchequer a declaration in *ejectment* is still to commence and conclude as if preceded by a *quo minus*. *Doe d. Gillett v. Roe*, 1 Cron. Mee. & Roscoe, 19; 3 Moore & Scott, 376.

(y) *Savignac v. Roome*, 6 T. R. 130.

(z) *Anderson v. Thomas*, 9 Bing. 678, *supra*; *Thompson v. Dicus*, 2 Dowl. 94; *Marshall v. Thomas*, *id.* 205; *Rotton v. Jeffery*, 2 Dowl. 637, in the last case the writ and commencement of declaration was in *debt*, but in the body *assumpsit*, the Court on motion refused a rule, but merely because plaintiff would apply to amend. According to *Dobson v. Sterne*, 1 Bos. & Pul. 366, and *Clarke v. Crosby*, in MS. case, in 1 Chit. on Plead. 314, 315, 5th edit. an informality in the commencement of a declaration, though technical, is not in general ground of *demurrer*. Formerly the commencement might assist in deciding on a doubtful form of action in body, *Savignac v. Roome*, 6 T. R. 130; *Wilkes v. Kerby*, Lutwych, 1509; *Franklyn v. Reeve*, 2 Stra. 1023; Com. Dig. Pleader, C. 12.



above, and the plaintiff is to be left to declare, if he can, according to the form of action named in the writ. (a) But if the *form of action*, as well in the *commencement* as in the *body* of the declaration, vary from the form named in the writ, a summons in vacation, or motion in term, to set aside the declaration for irregularity, may be sustained, (b) although on principle, if the *body* of the declaration be in the same form of action as that expressed in the writ, any mistake in that respect in the *commencement* ought to be rejected as surplusage, being an unnecessary statement. But it seems that, provided the writ and declaration accord as to the *form* of action, as being each in *debt*, it is immaterial, except, perhaps, in bailable actions that the declaration varies from the writ as respects the *cause* of action, and a variance in the latter respect may be rejected as surplusage, as where the commencement of a declaration in debt, described the plaintiff to be suing *as assignee* of the late sheriff, and then the plaintiff declared in the body of his declaration on a bond made to himself. (c)

The 2 W. 4, c. 39, s. 8, directs, that when a defendant is an actual prisoner in custody of the Marshal or the Warden, the commencement of the declaration may so allege, although the process was out of another Court; but such allegation cannot be traversed by plea. (d)

It is very usual, even since the rule of Mich. T. 3 W. 4, prescribing the forms of commencement in the framing the same, after first naming the plaintiff, to add the words "the plaintiff in this suit," and after first naming the defendant, to add "the defendant in this suit," and then throughout the declaration and subsequent pleadings to describe the parties as "the said plaintiffs," or "the said defendants," without repeating their names. But since such rule, it seems advisable to introduce those descriptions of the parties only in the *body* of the declaration. It is *there* proper, at least when the names of the parties would be numerous. (e)

It has been usual in an action of *debt*, in the commencement to state that the defendant was brought into Court to answer

(a) *Ward v. Tummon*, 1 Adolp. & Ellis, 619.

(b) *Ante*, 197; *Thompson v. Dicus*, 1 Crom. M. & Ros. 768; 2 Dowl. 94, 95; 3 Tyrol. 873, S. C.; *Scrivener v. Walling*, 1 Harrison's Rep. 8; 9 Legal Observer, 299; *Edwards v. Dignam*, 2 Cr. & M. 346; 2 Dowl. 240, S. C.; *ante*, vol. iii. 197; *King v. Skeffington*, 1 Cr. M. & Ros. 363.

(c) *Reynolds v. Welsh*, 3 Dowl. 441.

(d) *Barnell v. Harris*, 2 Dowl. 187; *Rex v. Kingston*, 9 Legal Observer, 110; 3 Dowl. 159; *ante*, vol. iii. 394.

(e) See *Meeks v. Orlade*, 1 New Rep. 289; *Davidson v. Savage*, 6 Taunt. 121; 2 Marsh. 301, S. C.; and *Stevenson v. Hunter*, 6 Taunt. 406; 2 Marsh. 101, S. C.

CHAP. XV.  
OF THE  
DECLARATION  
ITSELF.

the plaintiff of a plea of debt for £——, or of a plea that he render to the plaintiff the sum of £——, which he owes to and unjustly detains from him, stating the aggregate of the sums afterwards sued for in each count; but that allegation is unnecessary, and a mistake therein as to the sum could not be demurred to or taken other advantage of; (f) and if the commencement of a declaration in debt, at the suit of an executor, be improperly in the debet and detinet, that is no ground of demurrer, because the words “owes to” may be rejected as surplusage. (g) *Indeed that reason ought in all cases to be the answer to any objection against the correctness of the commencement of a declaration.* (h) We have seen that, at least in actions *not bailable*, upon a general writ, the plaintiff may declare in a particular character, and the defendant also may be declared *against* in a *particular* character. (i)

5thly. Of the body of the declaration; statement of time of cause of action.

5thly. *The Body of Declaration.*—With respect to the statement of the *time* in the body of the declaration, when the cause of action accrued, it should, when time is material, be laid on the real day, and when not material, on some day on or before that on which the writ issued; but we have seen, that when the exact day is in law immaterial, as in an action for verbal slander, the statement by mistake, in a declaration, of a day after the writ issued, or after that on which the declaration was entitled, would be aided *after verdict*, and would not *afterwards* constitute a ground of motion in arrest of judgment or writ of error, because it will be inferred that the judge would not have suffered the plaintiff to obtain a verdict if the evidence had shown that the action was prematurely brought; but still the inconsistency might be pointed out by special demurrer. (k)

No statement of venue or place, except in trespass quare clausum fregit, when local description requisite.

With respect to *venue* or local description, as the rule 8 of Hil. T. 4 W. 4 orders, “and no venue *shall be* stated in the body of the declaration, or in any other subsequent pleading, provided that in cases where local description is now required such local description shall be given,” it seems to follow that an unnecessary statement of venue, contrary to the directions in the rules, would now be an *irregularity*, though formerly there *must* have been a repetition of venue as well as time in every distinct allegation, or the defendant might have demurred. (l)

(f) *Lord v. Houston*, 11, East, 62, 65.

(g) *Collett v. Collett*, 3 Dowl. 211; 9 Legal Obs. 252.

(h) *Dobson v. Herne*, 1 Bos. & Pul. 366; *Clark v. Crosby*, id. 314, note (f); 1 Chit. on Pl. 5th ed. 313, 315.

(i) *Ante*, vol. iii. 181 to 183, 200; *Knowles v. Johnson*, 2 Dowl. 653.

(j) *Steward v. Layton*, 3 Dowl. 430; *ante*.

(k) *Ante*, 463, 464, *semble*.

(l) *Denison v. Richardson*, 14 East,

In a declaration necessarily of considerable length, the avoidance of the repetition of place might save a *few words*, but the repetition a *few* times in a short declaration, although in strictness a violation of the rule, will scarcely justify a respectable practitioner in taking out a summons to strike out the useless words, because the expense of that proceeding would be greater than that of the repetition objected to, (m) which has always been considered by the Courts as an objection against a summons or motion to strike out unnecessary matter. (m) It is certain that the unnecessary repetition of venue is not ground even of special demurrer, but is only an irregularity to be objected to upon summons to strike out the improper statement. (n) It must be remembered that the above rule, ordering that no *venue* shall be inserted in the body of the declaration, does not dispense with the necessity for the declaration in an *inferior Court* alleging that each material fact, or at least the cause of action, as well as the promise, occurred *within its jurisdiction*; (o) and in all the counts, whenever *place* is material, as where a contract is to be performed at a particular place, it must be stated with as much particularity and accuracy as heretofore, and a venue in the body of the declaration may still aid a defective venue in the margin. (p)

Declaration in  
trespass quare  
clausum fregit.

The rule Hil. T. 4 W. 4, V. 1. also orders that, "In actions of *trespass quare clausum fregit*, the close or place in which, &c. (meaning where the trespasses were committed,) shall be designated by name or abuttals or other description, *in failure whereof the defendant may demur specially*." (q) And this seems almost the only exception that the non-observance of the new rules as to pleading can in general only be objected to as an *irregularity*, and not as a ground of *demurrer*. The object of this rule, it has been observed, was not only to abolish the common bar or plea of *liberum tenementum*, but also the new assignment consequent thereon; and also to take away any necessity for a new assignment in many other cases on pleas of right of common, license, easements,

300; *Pippin v. Sheppard*, 11 Price, 400; 1 Chit. on Pl. 289, 5th edit.

(m) See *Brindley v. Dennett*, 2 Bing. 184; 9 Moore, 388, S. C. where the Court observed that the application to strike out the alleged unnecessary matter was even more vexatious than the introduction of the matter itself.

(n) *Harper v. Chamneys*, 2 Dowl. 680, S. C.; 1 Crom. M. & R. 369; 4 Tyr. 859, named *Farmer v. Chamneys*; *Fisher*

*v. Snow*, 3 Dowl. 27; *Townside v. Gurney*, id. 168; 9 Legal Obs. 110.

(o) *Read v. Pope*, 1 Crom. M. & R. 302; *Salter v. Slade*, 1 Adol. & El. 608,

(p) *Doe v. Roe*, 3 Dowl. 323; 9 Legal Obs. 301.

(q) See decision on this rule, *Lempriere v. Humphrey*, 1 Harr. & Woll. 170; "abutting towards," is an incorrect description of abuttal.

CHAP. XV.  
OF THE  
DECLARATION  
ITSELF.

When declaration on a policy may be in the *alternative* as to interest of parties insured.

&c. particularly since the decisions that the word *close* is divisible. (r)

The rule Hil. T. 4 W. 4, further, in a declaration on a *policy of insurance*, allows the interest of the party insured to be thus averred in the *alternative*, contrary to the *general principles* of pleading, which will not admit of alternative allegations, viz. "That A. B. C. and D., or *some or one* of them, were or was interested," &c. And it may also be averred that the insurance was made for the use and benefit and on the account of the said person or persons so interested. The object of this particular rule was to prevent the necessity for several counts varying the statement of the parties interested, and by permitting this alternative allegation to render one count sufficient.

What other express alterations in body of declaration.

As regards any *single count*, except in the above instances of bills of exchange, promissory notes, and the common counts, and excepting in the allegation in a declaration on a policy of insurance, and the necessity for omitting venue, but naming the close or its abutments in trespass quare clausum fregit, there is not any other *express* new regulation, though the prescribed forms may be considered *as models* which every pleader would do well to imitate as regards brevity. The new rules relating to pleading have however suggested to a very sensible author, that it may now be expedient, in declaring specially for any money demand, to admit, on the face of the declaration, any part payment, so as to prevent the defendant from occasioning delay or expense by a useless plea of such payment, an acute observation extremely advisable to be acted upon, (s) especially in those cases when the part performance would take a case out of the statute of frauds, or part payment of principal money or interest would take a case out of the statute of limitations, under the 9 G. 4, c. 14.

6. The conclusion of a declaration.

6. *The Conclusion of Declaration.*—Since the uniformity of process act, 2 W. 4, c. 39, abolishing the process by *quo minus*, a declaration in *personal* actions in *all* the Courts should conclude as in the form given in Reg. Gen. Trin. T. 1 W. 4, viz. "To the plaintiff's damage of £—, and thereupon he brings suit, &c." varying, when the declaration is at the suit of assignees of a bankrupt, or others suing in *auter droit*, by introducing the word *as*, "to the damage of the plaintiffs *as* assignees, or *as* executors as

(r) Bosanquet's Rules, 59, note [57]; and see Chitty on Pleading, 6 edit. fully; and see older rules in K. B. and C. P. Mich. T. A. D. 1654.

(s) See Mr. Bosanquet's observations in his Rules of Pleading, 85, note (s), and forms there given; and *id.* 51, in note.

aforesaid ;” and in actions *qui tam*, omitting the allegation that the plaintiff has sustained damage, because a common informer cannot recover any, inasmuch as his particular right to the penalty only attaches on his issuing his writ, and therefore he cannot claim any compensation for the *previous* detention. In the Exchequer it would now be irregular, if not demurrable, to conclude *quo minus*, though before it was an essential form. (t)

CHAP. XV.  
OF THE  
DECLARATION  
ITSELF.

7. *Statement of Pledges*.—The Reg. Gen. Mich. T. 3 W. 7thly. State-  
4, r. 1, we have seen, expressly orders, “ that the entry of ment of *pledges*  
“ *pledges to prosecute* at the conclusion of the declaration, *shall* to be discontinued.  
“ *in future be discontinued*.”

8. *Other Matters to be observed*.—We have thus enumerated 8. Other mat-  
the few instances in which the forms of declaration have been ters to be ob-  
altered by recent statutes and rules, and which we have seen served.  
do not interfere with the previous principles or rules of plead-  
ing, which must still be observed ; and amongst others, that re-  
quisite quality, that the declaration should *correspond with the*  
*process* in the names of the parties, the description of the cha-  
racter in which they sue and are sued, and in the nature of the  
cause of action. (u) But a defect in either of these respects, in-  
asmuch as the same do not appear on the face of the declara-  
tion itself *without referring to the writ* or other *extrinsic* fact,  
would not constitute a ground of demurrer, but merely of  
*irregularity*, to be set aside or corrected upon summons or  
motion to the Court, and may therefore be properly considered  
as part of the *practice* of the Court rather than of the science  
of *pleading*.

At common law, and independently of any rule, each super- Secondly, Pro-  
rior Court of Law has jurisdiction to *strike out unnecessary* hibitions of un-  
*matter*, as in an action of debt for mortgage-money, a long de- necessary length  
scription in the deed of the mortgaged premises, (x) or a co- in declarations  
venant on which no breach is assigned, or a second count not by former rules  
in any respect materially varying from the first. (x) There are and practice.  
also several *express ancient rules of Court* upon the subject, General juris-  
which seem of late to have been lost sight of. (y) diction of the  
Courts to short-  
en unnecessary  
length in plead-  
ing.

(t) *Hirst v. Pitt*, 3 Tyrw. 264 ; but *sem-  
ble* the words might be rejected as *surplus-  
age*.

(u) *Tidd's Supp.* A. D. 1833, p. 122 ;  
*ante*, vol. iii. 181 to 183, 200 ; *Knowles v.*  
*Johnson*, 2 Dowl. 653 ; 1 Arch. C. P.  
[70].

(z) See instances *Dundass v. Lord Wey-*

*mouth*, Cowp. Rep. 665 ; *Price v. Fletcher*,  
Rep. T. Hardw. 129, 727 ; 1 New  
Rep. 289 ; 1 Saund. 233, n. (2) ; *Tidd*,  
9th ed. 616, 619 ; 2 Arch. K. B. 4th ed.  
828.

(y) In K. B. M. T. 1654, s. 12, 13,  
16 ; in C. P. Reg. M. T. 1654, s. 16, 17,  
19.

CHAP. XV.  
OF THE  
DECLARATION  
ITSELF.

The like express powers by ancient rules of M. T. 1654, in K. B. and C. P.

Thus it appears that the judges as well of King's Bench as Common Pleas in M. T. 1654, amongst other very important rules ordered, *that pleadings* be succinct without unnecessary repetitions, and that in pleading a general statute it be not recited, but the declaration conclude against the form of the statute; and that in actions of covenant no more of the deed than is necessary for the assignment of the breach, and not to repeat the covenant in the conclusion; and that in actions of slander long preambles be forborne, and no more inducement than what is necessary for the maintenance of the action, but where it requires a special inducement or colloquium; and that declarations in trespass quare clausum fregit may mention the place certainly, and so prevent the use and necessity of the common bar and new assignment, and which in that case are to be forborne, and some other regulations importantly affecting pleadings. (x) In these and other cases there are many instances of a judge or Court striking out the superfluous matter, and making the plaintiff pay the costs. (a)

Impolicy of over-statements in pleadings.

Independently also of costs it was always injudicious, especially in actions for damages, to make any *over-statement* of the supposed injury, particularly in actions for a *common assault* or slander, because *inflated descriptions* afford the defendant's counsel an opportunity of commenting, sometimes with considerable effect to a common jury, on the absurd discrepancy between the plaintiff's declaration and his evidence, and of turning the cause into ridicule; so that juries have perhaps merely on that account given nominal damages less than forty shillings, when they might otherwise have given the plaintiff a sum at least sufficient to entitle him to full costs. (b)

(s) Reg. M. T. 1654, K. B. s. xii. to xvii.; K. B. s. xiv. to xix. C. P.

(u) Tidd, 9th ed. 616 to 619; and *post*.

Instances of injudicious unnecessary statements.

(b) As if a declaration in fact for a single blow with the open hand should absurdly state, that the defendant with swords, sticks, staves, whips, and other weapons, and with fists, assaulted and beat and knocked the plaintiff down, and pulled and dragged him about on the ground, and pulled the plaintiff by the nose, and kicked and wounded and bruised him, giving him divers blows on and about his head, face, breast, back, neck, shoulders, arms, thighs, legs, feet, and belly, and *divers other parts of his body*, whereby he became sick, sore, lame, diseased, and disordered, and *his life was greatly despaired of*, &c. &c., though the form usually adopted and

even recommended as proper by some able pleaders, see 1 Saund. Rep. 14, note (3). So in a declaration for trifling slander it may be advisable to omit the usual words, stating that the plaintiff was of *good name, fame, credit, and reputation*, or other words affording counsel an opportunity to turn the declaration into ridicule, and suggesting to the jury the expediency of giving the plaintiff a verdict for one shilling, i. e. three-pence for his good name, and the like for each of his other extraordinary qualities. A case of this nature was lately so turned into ridicule, the commentator quoting—

*Iago*—What, are you hurt?

*Cassio*—Ay, past all surgery.

*Iago*—Marry, heaven forbid!

*Cassio*—Reputation! reputation! reputation! O! I have lost my reputation! I have lost the immortal part, sir, of my-

But whilst the judges had no power to amend variances that appeared pending a trial, the practice was to introduce *several counts* varying the statement of the right or injury, and as recently described by a learned judge *in the nature of safety-valves, to be used only if occasion should require*; (c) and the Courts did not, unless in cases of obvious vexation, interfere to reduce the number, unless by consent; and if the plaintiff obtained a verdict on any one count, he was entitled to recover from the defendant the costs of so much of the pleadings and of the briefs and evidence as related to the issue on which he had succeeded, and although the plaintiff *did not receive costs* in respect of those counts on which he did not succeed, (d) yet he was not required to pay to the defendant the costs he thereby incurred; (e) and yet on principle, admitting that a plaintiff might be right in purchasing safety by the help of so many counts, between which there was but a very slight difference, there could be no reason that he should be entitled to do so at the defendant's expense. (f) The consequence was, that those who prepared pleadings on the part of the plaintiff took care, by inserting *several varying counts* for the same cause of action, to avoid all risk of variance; and the circumstance of the plaintiff's *not receiving costs* on counts not proved, was not of itself sufficient to restrain the introduction of a great variety of counts. (g) However, in an action at the suit of an executor, it was always considered imprudent to

CHAP. XV.  
OF THE  
DECLARATION  
ITSELF.

Fourthly, Origin of several counts for the same cause of action.

self, and what remains is bestial. My reputation! my reputation!

*Othello, Act II. Scene 3.*

A very discreet and skilful *Leader*, (afterwards elevated to the bench,) to avoid the great danger of ridicule in some cases, used frequently to request his junior in opening the pleadings not to state the particular description of the assault or of the libel or slander as stated in the declaration, but merely to state that "the plaintiff in his declaration complains of "an assault and other personal injuries committed by the defendant," (or is for a libel or slanderous words affecting the plaintiff;) "and the defendant has pleaded not guilty, &c." according to the facts. Thus avoiding the risk of predisposing the jury or the auditors to laughter, which, if once excited, might be very injurious in the result.

So although there is an instance of the absurdity of joining with a count for criminal conversation a count in trover for wearing apparel and household furniture, *James v. Biddington*, 6 Car. & Payne, 589, 590, and the introduction of special da-

mage, by the plaintiff's loss of a customer at bathing-rooms, in consequence of words directly charging an unnatural crime; yet no sensible practitioner would in his own practice permit such joinder, affording the defendant's counsel an opportunity of observing to the jury, that the plaintiff thought as much of and put as high a value on the wife's clothes and his customer's subscription, as he did on her affections or his own character.

(c) See Vaughan, B., *Ward v. Bell*, 2 Dowl. 76; 1 Crompt. & Mee. 848, S. C.

(d) *Ward v. Bell*, 1 Crompt. & Mee. 848; 2 Dowl. 76, S. C.

(e) Tidd, 9th ed. 972; 1 Chitty on Pleading, 5th ed. 448, 449; *Hopkins v. Barnes*, 2 Price, 136; see 2 Bing. 412, where nine counts were allowed in an action for slander, though the words used were very few.

(f) See the sensible argument of Mr. Wightman in *Ward v. Bell*, 2 Dowl. 76.

(g) And see further as to the use of several counts *Stephen on Pleading*, 315; *Wordsworth on Rules*, 35, 36; and more fully 1 Chitty on Pleading, 445 to 451.

CHAP. XV.  
OF THE  
DECLARATION  
ITSELF.

add a count on a supposed promise to himself, unless the evidence in support of it was most certain, because if he failed in the action, he was then considered liable to pay costs; though if the declaration had been confined to counts on promises to the testator, he suing only as executor, would not, before the enactment in 3 & 4 W. 4, c. 42, s. 31, be liable to pay costs. (h) We will now state in what respects the *length of declarations* has been moderated by recent rules.

Fifthly, Alterations by Reg. Gen. Trin. T. 1 W. 4, reducing length of counts on bills and notes and indebitatus counts, accounts stated in assumpsit and debt, and abolishing quantum meruit and vellebant counts.

We have seen that the General Rule of Trin. T. 1 W. 4, though declaratory of a more extensive principle, yet only extends to a few cases, though certainly very frequently occurring in practice, relating to declarations on *bills of exchange and promissory notes*, and the common *indebitatus counts* as well in assumpsit as debt, and orders, that if such counts shall exceed the prescribed length, no costs of the excess shall be allowed to the plaintiff if he succeed in the cause, and that such costs of the excess as had been incurred by the defendant shall be taxed and allowed to the defendant; and that on the taxation of costs as between attorney and client, no costs should be allowed to the attorney in respect of any such excess of length; (so that an attorney cannot even subject his own client to the unnecessary expense); and in case any costs shall be payable by the plaintiff to the defendant on account of such excess, the amount thereof shall be deducted from the amount of the attorney's bill. The effect of this general rule is to reduce to three or four folios the length of the very frequent declarations on bills of exchange, promissory notes, and common debts, which used formerly to occupy about twenty-five folios; and the difference in length is not only saved in the *declaration*, but also in the *inquiry, issue, nisi prius record, and subsequent proceedings*, when any. This Reg. Gen. by prescribing concise forms of indebitatus counts and limiting the length, *impliedly abolished* the quantum meruit and quantum vellebant counts, which, though usually inserted, were never necessary, (i) though formerly considered otherwise by high authority, who indeed stated those counts as illustrations of the use of a second count to avoid variance. (k)

Sixthly, Alterations by Reg. Gen. H. T. 2 W. 4, r. 74.

Reg. Gen. of H. T. 2 W. 4, r. 74, ordered, that "*no costs shall be allowed on taxation to a plaintiff upon any counts or issues upon which he has not succeeded; and that the*

(h) *Ashton v. Poynter*, 1 Gale, 57; 3 Dowl. 465.

(i) 2 Saund. 122, n. (2).  
(k) 3 Bla. Com. 295.



*costs of all issues found for the defendant shall be deducted* (l) *from the plaintiff's costs.* (m) And it has been held, that even the plea of general issue to a declaration containing several counts, or several distinct allegations in one count, creates as many issues as there are counts or allegations within the meaning of this rule, and that the defendant is entitled to costs upon every count on which the plaintiff fails. (n) Hence the pleader should not insert in a declaration more than it can be ascertained the plaintiff will be able to prove, and if he do, the costs of the pleadings, briefs, and witnesses, as to the part on which the plaintiff fails, will fall upon him; and this rule applies to each separate count in ejectment. (o) And it has even been decided, that if a plaintiff do not prove all the words in one entire count in slander, but fail as to part, on the ground that the latter did not relate to him, as alleged in an innuendo, the defendant is under this rule entitled to the costs of so much of the pleadings so found for him. (p) In these cases the defendant will be entitled not only to the costs of so much of the *declaration* as is found in his favour, but also of so much of his *special pleas* as have been found for him, and also of so much of his *briefs* and *evidence* as *solely* or *principally* related to the same, (q) but not of more; and the plaintiff has a right to what are termed the *general costs* in respect of the issues found for him. (r) And if the jury find for the defendant upon one issue, and the judge thereupon discharge them as to the other issues, it was held that the defendant was not entitled to the costs of the pleadings or witnesses, in respect of the issues upon which no verdict was given. (s) So if the jury find *immaterial issues* in favour of a defendant, and the plaintiff afterwards obtain judgment non obstante veredicto, neither party is entitled to the costs of those issues under this rule of H. T. 2 W. 4. (t) And where in an action of slander the jury gave £50 damages on the first count, and £100 damages on the other nine counts, one of which latter counts was upon a writ of error held bad, and the plaintiff agreed to remit the £100 damages, it was held that he thereby gave up all the costs

CHAP. XV.  
OF THE  
DECLARATION  
ITSELF.

Plaintiff to be allowed costs only on issue on which he succeeds, and costs of issues found for defendant to be deducted or paid. \*

(l) And if the latter costs exceed the plaintiff's, defendant may recover them, *Milner v. Graham*, 2 Dowl. 422.

(m) See Jer. Rules, p. 62, n. (s); *Cox v. Thompson*, 2 Crompt. & Jer. 498; *Knight v. Brown*, 1 Dowl. 730; *Richards v. Cohen*, 1 Dowl. 533.

(n) *Cox v. Thompson*, 2 Crompt. & Jer. 498.

(o) *Doe v. Webber*, 1 Harr. 10.

(p) *Prudhomme v. Fraser*, 1 Harr. & Woll. 5; 4 Nev. & Man. 512.

(q) *Larnder v. Dick*, 2 Crompt. & Mee. 389; 2 Dowl. 333; 4 Tyr. 239, S. C.; *Eades v. Everatt*, 3 Dowl. 687.

(r) *Larnder v. Dick*, 4 Tyr. 239; 2 Dowl. 333, S. C.; 2 Cr. & M. 389, S. C.

(s) *Valance v. Adams*, 2 Dowl. 118.

(t) *Goodburne v. Bouman*, 2 Dowl. 206.

CHAP. XV.  
OF THE  
DECLARATION  
ITSELF.

on the last nine counts, (u) a case strongly evincing the great hazard of improvidently introducing any *doubtful* count; and under this rule the defendant is entitled to the costs of all the issues found for him, although they exceed the costs of those found for the plaintiff. (x) Since this rule, therefore, and before and independently of the rule H. T. 4 W. 4, it is important that the declaration and pleadings on the part of a plaintiff should state no more than can be proved on his behalf, for otherwise the defendant's costs may be equal to, if not exceed, those of the plaintiff. It seems, however, that a defendant should now at the trial confine the plaintiff to one of several counts, and that it is too late afterwards to move the Court for the purpose. (y) Thus when a verdict was taken on all the counts by consent, with liberty to move to enter a nonsuit, the Court refused, after that motion had been discharged, to allow the defendant to confine the verdict to any particular counts. (y) And even on a declaration for usury, containing thirty-seven counts, although there was only one transaction, the judge refused at the instance of the defendant to compel the plaintiff to elect on which count he would stand before the jury had given their verdict. (z) It was however held, even before the late rule, that if there be but one agreement, and the declaration contain several counts, the plaintiff can only have a verdict upon and the costs of one count, and that if the judge direct a jury otherwise, a bill of exception lies. (a)

This rule of H. T. extends to the result of an award, and where the arbitrator awards only as to a part in favour of the plaintiff, and as to the residue for the defendant, the defendant is entitled to the costs of the latter. (b)

On the other hand, it is essential on behalf of a *defendant* to keep in view, in all *his* pleadings, the inexpediency of raising any issue on which he is not certain of succeeding upon the evidence; for where the defendant pleaded the general issue and several special pleas, and the jury found for the *defendant* on the general issue, but for the *plaintiff* on the special pleas, it was held, that the plaintiff was entitled to the costs of the pleadings, and witnesses, and evidence, relating to such special pleas. (c) The above is to be understood with this quali-

(u) *Dadd v. Crease*, 2 Crompt. & Mee. 322.  
223; 2 Dowl. 269.

(x) *Milner v. Graham*, 2 Dowl. 422.

(y) *Martin v. Coleman*, 1 Harr. 86.

(z) *Swinburn v. Jones*, 1 Moo. & Rob.

(a) *Ward v. Bell*, 2 Dowl. 76.

(b) *Daubus v. Rickman*, 1 Hodges, 75;

*Eades v. Everatt*, 3 Dowl. 687.

(c) *Hart v. Cutbush*, 2 Dowl. 456.

fication, that where some issues are found for the plaintiff, and some for the defendant, although the latter is entitled to the costs of the issues found for him, as respects the *pleadings*, yet he is not entitled to the *general* costs of the cause, or even to the expenses of his own witnesses, unless their evidence related *exclusively* or principally to the issues found for him. (d)

CHAP. XV.  
OF THE  
DECLARATION  
ITSELF.

This rule renders it extremely important, as regards the costs, that before drawing a declaration, or plea, or other part of pleading, the attorney for the party pleading should ascertain whether the *evidence* will certainly sustain every part of his proposed pleading, and to inform his pleader accordingly, whose province it will be to exercise due caution, as well in the number of distinct allegations as in the mode of describing them. The general operation of this Reg. Gen. of Hil. T. 2 W. 4, r. 74, will be, that a plaintiff or defendant will, independently of Reg. Gen. Hil. T. 4 W. 4, 5, 6, & 7, be entitled to *receive* the costs of all pleadings, and parts of pleadings, found *for* him, and be liable to *pay* the costs of all parts of pleadings found *against* him, but under such rule there is not that *punishment* in the total loss of costs on the parts of pleadings found for him, as we shall find is provided by Reg. Gen. Hil. T. 4 W. 4.

*Seventhly*, Practical consequences affecting the structure of declaration or plea, &c.

By far the most important of the new rules are those of Hil. T. 4 W. 4, rule 5, 6, 7, which *imperatively* prohibit *several* counts, "unless a *distinct subject-matter of complaint* " is intended to be established in respect of each," or plea substantially proceeding on the *same ground of defence*. These rules are to be examined, *first*, as to the *operation* of the prohibitory provision, and *secondly*, as to the *consequences* of non-observance. As regards *declarations*, the terms of the fifth rule are: "Several counts shall not be allowed, unless a *distinct subject-matter of complaint* is intended " to be established in respect of each." It is certain, that in ancient pleadings more than one count was not inserted, unless there were really several distinct claims, but then formerly the subjects of litigation were but few, especially in assumpsit and case, and most of the forms of declaration were to be found in the Registrum Brevium. In modern times, if every active attorney could always secure correct instructions and a statement

*Eighthly*, The pleading rules of Hil. T. 4 W. 4, r. 5, 6, 7, viz. reg. 5, prohibiting more than one count on the same subject-matter, and giving instances, but permitting several breaches. (e)

(d) *Larnder v. Dick*, 2 Dowl. 333; *Eades v. Everatt*, 3 Dowl. 687.

(e) See the precise terms of the rule *ante*, 455.

CHAP. XV.  
OF THE  
DECLARATION  
ITSELF.

of facts, *precisely as the witnesses will prove them* on the trial, then a careful and intelligent pleader could not have occasion to introduce more than one count in a case falling strictly within the above rule. But it has very often occurred, and ever will occur, that even intelligent and honest witnesses, who have been applied to before declaring, and for the very purpose of declaring correctly, to make their statements of the transaction, even in writing, yet they will afterwards, on the trial, very materially vary in giving their evidence, and thereby a material variance will arise; or in the original statement one or more witnesses would vary very materially in their account of the transaction to the account given by other witnesses. In these cases, especially when the proof depended on verbal evidence, and not on written documents, cautious pleaders would introduce several counts varying the description of the contract, or the right, or breach, or injury, according to the varying statements of such witnesses, and even when there had not been any known discrepancy in the evidence, experience having informed pleaders what are the ordinary variations in transactions, they inserted such counts as they deemed it probable would enable the plaintiff on one or the other of such counts to obtain a verdict. (f) But as the legislature, by 3 & 4 W. 4, c. 42, s. 23, enabled a judge, upon a trial, to permit *any variance* to be amended, provided it did not prejudice the other party on the *merits*, it was considered expedient, at the same time, by s. 1, to enable the judges to make such alterations in the course of pleading as they might think fit, with the exception, that where any particular statute had given a right to plead the general issue, and to give the special matter in evidence under it, that right should continue. The learned judges, by the rules promulgated under the authority of that enactment, reciting such powers of amendment, and evidently supposing that they would be *fully and liberally acted upon*, and that, therefore, the introduction of *several* counts upon the same transaction, with the view to *avoid the risk of variance*, would no longer, in practice, be necessary, *therefore promulgated* the above rule, which, from fear of consequences as respects costs, has in effect put an end to the practice, (at least

---

(f) In *Nelson v. Griffith*, 2 Bing. 412; nine counts for verbal slander were permitted. The case of *The King v. Archbishop of York and others*, 1 Adol. & Ell. 394; and 3 Nev. & Man. 453; in the former of which, p. 398, the declaration is set forth, and is a strong instance that cases

will occur, where it will be very hazardous to rely on one count alone. Mr. Tidd and the author considered it necessary to introduce even *five counts*; and a learned judge at Chambers, and the Court in Banc afterwards, were of the same opinion.

without the risk of incurring severe punishment in costs,) of introducing more than one count upon one and the same transaction; and so long as the judges *very liberally* exercise their powers of amendment, there can be no objection to the rule, which, by shortening the pleadings, will materially lessen the entire expense of a trial.

But unfortunately instances have occurred where learned judges have refused amendments, and afterwards regretted their decision. (g) Certainly, in cases within the rule, every attorney, and every pleader, must exert much more care and attention in obtaining instructions for and preparing the single count, and the former should, in strictness, see and carefully examine every witness to the transaction before he declares, and where witnesses are hostile, or access to them cannot be had, the risk of a trial and a nonsuit, in respect of a variance which the judge may refuse on the trial to amend, is since this rule considerably increased, and cannot be avoided even by the most active and intelligent endeavours. In short, the common law liberty of introducing several counts for security was abridged, and, indeed, in effect, annulled, upon an understanding that a plaintiff *shall*, on the trial, be allowed to amend; but, unfortunately, it is not by any means of course that such amendment will be allowed, and this, although it be made appear that another learned judge had refused to allow the introduction of the very count which, had it been inserted, would, without any favour or amendment, or payment of costs, have entitled the plaintiff *as of course* to the verdict.

It will be observed, that in explanation of the meaning of the words, "*unless a distinct subject-matter of complaint is intended to be established in respect of each,*" the rule gives several *examples*, which practitioners and students must carefully consider, not only as in effect constituting part of the positive rule in those particular instances, but also as greatly elucidating the intended operation of the rule in other cases. (h)

*Ninthly*, When or not several counts may and should still be inserted.

It will also be expedient to study the examples when or not *several pleas* shall be admissible and the decisions thereon, for in cases where two or more pleas would be admissible, perhaps in cases similar on principle, *several counts* ought also to be admitted; as where in an action of trover for wool the defendant

(g) *Jelf v. Oriel*, 4 Car. & P. 22; *Dos* S. C.

*v. Errington*, 3 Nev. & Man. 646; *Parker*

(h) See the rule and instances, *ante*, 455 to 458.

CHAP. XV.  
OF THE  
DECLARATION  
ITSELF.

was permitted to plead a lien by custom, a lien by agreement, and two other pleas of lien nearly similar. (i)

It will be observed that the fifth rule expressly excepts a count upon an *account stated*; so that after a special or a common count for the original debt, a count upon an account stated *may* always be added, though it should not unless there be evidence of a *subsequent accounting* or an admission to the plaintiff himself of a named balance being due to him; for otherwise, if the plaintiff fail on that count, he may still, under Reg. Gen. Hil. T. 2 W. 4, r. 74, have to pay costs of the issue as to that count. (k) The rule declares, that the several *examples* shall be considered merely as *instances* not intended to narrow or restrict the rule in its operation or its principle. It is however declared that the rule shall not prohibit the introduction of several *breaches*. (l)

Some of the learned judges appear to have considered that if the declaration *might*, notwithstanding the fifth rule, contain two or more counts varying the statement of substantially the same right or cause, then it is not a case in which a judge can be required or expected to exercise his discretion to permit an amendment; as in a declaration against a sheriff, the first count for an actual arrest and an escape, the plaintiff might add a count for *not arresting when there was an opportunity*; and if on the trial, for want of such a count, or a declaration contained only one count for an injury to a watercourse in right of a *mill*, when a count in right of a *close* might have been added; (m) and if so, the pleader might be censured for not inserting more counts accordingly. (m) It is however expressly declared, "that the *examples* are given only as some *instances* of the application of the rules to which they relate, but the *principles* contained in the rules *are not to be considered as restricted* by the examples specified." The words "*Distinct subject-matter of complaint*," obviously mean a *distinct and separate substantial cause of action* (always including a right, and an infraction of that right), and as distinguishable from a mere *variation* in the *mode of describing* the same debt or injury; and pro-

(i) *Leuckhart v. Cooper*, 1 Bing. N. C. 509; 1 Hodges, 16; 3 Dowl. 415, S. C. Some persons have doubted whether as all those pleas could not be established on the trial, but only *one*, they were not mere variations in statement, and not statements of distinct grounds of answer or defence, and consequently not properly admissible; see terms of rule Hil. T. 4 W. 4. reg. 5, ante, 455.

(k) *Ante*, 457; see 1 Chitty on Pleading, 391, as to when a count on an account stated is sustainable.

(l) *Ante*, 457.

(m) Per Patteson, J. in *Frankum v. Earl of Falmouth*, as stated in Bosanquet's Rules, 14, in notes; and see *Guest v. Everest*, 9 Legal Observer, 75; Chitty on Amendment of Variances, 26, 27.

bably were intended to prohibit more than one count, when there could in justice be only *one recovery of damages*. Supposing, therefore, that there have *in fact* been two distinct promises to pay the same debt,—the one on an *executory* consideration, and the other on an *executed* consideration; or, in other words, one promise to pay before the work was done, or other consideration given, and another promise in fact to pay after the work was done, or consideration given, then (with the exception of an account stated) only one count is to be allowed, because there is only one subject-matter of complaint, viz. the nonpayment of only *one debt*. (n) It has however been suggested, that in an action against the sheriff for an *escape*, there may be two counts,—the first stating an *actual arrest and escape*, and a second count stating that the sheriff *did not arrest* the original defendant when he had an opportunity, and which breach of duty might have in fact occurred on another occasion, either before or after the actual arrest, and which might have created a *distinct* cause of action; (o) and that in an action on the case for a disturbance of a right to a watercourse there might perhaps be a count stating the right in respect of *a close* of the plaintiff and another count in right of *a mill*. (p) As the terms of Reg. Gen. Hil. T. 4 W. 4, reg. 5, prohibiting *several pleas* carrying the statement of the same ground of defence, are the same as those prohibiting several counts carrying the statement of the same subject-matter of complaint, it would seem that, on principle, decisions in favour of admitting several pleas would also be applicable to several counts; and if so, then, as in an action of trover, the Court of Common Pleas permitted four varying special pleas, each describing as a defence a right of lien, viz. one founded on custom, another on agreement, another on a custom differently stated, and the other a different custom, it would seem that equally should a plaintiff be allowed in cases of doubt to introduce four counts similarly varying. (q)

A very sensible author has supposed, that with analogy to the instance stated in the rule, “that a count for freight upon

(n) See an instance in *Marsh v. Griffin*, post.

(o) Per Patteson, J. in *Guest v. Enderst*, 9 Legal Observer, 75; and *Bosanquet's Rules*, 13, in note.

(p) *Frankum v. Earl of Falmouth*, as stated in *Bosanquet's Rules*, 14, in notes, S. C. in 1 Harr.; 4 Nev. & Man. 330; 6 Car. & Pa. 529; but do not in the latter notice that point.

(q) *Leuchhart v. Cooper*, 1 Bing. N. C. 509; 3 Dowl. 415; 1 Hodges, 16, S. C. *Hart v. Bell*, 1 Hodges, 6; *sed quere*, for in *Wilkinson v. Small*, 3 Dowl. 465, Mr. Justice Williams said, “The rule is much more strict as to plaintiffs, who are only allowed one count to each cause of action, and the reason is different, whereas defendants may have several inconsistent pleas.

CHAP. XV.  
OF THE  
DECLARATION  
ITSELF.

---

a charter party, and another count for freight *pro rata itineris*, upon a contract implied by law, are to be allowed." It would seem that where a party contracts to work by a certain plan, and that plan is so entirely abandoned, that the original contract cannot possibly be traced, and it cannot be said to which part of the work it shall be applied, in such case the plaintiff will be permitted to recover as if no such contract had been made, and to charge for the whole work done, according to its value, and the benefit actually received; and that in this case it will be necessary, *from the uncertainty of the event of the proofs*, as to whether they will show the special contract to have been wholly abandoned, or only deviated from, to join both counts. (r) However, in a late case, two learned judges at chambers separately considered that a plaintiff had no right to insert two counts, the first special, on a contract that if the plaintiff would take possession of a farm, and plough and sow it, in expectation of the fulfilment of an agreement for a lease, the defendant would pay the expenses thereof, in case the agreement should not be fulfilled; and a common count for work and labour and seed provided, although the plaintiff *bona fide* expected to prove, besides the special contract, a *distinct promise in fact* after the agreement had been abandoned, and the defendant had taken and derived the benefit of the labour and seed; and those learned judges on *summons* compelled the plaintiff to elect to proceed on the special count, and that for money had and received, and on an account stated, striking out the common counts for work and labour and seed, and that for money paid. (s)

Upon the whole, in practice, when an experienced pleader, after full consideration, thinks that the proposed several counts are essential for the purpose of just security to the plaintiff to be introduced, and that they do not contravene the rule, it seems to be advisable to insert all in the declaration, and explicitly to state his reasons to the learned judge in answer to any application to strike out all but one, and then, in case that judge should order them to be erased, to submit to his decision, and not pertinaciously to retain the counts objected to, at the risk of losing all the costs under the seventh rule; and in which case, should a variance appear on the trial, it is most probable the judge who presides at the trial, on proof of such

---

(r) Bosanquet's Rules, 19, note 14.

(s) *Marsh v. Griffin*, Hil. T. 1835, per Parke, B. and Bolland, B. at chambers;

and see *post*, application to strike out courts.



prior proceeding at chambers, will permit an amendment, or the Court in banc would be disposed on motion for a new trial to afford redress.

CHAP. XV.  
OF THE  
DECLARATION  
ITSELF.

As these rules preclude the use of several varying *counts* upon the *same subject of complaint*, but expressly permit *several breaches* of one and the same contract in the same count, it may be advisable, when the law admits, to frame the declaration on an *implied duty*, and to declare upon the *duty* and assign as *many breaches* as may be applicable, instead of declaring on a supposed promise to perform a particular and specified *part* only of that duty; as, for instance, in an action of assumpsit against an attorney for negligence, the declaration might state his retainer to sue or defend, or to advance the plaintiff's money on security, "and that in consideration thereof, and of fees and reward, the defendant undertook to *observe and perform his duty* in that respect," and then in the same count it might be averred that it was the defendant's duty to do so and so; as, to take such due care of the conduct of the action or defence, or to take due care to endeavour to obtain proper security, &c. and then alleging as many breaches as may be deemed advisable. So in an action against a tenant holding under a parol demise for numerous breaches of implied good husbandry, the declaration might state that in consideration of the letting, or of the subsisting tenancy, the defendant undertook to observe the course of good husbandry, and use the premises in a tenantlike manner, and then assign as many breaches as will be supported in evidence. So, instead of several separate counts for illegal acts relating to the same distress, all or many might be included in one count, as a count stating a distress for *more rent* than was due, and then also averring that the goods distrained were of *much greater value* than the pretended arrear of rent, so as to constitute an excessive distress, contrary to the statute of Marlbridge; and then stating, that the goods having been so distrained, the defendant wrongfully impounded the goods off the premises without giving the plaintiff notice of the place of impounding; and then that the defendant sold part of such goods within five days, and neglected to have the goods appraised by two sworn appraisers before such sale; and that defendant did not sell the goods for the best price, that he might with due care have obtained; and that he sold *more than was necessary*, and that he did not *leave the overplus* with the sheriff, &c. and so on.

Suggestions for changing the forms of declaring in some cases; as, declaring upon a *general duty*, and assigning *several breaches* thereof.

CHAP. XV.  
OF THE  
DECLARATION  
ITSELF.

*Tenthly, Plead-  
ing influenced  
by consideration  
of costs,*

The pleader should anticipate that if he insert several counts that are even permissible under the new rules, yet if the defendant plead to each separately, or plead so as to put each allegation in issue, and there be no confidence of the plaintiff's success on both counts, it may become advisable to take out a summons for leave to withdraw the untenable count, instead of proceeding to trial at the great risk of having to pay to the defendant all the costs of his pleadings and evidence relating to the untenable count or allegation.

*Eleventhly, The  
rule how far  
imperative on  
the judge at  
chambers, or at  
nisi prius,*

The effect of the 6th and 7th rules is, that if a defendant, on receiving the declaration, be advised that it contains two or more counts, founded on the same subject-matter of complaint, he is at liberty to obtain a summons calling on the plaintiff to show cause before a judge at chambers, why the superfluous count should not be struck out. The 6th rule is *imperative on the judge* to make his order for striking out the superfluous count, "*unless he shall be satisfied, upon cause shown, that 'some distinct subject-matter of complaint is bonâ fide intended to be established in respect of each,'*" and in that case it seems *imperative* on him, being of that opinion, to indorse upon the summons, or state in his order, as the case may be, that he *is so satisfied*, and also to specify the counts mentioned in such application which shall be allowed.<sup>(t)</sup> But still, under the seventh rule, however bonâ fide the plaintiff may have been considered by the learned judge at chambers to have acted in introducing such second or other count, yet if the plaintiff fail in establishing a *distinct ground of complaint*, a verdict is to be entered against him thereon, and he is to pay to the other party the costs occasioned by such count, including those of the *evidence* as well as of the *pleadings*; <sup>(u)</sup> and then comes the most serious part of the rule, viz. that if the judge on the trial, upon all the facts then before him, shall be of a different opinion to the judge who at chambers permitted the second or further count to stand, *i. e.* shall be of opinion that *no such distinct subject-matter of complaint was bonâ fide intended* to be established, and *shall so certify* before final judgment, <sup>(x)</sup> the party so pleading shall not recover any costs even

(t) The decision of a judge at chambers upon the introduction of a second count is probably *conclusive*, without appeal to the Court in banc, *semble*, see observations of Denman, Ch. J., in *The King v. Archb. of York and others*, 3 Nev. & Man. 453; 1 Adol. & Ell. 397, S. C.; *ante*, vol. iii. 35; see the forms of sum-

mons and order, *post*.

(u) We may remember that the plaintiff incurred the *same liability* in the previous rule of Hil. T. 2 W. 4, *ante*, 476, 7.

(x) The words "and shall so certify" seem to import that the judge at nisi prius has a *discretionary jurisdiction*, and that it is *not imperative* on him so to cer-

upon the issue or issues upon which he has succeeded, arising out of any count, &c. with respect to which the judge shall so certify.

*Twelfthly, Observations on the effect of these rules; and impolicy of non-observance.*

It has been urged, that these rules are unnecessarily harsh in depriving a plaintiff of the power of adding a count varying his statements, *especially in cases where he could not anticipate the evidence, perhaps, exclusively in the possession of the defendant*, and which might unexpectedly start up on the trial and occasion a variance, and it has been suggested that the rule should only have been, that the costs of counts and issues found for the defendant should be disallowed to the plaintiff and deducted from his other costs, *unless the judge trying the cause should certify that such counts were proper or reasonably introduced.* (y) But it is well known that this and all other objections to the terms of these rules were fully discussed and considered by the common law commissioners and by the learned judges before the rules were promulgated, and it was anticipated that if *any* exception to the rule prohibiting more than one count were allowed (as, for instance, a power to add *several counts by leave of a judge or of the Court,*) the applications would have been endless, and the rule itself would soon have become a dead letter, and it was considered that, supposing, as might be *justly* anticipated, the power of amendment in cases of variance would be *liberally exercised*, there was no occasion to permit any *exception* to the rule; and as regards the *punishment* of a party, by depriving him of the costs of the count and issue found in his favour, because he had improperly and injudiciously, with undue pertinacity, retained a redundant count, though *prima facie* perhaps severe, yet the same is not in reality unjust, because such punishment could only follow where a plaintiff or his attorney had by some *fraud* or, at least, *misrepresentation, imposed on the judge at chambers*, by assuring him that there was another distinct cause of action, and thereby induced him to permit the second or subsequent count to continue, and it is not probable that the judge would on the trial certify that no distinct subject-matter of complaint was *or had been bona fide intended to be established in respect of each count* so allowed, unless he, upon due consideration, was

tify, even though he may be of an opinion unfavourable to the plaintiff, as to the *bona fides* of his retaining the second count.

(y) Atherton on Personal Actions, and Rules, 117, 118. But see observations in Bosanquet on the New Rules, 30, in note.

CHAP. XV.  
OF THE  
DECLARATION  
ITSELF.

satisfied that an imposition was *originally* intended to be practised, and certainly would not so certify when the plaintiff or his attorney had *fair ground* to expect that he might and would succeed in establishing such distinct claim.

The effect of these rules in practice will certainly be to render it essential for the plaintiff's attorney, in every case, very fully to enquire not only into the facts but also the sufficiency of the *evidence* in support of any *second count*, before he *introduces* or, at least, *persists in retaining* a second count in contravention of these rules, and, at least, if a summons should be obtained on the part of a defendant to strike out a second count, it will be advisable *not to persist* before the judge in retaining it, at the peril of his not succeeding on the trial in supporting it by overwhelming proof, and in cases of the least doubt it will be most prudent to consent to withdraw the obnoxious count, even with intent afterwards to commence a *distinct action* in respect of the cause of action to which such count was intended to apply.

Even the improper introduction of *venue* in the body of a declaration, or of one of the shortest parts of the prescribed common counts, as, "And in £100 for work and labour done" and performed, and materials found by the plaintiff for the defendant at his request," would, if a summons were successfully obtained by the defendant's attorney to strike them out, occasion considerably more costs than even the retention of those few words. (z) If a defendant obtain a summons for leave to plead *several pleas*, and do not succeed as to one of them, the costs in that case in general are costs *in the cause*, (i. e. not to be paid till the conclusion of the action,) yet the same will, in case the plaintiff succeeds, increase the costs to be paid by the defendant to the amount of several pounds. Therefore, every practitioner should abstain from introducing more counts or pleas than he is confident a judge will suffer to stand.

The recent rules may also induce prudent practitioners to decline the consolidating or uniting several different claims in one declaration, and in that respect may tend to multiplicity of actions. In practice, amongst the majority of the most respectable practitioners, it is not usual to take out a summons to strike out a count under these rules, but they prefer to try the action liberally, admitting all fair variations as well in the declaration as in the pleas, and it is much to be regretted that

---

(s) As much as £4, or upwards, see Applications to strike out Counts," and the case of *Marsh v. Griffin*, *post*, "Of the items of costs there stated in the note.

any practitioner can be found who will adopt proceedings to strike out only a very few words, which have not nor will occasion any material expense, and certainly far less than the costs of the vexatious application, a circumstance which of itself was considered at one time an answer to any application to the Court of that nature. (a)

CHAP. XV.  
OF THE  
DECLARATION  
ITSELF.

Having thus considered the operation of the recent statutes and rules as regards the *structure* of the draft of a declaration, a few practical points still remain to be examined, and which may be thus arranged.

Thirdly, Other practical matters connected with declarations.

- |  |   |
|--|---|
| 1. Mode of engrossing or writing the declaration . . . . . 489         | notice of declaration filed . . . . 494   |
| 2. Number of copies of declaration in case of a prisoner . . . . . 490 | 8. Form of notice of declaration having been filed on serviceable process, and to plead in the King's Bench, Common Pleas, or Exchequer, where the plaintiff has entered an appearance for defendant sec. stat. . . . . ib. |
| 3. Declaration in what cases to be delivered . . . . . ib.             | 9. The like de bene esse on bailable process . . . . . 495  |
| 4. When to be filed and notice thereof given . . . . . 491             | 10. Of declaring by the bye . . . . . ib.   |
| 5. Notice of declaration, when filed . . . . . ib.                     | 11. Accompanying particulars of demand, when required, &c. . . . 496  |
| 6. Requisites of such notice of declaration, when filed . . . . . 492  |   |
| 7. Time within which defendant must plead, may be stated in            |   |

The 4 Geo. 2, c. 26, enacts that all pleadings shall be written in the *English* tongue, and be written in such *common hand* as acts of parliament are usually engrossed, *in lines and words to be written at length*, as the said acts usually are, and not abbreviated, on pain of forfeiting 50*l.* to a common informer; but the 6 G. 2, c. 14, enacts, that such penalty shall not extend to the expressing the names of writs or technical words, nor to abbreviations used in the English language. The stamp acts, 48 G. 3, c. 149, schedule, Part II. and 55 G. 3, c. 184, schedule, Part II. required copies of declarations to be written in the usual and accustomed manner, and it not having been the practice to write such copies on both *sides* of the paper, the Court of King's Bench held that a copy so written and delivered to a prisoner was irregular, and entitled him to be discharged out of custody. (b) But as that regulation had in view the stamps on each sheet of a copy of a declara-

1. Mode of engrossing or writing the declaration.

(a) Vide post, "Of Striking out Counts, &c.," see observations of the Court in *Brindley v. Dennett*, 3 Bing. 184.

(b) *Champneys v. Hamlin*, 12 East, 294; *Hartop v. Jukes*, 1 Maule & Sel. 709; *Doe d. Irwin v. Roe*, 1 Dowl. & Ryl. 562.

CHAP. XV.  
PRACTICE AS TO  
DECLARA-  
TIONS.

tion, and all such stamps have since been repealed by 5 G.4, c. 41, that regulation may not now be material. The Court of Common Pleas refused to set aside a declaration on the ground that the common counts were partly printed and partly written, (c) and indeed that is now the constant course, as the common counts are usually printed in blanks, with spaces for names and sums to be filled up in writing. But care must be observed that no blank spaces be left that would render the sense uncertain. The declaration is always printed or written on paper, and not on parchment. A rule of the Court of Common Pleas of Mich. Term, 1654, reg. 18, promulgated to cause care in examination of the declaration, orders that if the plaintiff's attorney delivers a copy to the defendant's attorney, *materially varying* from the original declaration, the disadvantage thereof shall not be cast upon the defendant, but on the plaintiff, whose attorney is paid for it. And where the declaration in ejectment served on the defendant described the premises as situate in the wrong parish, varying from that on the record, and the plaintiff obtained a verdict, the Court granted the defendant a new trial, and compelled the plaintiff to make the record correspond with the declaration delivered, or pay all the defendant's costs and proceed to a new trial. (d)

2. Number of  
copies of de-  
claration in case  
of prisoner.

In ordinary cases only one copy of the draft of declaration, fairly written, is filed or delivered. But formerly, in the case of a *prisoner*, it was essential to incur more trouble and expense by having *three* copies. But now, by Reg. Gen. Hil. T. 2 W. 4, reg. 36, it is ordered, "that when the plaintiff declares against a prisoner, it shall not be necessary to make more than *two* copies of the declaration, of which one shall be served and another filed, with an affidavit of service; upon the office copy of which affidavit, a rule to plead may be given." This rule assimilates the practice of the King's Bench to that of the Common Pleas, and dispenses with the previous necessity in the former Court to have three copies of declaration. (e)

3. Declaration  
in what cases to  
be delivered.

The recent statutes and rules do not appear to interfere with the former practice as to delivering or filing the declaration, and therefore recourse must still be had to the ancient practice. It will, however, be observed, that the Reg. Gen. of Hil. T. 4 W. 4, reg. 1, expressly orders, that no demurrer

(c) *Brand v. Rich*, 8 Taunt. 591; 2 Moore, 654, S. C.; Tidd, 452.

(d) MS. A. D. 1817, K. B.

(e) See the rule and prior practice, Jervis's Rules, 58, note (1), and Tidd, 344, 345, 355.

nor any pleading *subsequent* to the declaration, shall in any case be filed with any officer, but the same *shall always* be delivered between the parties; (e) and unquestionably the most convenient and least expensive course is that the declaration as well as all other pleadings and proceedings should be delivered directly to the opponent, which saves the loss of time, trouble, and expense, of resorting to any public office, as well as the expense of officers to be there in attendance.

When the defendant has appeared, either by himself or his attorney, and caused his appearance to be entered to serviceable process, or by putting in bail to a *capias*, or writ of detainer, a *copy of the declaration* must be *delivered* to the defendant's attorney or agent, or to the defendant himself, when he has appeared in person, if his residence be known; but when he has appeared by attorney, whose residence is known, or may be readily ascertained, it would be irregular to deliver the declaration to the defendant himself. (f) If the abode of the defendant's attorney be unknown, then such copy may be left with the clerk of the declarations, and notice thereof given to the defendant himself or his attorney. (g)

When the defendant has not caused his appearance to be entered, or in a bailable case has not put in bail above, then, as it is not presumed that the plaintiff knows the residence of the defendant, or who he intends to employ as his attorney, the declaration *may* and indeed *must be filed*, viz. in the King's Bench, in the office of the clerk of the declarations, in the Common Pleas, with the prothonotary, and in the Exchequer with the filacer. (h)

4. Declaration in what cases to be filed and notice thereof given.

Whenever a declaration has been regularly filed, *notice thereof* and of its having been so filed must be given to the defendant, by leaving such notice at his present, or, by leave of the Court, last place of abode, (i) and a separate notice must in like manner be delivered for each defendant, where there are several. (k) The Gen. Reg. Hil. T. 2 W. 4, r. 49, orders that "where the residence of a defendant is unknown, *notice of declaration* may be stuck up in the office;" but the rule is

5. Notice of declaration when filed.

(e) And see previous practice, Jervis's Rules, 87, n. (a).

(f) Lofft, 332; 1 Arch. K. B. 4th ed. 226, 227.

(g) R. T. 2 G. 2, R. T. 12 W. 3; *Hindford v. Charteris*, 2 Ld. Raym. 1407; Tidd, 452; 1 Arch. K. B. 227.

(h) R. T. 1 G. 2, K. B.; B. M. 1 G. 2, C. P.; 1 Arch. K. B. 227.

(i) R. T. 1 G. 2, K. B.; R. E. 49 G. 3; R. M. 1 G. 2, C. P.; *Watson v. Delcroix*, 2 Dowl. 396; 4 Tyr. 266, S. C.

(k) *Coulson v. Turnbull*, Barnes, 246; *Kingdon v. Horn*, Barnes, 293.

CHAP. XV.  
PRACTICE AS TO  
DECLARATIONS.

thus qualified, "*but not without previous leave of the Court.*"<sup>(l)</sup> and such application must precede the delivery of the declaration, and therefore where the plaintiff's attorney, not knowing to where the defendant had removed, left the declaration at his last residence, the Court on subsequent motion refused to make a rule declaring such antecedent service good; <sup>(m)</sup> and it has been questioned whether a single judge at chambers can give such leave; <sup>(n)</sup> and upon an application to the Court, they require an affidavit, showing that very diligent and frequent inquiries, and what in particular, for one alone will not suffice, have been made after the defendant, in order to deliver such notice to him personally. <sup>(o)</sup> But the rule giving such leave is absolute in the first instance. <sup>(p)</sup> If it appear that the notice has been left at the defendant's present residence, or there is reasonable ground to believe that the defendant has had actual knowledge of the notice of declaration, there is then no occasion to apply to the Court for leave to stick up the notice in the office, <sup>(q)</sup> although to avoid the risk of the defendant's afterwards moving the Court, on the ground that he had no intimation of the notice, the safest course is to apply to the Court for leave to stick up the notice in the office. Where in the service of a notice of declaration the probabilities are that it has come to the hands of the defendant, and the latter does not deny that it had come to his knowledge, the Court will not set aside the service. <sup>(r)</sup>

6. Requisites  
of such notice  
of declaration  
when filed. (s)

Notwithstanding the practical proceedings in an action have in other respects been materially changed by the recent enactments and rules, yet the *form and requisites of a notice of de-*

(l) *Watson v. Delcroix*, 2 Dowl. 396; 2 Crompt. & M. 425. In *Martin v. Colvill*, 2 Dowl. 694, it was ordered that service of declaration should be deemed sufficient, by leaving it at the last place of residence of defendant, and sticking it up in the Exchequer Office, where the defendant had removed since service of the summons, but the Court refused to make a prospective order as to subsequent proceedings; and see *Cornish v. King*, 3 Tyr. 575, ante, vol. iii. 320, note (b).

(m) *Troughton v. Craven*, 3 Dowl. 436.

(n) 1 Arch. K. B. 4th ed. 227.

(o) *Id. ib.*; *Fry v. Rogers*, 2 Dowl. 412; *Heming v. Drake*, id. 637; see form of affidavit T. Chitty's Forms, 108. In addition to the usual form of affidavit it is suggested that deponent should

swear to a search in the Directory, and at general or local post offices, and at any public offices with which it may be supposed that the defendant was connected; and see suggestion, ante, vol. iii. Chap. VII. as to proceedings on distringas, and Chitty on Bills, 8th ed. as to diligent inquiries.

(p) *Bridger v. Austin*, 1 M. & Scott, 520; 1 Dowl. 272, S. C.

(q) *The Mayor and Burgesses of Derby v. Wheeldon*, 9 Price, 150; see further as to the service of the notice of declaration, 1 Arch. K. B. 4th ed. 228.

(r) *Rolfe v. Brown*, 3 Dowl. 628; and see same principle as regards service of process, ante, vol. iii. 272.

(s) As to this notice, when the notice to plead is incorporated therein, see further next chapter "Notice to plead."



*claration having been filed* continue the same, excepting that the Reg. Gen. 2 W. 4, r. 41, directs that "it shall not be deemed necessary in a notice of declaration to express the amount of the damages laid at the conclusion of the declaration." (t) The form and requisites in other respects depend on separate rules of each of the Courts, now comparatively ancient. The rule Trin. T. 1 G. 2, A. D. 1727, of the King's Bench, *professedly* by its recital made to establish the practice of the Court of King's Bench, upon the stat. 12 G. 1, c. 29, ordered that "in all causes where a copy of the process of that Court shall be served upon any defendant, and an appearance entered, or common bail filed for such defendant by the plaintiff's attorney, pursuant to the said act, the plaintiff's attorney in such case shall leave a copy of the declaration in the office, with the proper officer appointed for that purpose, and also *give notice thereof to the defendant*, by delivering an English notice, written in secretary hand, to such defendant, or by leaving the same at the last or most usual place of abode of such defendant; in which notice shall be likewise expressed, *the nature of the action*, and at *whose suit* prosecuted, and the *time* limited by the rules of Court for such defendant to plead to such action; and that in case such defendant do not plead to such declaration by such limited time, so to be expressed in such notice, judgment shall be entered against such defendant by default, and from the time of giving such notice as aforesaid, such declaration shall be deemed well delivered to such defendant, and not otherwise: and in case such defendant, after such notice given, do not plead by the time the rules for pleading are out, the plaintiff in such case may sign his judgment, *without any other or further calling for a plea*; and thereon give notice of his executing his writ of inquiry, either by delivering a notice in writing to such defendant, or by leaving the same at the last or most usual place of abode of such defendant, which shall be a sufficient notice to such defendant of the time of executing such writ of inquiry."

In the following Mich. T. 1 G. 2, A. D. 1727, a rule nearly similar, and enjoining the same form of notice, was promulgated for the *Common Pleas*; and the practice is now the same in the Exchequer. (u)

Although perhaps on principle a defendant, on receiving Irregularities or

(t) Not previously necessary in C. P. Tidd, 457; Jervis's Rules, 53, note (g).  
*Heikerington v. Hobson*, 6 Taunt. 331;

(u) Price P. 249, 250, note\*.

CHAP. XV.  
PRACTICE AS TO  
DECLARA-  
TIONS.

imperfections in  
notice of decla-  
rations when  
and how ob-  
jected to.

any notice that a declaration has been filed in the cause in the proper office ought to enquire there, and obtain a copy, and thereby learn all necessary particulars, and not be allowed to take advantage of any want of particularity in the notice, yet it has been held that, if the notice of declaration irregularly *vary* from the writ in the *number* or names of the parties, (x) or in the description of the *form of action* from that named in the writ, the notice will be irregular; and the same, and all proceedings thereon, may, on summons or motion, in due time, be set aside; (y) as where the writ of summons was "trespass on the case *upon promises*," and the notice of declaration was "in an action of trespass on the case," omitting promises. (y) It was formerly held that a notice of declaration must be dated, (x) but the contrary was afterwards determined; (a) and as by the terms of the rules prescribing the requisites of the notice, the same, as well as the declaration, begin to operate only from the delivery of the notice, it would seem that a date, though usual, is immaterial when the declaration has been filed *de bene esse*; which we have seen it can now only be on bailable process on or after the eighth day after the arrest. The notice should state that it has been so filed as in the subscribed form; but if omitted, the Courts nevertheless have held the notice sufficient. (b) The *usual form* of such notice is subscribed.

7. Time within  
which defendant  
must plead to be  
stated in notice  
of declaration  
filed.

As respects the *time for pleading*, it must, according to the directions in the above rules, be accurately stated in the notice, and if it give the defendant *less time* than he is entitled to, would be bad; (c) though if it give the defendant more time than was necessary, it will be binding on the plaintiff. (d)

(x) *Evans v. Whitehead*, 2 M. & R. 367.

(y) *Ans.* vol. iii. 197, note (x), 376, note (p); *King v. Skiffington*, 1 Cr. & M. 363; 3 Tyrw. 318; 1 Dowl. 686, S. C.; *Robins v. Richards*, 1 Dowl. 376; *Cook v. Johnson*, 1 M. & Scott, 115; 1 Dowl. 247, S. C.; *Oraves v. Urse*, 2 Wils. 84; and see the older cases, 1 Sellon Pra. 248, 252; Tidd, 452, 457, *id.* Supp. A. D. 1833, p. 123; *Chapman, K. B.*, 2 Add. 106; 1 Arch. K. B., 4 ed. 228, 229.

(z) *Cromwell v. Goodwin*, Barnes, 409, P. R. 134; cited in *Sell. Pr.* 250; *Anonymous*, 2 Chitty's Rep. 238.

(a) *Anonymous*, 2 Chit. R. 238.

(b) *Cort v. Jaques*, 8 T. R. 77; *Watkins v. Wooley*, 8 Taunt. 644; 2 Moore, 719, S. C.

(c) 1 Sellon Pr. 250, cites P. R. 135. When a notice to plead was indorsed on declaration delivered, and was in blank as to the time when defendant was to plead, it was held sufficient, as defendant was bound to know or ascertain the proper time. *Hifferman v. Langelle*, 2 Bos. & P. 363; and see *Doe v. Roe*, 1 Tyrw. 280, *sed quere*.

(d) *Solomonson v. Parker*, 2 Dowl. 405.

8. Notice of  
declaration hav-  
ing been filed  
on serviceable  
process, and to  
plead in K. B.,  
or C. P., or

In the K. B. [or "C. P." or "Exchequer of Pleas."]

Between { A. B., Plaintiff,  
and  
C. D., Defendant.

Take notice that a declaration was this day [or "on the — day of — last" or "instant"] filed with the clerk of the declarations in the King's Bench Office, [or in C. P. "with the prothonotaries, at their office in Tanfield Court,"] in the Inner Tem-

CHAP. XV.  
PRACTICES AS TO  
DECLARATIONS.

This depends on ancient rules in the respective Courts, similar to each other in effect. The time is *four days* when the venue is laid in London or Middlesex, and the defendant resides within twenty miles of London, and *eight days* if the venue be in any other county, or the defendant resides above twenty miles from London. (e) The notice of declaration, as respects the time for pleading, is deemed filed only from the time of the service of the notice; (f) and therefore a rule to plead before service of notice of declaration would be irregular. (g) If any notice of declaration is received or communicated to the defendant, he must, if it be defective, apply within a reasonable time to set it aside; and if he neglect so to do, and the plaintiff sign judgment for want of a plea, the Court will not afterwards set aside the judgment in respect of any objection to such notice. (h)

It has been supposed by high authority that the same plaintiff may still declare *by the bye* after the defendant has appeared, viz. may deliver another distinct declaration for a different cause of action from that expressed in the process

10. Of declaring by the bye.

ple, London, [or in *Exchequer*, "filed in the Office of Pleas of the said Court, situate in Lincoln's Inn, in the county of Middlesex,] against you, at the suit of the above-named plaintiff, in an action upon promises, [or "of debt for ——" or as the action is,] and unless you plead thereto in four [or "eight," depending on facts, as in context, and *post*, Time of Pleadings] days from the date hereof [in *Exchequer* more properly the form runs "service hereof"] judgment will be signed [in *Exchequer* say "entered"] against you by default. Dated this — day of — A. D. 1835.

*Exchequer*, where the plaintiff has entered an appearance for defendant sec. stat.

Yours, &c,  
Plaintiff's Attorney, [or "Agent."]

To Mr. —, the above-  
named Defendant. }

In the K. B. [or "C. P." or "*Exchequer of Pleas*."]

Between { A. B., Plaintiff,  
and  
C. D., Defendant.

9. The like, de bene esse, on bailable process.

Take notice that a declaration was this day [or "on the — day of — last," or "instant"] filed with the clerk of the declarations in the King's Bench Office, [or in C. P. "with the prothonotaries at their office in Tanfield Court,] in the Inner Temple, London, [or in *Exchequer*, "filed with the filacer, in the Office of Pleas of the said Court, situate in Lincoln's Inn, in the county of Middlesex,] conditionally, until special bail be put in and perfected, [or if already put in, say only "perfected"] against you, at the suit of the above-named plaintiff, in an action upon promises [or "of debt for £—," or as the action is;] and unless you appear and plead thereto in four [or "eight," as the case may require, see context, *supra*] days, judgment will be signed [or in *Exchequer* say "entered"] against you by default. Dated, &c.

(e) See in K. B. Reg. Trin. T. 5 & 6 G. 2, and *Holland v. Cook*, 1 M. & Selw. 566; in C. P. Reg. Mich. T. 3 G. 2; Reg. E. 3 G. 2; Reg. Hil. 35 G. 3; in *Exch. Reg. Mich.* 5 G. 3; and Reg. Trin. 26 G. 3; Reg. Mich. T. 1 W. 4, r. 11; *Jervis's Rules*, 10; *Man. Exch. Pr.* 200; *Price Pr.* 214, 225.

(f) In K. B. Reg. Trin. 1 G. 2; Reg. Trin. 2 G. 2; in C. P. Reg. East. 49 G. 3, Reg. Mich. 1 G. 2; 7 T. R. 298; *Waddle v. Brasier*, 1 Cr. & M. 69; 1 Dowl. 639; see rules, *ante*, 493.

(g) *Grey v. Saunders*, Barnes, 248; *Worley v. Lee*, 2 T. R. 112.

(h) *Smith v. Clarke*, 2 Dowl. 218.

CHAP. XV.  
PRACTICE AS TO  
DECLARATIONS.

---

without any particular process to support such declaration, and thus save the delay, trouble, and expense of issuing a writ in such collateral action; (i) it is however stated that it is in general agreed that no *other person* except the original plaintiff can declare by the bye in any case. (i) And as other authors appear to think that the practice of declaring by the bye has, in effect, been *entirely determined*, the safest course will be for even the original plaintiff to issue a fresh writ for another cause of action, which it may not be advisable to attempt to include in his first action. The permitting a plaintiff, and still less a third person, to subject a defendant to the expense of a second or third, or even more declarations, without any previous writ or notice, according to the previous practice, seems, on principle, to have been so objectionable, that it is to be hoped that it will not be revived.

SECT. VII.—OF ACCOMPANYING PARTICULARS OF PLAINTIFF'S  
DEMAND WHEN REQUISITE.

VII. *Of accompanying particulars of plaintiff's demand when requisite.*

The Reg. Gen. of Trin. T. 1 W. 4, r. 6, presently more fully stated, requires that when a declaration, containing an *indebitatus*, or *common count in assumpsit or debt*, is *delivered*, then *with such declaration* certain particulars of demand shall at the same time be delivered. But if the declaration *be filed*, then such particulars shall accompany the notice of declaration so filed. (j) It will be more convenient to consider the requisites of these particulars when we examine the subject of particulars of the plaintiff's demand in general.

---

(i) Tidd, Supp. A. D. 1833, p. 120; Atherton on Personal Actions, 103, 106. But see Petersdorff's Plead. p. 20, and 1 T. Chitty's Archbold, K. B. 4th edit.

220; 1 Archb. C. P. [68], where it seems to be supposed that even the same plaintiff cannot now declare by the bye. (j) See further, *post*, Particulars.

## CHAPTER XVI.

## OF PROCEEDINGS TO COMPEL DEFENDANT TO PLEAD, VIZ. NOTICE TO PLEAD, RULE TO PLEAD, AND DEMAND OF PLEA.

Proceedings to compel defendant to plead, or enable plaintiff to sign judgment by default in general ..	497	same.....	503
I. Notice to plead .....	498	Time of entering rule to plead ..	ib.
General regulations respecting, ..	ib.	Mode of ruling to plead .....	504
The time to plead to be stated therein .....	499	Forms of .....	ib.
How long plaintiff may delay serving notice to plead ....	501	III. Demand of plea .....	505
Modes or forms of giving notice to plead .....	ib.	General regulations respecting ..	ib.
Forms given.....	502	Time of demanding plea .....	506
II. Rule to plead when necessary ..	ib.	When time expires, and judgment may be signed after demand.	507
General regulations respecting		Form and mode of demand....	ib.
		Must be in writing .....	ib.
		Form of indorsed demand. ..	ib.
		Separate demand of.....	ib.
		How demand of plea served ..	ib.

IN general the notice to plead is given at the same time as the declaration is delivered, and indorsed thereon; or when the declaration is filed, and notice thereof is given, the notice to plead is incorporated in the notice of such filing, and the rule to plead when necessary is immediately entered, and demand of plea made; and therefore most authors have considered the notice to plead, rule to plead, and demand, in the same chapter with the practice relating to declarations. But a plaintiff may adopt all those proceedings separately; and when he is reluctant to declare, or otherwise expedite his suit, he may purposely delay giving the notice to plead, &c. until he is ready to proceed; and in those cases the only course for a defendant, anxious to expedite the suit, is to plead, as he may do without notice, rule, or demand: and then the plaintiff, when ruled to reply, must do so. We will therefore in this chapter examine the notice to plead, rule to plead, and demand of plea, separately.

CHAP. XVI.  
COMPELLING  
DEFENDANT TO  
PLEAD.

It has been observed, (a) that the law is so careful to prevent a plaintiff from taking any undue advantage of a defendant, by obtaining a judgment against him *unawares*, (b) that it not only *absolutely allows* a certain time to plead to the declaration, but it *obliges* the plaintiff to give the defendant *three*

Proceedings to compel a defendant to plead, or to enable plaintiff to sign judgment for want of a plea in general.

(a) 1 Sellon's Prac. 335.

(b) But still if a defendant inadvertently delivers a plea without signature of counsel, or a plea in abatement without affidavit of the truth, plaintiff may

treat same as a nullity, and sign judgment, and in debt issue execution without notice, a practice which it is submitted requires alteration.

CHAP. XVI.  
COMPELLING  
DEPENDANT TO  
PLEAD.

warnings before he can sign judgment for want of a plea; viz. 1st, a *due written notice* to plead; 2ndly, to *serve him with a rule to plead*; (c) and 3dly, if the defendant still neglects to plead, the plaintiff must *then make a formal demand in writing* of a plea, at least twenty-four hours before judgment can be signed, and *afterwards search* the office (d) to see if one has been put in, before he can sign judgment; so that there must be no less than *three regular notices or warnings* given to the defendant to defend himself. (e) As in general, *lex neminem cogit aut vana aut absurdam*, it is probable that originally the notice to plead, rule to plead, and demand of plea, were designed as *progressive*, or at least substantial *distinct* notices, and cautions to be given to a defendant at *different times* of the necessity for his pleading; but it has been objected, that *now* all the three proceedings, to use an homely expression, are nearly jumbled together, or are concurrent; and, even by a recent rule, "a demand of plea" may be given at the same time as the declaration is delivered, "and even indorsed thereon;" (f) whilst in other parts of the practice warnings of this nature, as in the instance of a rule to declare and a demand of replication, have been abolished as useless proceedings, occasioning unnecessary expense.

I. OF THE NO-  
TICE TO PLEAD.

I. NOTICE TO PLEAD.—A notice to the defendant, requiring him to plead, seems to have been considered requisite in *all cases* before a judgment can be signed for want of a plea. (g) But it was recently decided, that in the case of a *prisoner*, when he has been *seized* with a rule to plead, the omission of an *indorsement* of notice to plead on the declaration, would not render irregular a judgment signed for want of a plea; and the Court said it was the daily practice for declarations against *prisoners* to be delivered without any indorsement of notice to plead; (h) and it has recently been decided, that if a declaration be amended, and even new counts added, it is not necessary afterwards to give a *fresh notice* to plead, or new rule to plead. (i) By the terms of the rules of K. B. they seem not to

(e) 1 Sellon's Prac. 335; but see post, 504, as to the *services* of any rule to plead.

(d) But now, by Reg. Gen. all pleadings should be *delivered*, and not *entered* or filed at any public office.

(e) 1 Sellon's Prac. 335. But see post, 504, that it is at least at present unnecessary to *serve* a copy of the rule to plead.

(f) Reg. Gen. Hil. T. 3 W. 4, r. 43.

(g) Heath v. Rose, 2 New R. 223.

(h) Clementson v. Williamson, 1 Bing.

New C. 356. *Sed quere*, for it would seem on principle that a *prisoner*, usually less able to pay for advice, ought to have more distinct notice and warning than defendants at large.

(i) Fagg v. Borsley, 2 Dowl. 107; and see Mould v. Murphy, 3 Tyrw. 538, and Osborne v. Pennell, 1 Bing. N. C. 320, as to a new rule to plead not being necessary.

require the defendant to plead at all, unless the plaintiff has given him a *notice to plead*, specifying correctly the time within which he ought to plead, and that therefore if such notice *to plead* be delayed, the defendant's time to plead would be indefinite; (*k*) and although the first rule in C. P. of Mich. T. 3 Geo. 2, seemed in terms to require the defendant to plead in four or eight days after declaration, according to the venue therein and residence of the defendant, without any notice to plead, (*l*) yet a subsequent rule equally requires such notice as in K. B.; (*m*) and yet it was held in one case in C. P., that where the declaration was indorsed with a notice to plead in blank, as thus, "to plead in —," it was sufficient, because it should be understood to mean within the number of days well known to be allowed by the rules of the Court; (*n*) but that decision seems contrary to the rule, and a departure from principle. (*o*)

When the declaration is *delivered absolutely*, either after the defendant's appearance, or after appearance entered for him by the plaintiff, or after bail above has been put in and perfected, or put in but not excepted to, then, "if the venue be laid in London or Middlesex, and the defendant reside within twenty miles of London, he must plead within *four days*, and if the venue be laid in any other county, or the defendant reside above twenty miles from London, then within *eight days*, and in default of so pleading the plaintiff may sign judgment." (*p*) The four or eight days for pleading are reckoned exclusive of the day of *giving* (i. e. delivery of) the notice, and inclusive of the last day, unless that be a Sunday, Christmas-day, Good Friday, or a day appointed for a public fast or thanksgiving, in which case they are to be reckoned exclusively of that day also, so that the defendant then also has all the next day. (*p*)

What time to plead should be stated in the notice.

When a declaration is *delivered de bene esse*, or conditionally (as we have seen it may on *bailable* process on or after the eighth day inclusive after the arrest, and before bail have perfected,) the notice to plead must give precisely the same number of days to plead, (viz. four or eight, depending on venue and the defendant's residence,) as when a declaration is

(*k*) See in K. B. Reg. Trin. 1 G. 2, and Trin. 5 & 6 G. 2, Mich. T. 10 G. 2.

(*l*) In C. P. Mich. T. 3 G. 2; Easter T. 3 G. 2; Hil. T. 35 G. 3.

(*m*) In C. P. Reg. Easter T. 3 G. 2.

(*n*) *Hiffermann v. Langelle*, 2 B. & P. 363; and yet the rule of Easter Term, 3 G. 2, in C. P. seems expressly to require the notice to plead to specify the time,

viz. four or eight days. See post, 500, note (*e*.)

(*o*) In K. B. Reg. Trin. 5 & 6 G. 2; in C. P. Reg. East. T. 3 G. 2; and see *Holland v. Cook*, 1 M. & Sel. 566; in Exch. Reg. Mich. T. 1 W. 4, rule 11.

(*p*) See Reg. Gen. Hil. T. 2 W. 4, r. 8; ante, vol. iii. 110.

CHAP. XVI.  
COMPELLING  
DEPENDANT TO  
PLEAD.

delivered absolutely, (q) and it expires at the same time, so the defendant's time for pleading is immediately current whilst he is proceeding to justify his bail. In that case, however, the defendant must put in, and if excepted to, perfect his bail before he can regularly plead in *bar*, (r) though he must, if at all, plead in *abatement* before justification, within four days inclusive. (s)

As the *defendant* best knows whether he *resides* within twenty miles of London, it should seem that when the venue is laid in London or Middlesex, it would be reasonable that the practice should require him to plead within the four or eight days, according to the fact of his residence, without the time being specified in the notice to plead, and perhaps that was the ground on which the before-mentioned decision in C. P. proceeded. (t) There is not, however, any decision in K. B. to that effect, and therefore the safest practice is to specify the time in the notice; and if it be doubtful whether the defendant's residence is beyond twenty miles from London, to allow him the full eight days; for we have seen that if the notice give the defendant *too little time*, it will be bad; (u) though if *more time* be given than was necessary, the defendant is entitled to the whole time, as stated in the notice. (x) Where a defendant had been arrested in London, but usually resided in Scotland, the Court held that four day's notice sufficed; (y) and an attorney, in respect of his supposed attendance in the Courts at Westminster, must in all cases plead within four days, although the venue be not laid in London or Middlesex, and he reside above twenty miles from London. (z) In the Exchequer, as a judgment cannot be signed in that Court till the afternoon of the fifth day, and the office is not open in vacation in the afternoon, the defendant has in effect, in vacation, *five* clear days to plead, unless the plaintiff's attorney will incur the extra expense of opening the office in the afternoon of the fifth day, for the purpose of signing judgment. (a)

Where a declaration has been *filed*, and notice thereof given, the notice to plead when given, and usually inserted in *such notice of declaration*, is to be four or eight days, depending as above on venue and the defendant's residence, but the

(q) In K. B. Reg. Trin. 22 G. 3; 1 Arch. K. B. 231.

(r) *Venn v. Calvert*, 4 T. R. 578.

(s) *Hopkinson v. Henry*, 13 East, 170; *Saunders v. Owen*, 2 Dowl. & R. 252; *Copen v. Bond*, 2 Young & J. 531.

(t) *Ante*, 499, note (y).

(u) *Ante*, 494, note (c).

(z) *Solomonson v. Parker*, 2 Dowl. 405.

(y) *Douglas v. Ray*, 4 T. R. 553, note.

(z) *Mann v. Fletcher*, 5 T. R. 369.

(a) *Kemp v. Fyson*, 3 Dowl. 265; and *post*, Time of Pleading.



days are reckoned exclusive of that on which the notice was given, and not from the time of filing the declaration. (b)

CHAP. XVI.  
COMPPELLING  
DEFENDANT TO  
PLEAD.

Neither a declaration nor a notice to plead can be delivered between the 10th August and 24th October, all proceedings in an action being expressly suspended during that time by the 2 W. 4, c. 39, sect. 11; (c) and if the time for pleading expire during those days, the defendant has as much time to plead after the 24th October as he had on the 10th August, though it will not be necessary to give a fresh rule to plead; (d) and the same rule extends to *enlarged time* to plead, obtained by a judge's order, unless terms to the contrary be expressly imposed by a qualified order. (e)

If a plaintiff think fit, he may, as regards the time of giving it, always *delay delivering or giving it an indefinite time*; (f) and he may deliver notice to plead on a *separate paper* subsequent to the declaration, or delay giving notice to plead when his declaration has been filed until any indefinite time afterwards, (f) and this in some cases is advisable, as where the plaintiff is not prepared to proceed to trial, and it is therefore desirable to obtain some time before he can be ruled to enter the issue. The defendant, however, may plead *voluntarily* at any time after the declaration has been delivered or filed, without waiting for a notice to plead, rule to plead, or demand of plea. If a plaintiff delay delivering his notice to plead until after four terms have expired since the delivery or filing of his declaration, then he must give the defendant *an entire term's notice to plead*, unless the action has been stayed by injunction or other proceeding on the part of the defendant. (g) It suffices to give such term's notice at any instant before the *first day* of a term, and a rule to plead may be *entered* at any time in the next vacation. (h)

How long the plaintiff may delay serving a notice to plead.

With respect to the *modes* or forms of giving the notice to plead, when a declaration is *delivered absolutely*, it is usual to *indorse* the notice on the front outside of such declaration, in

Mode or form of giving the notice to plead.

(b) *Hutchinson v. Brown*, 7 T. R. 498; *Weddle v. Brown*, 1 Crompt. & M. 69, and *ante*, 494, 495.

(c) See Statute, *ante*, vol. iii. 152, in note; and *id.* 96, 97, as to the construction of that rather obscure enactment. *Semble*, the notice to plead, though delivered immediately before the 10th August, need not vary from the usual form.

(d) Reg. Gen. Mich. T. 3 W. 4, r. 12.

(e) *Wilson v. Bradstocke*, 2 Dowl. 416; *Trinder v. Smedley*, 3 Dowl. 87.

(f) *Anonymous*, 2 Wils. 137; *West v.*

*Radford*, 3 Burr. 1452.

(g) Reg. Trin. 5 & 6 G. 2; *Haley v. Riley*, 1 Dougl. 72; *Bland v. Darley*, 3 T. R. 530. In 1 Arch. Prac. C. P. [77], it is suggested that if plaintiff delay declaring to a subsequent term, and defendant duly appear, the defendant may still be entitled to an imparlance; *sed quare*, if there is now an imparlance in any case of a *personal* action.

(h) *Price v. Hughes*, 1 Dowl. 448; *Milbourne v. Nixon*, 2 T. R. 40.

CHAP. XVI.  
COMPELLING  
DEFENDANT TO  
PLEAD.

these words, "*The defendant is to plead hereto in four [or "eight"] days, otherwise judgment.*" And when a declaration is delivered conditionally in a bailable case, the form is thus indorsed, "*This declaration is delivered conditionally until "special bail be put in and perfected, (or if already put in, then "only the latter,) and the defendant is to plead hereto in four [or "eight"] days, otherwise judgment.*" If the declaration has already been delivered absolutely, without any notice to plead indorsed, then in due time before signing judgment the plaintiff must deliver on a *separate paper* a notice to plead, intituled in the Court and fully in the cause, with the names of the parties, and referring to the declaration previously delivered, and requiring the defendant to plead within the proper specified number of days, as in the *subscribed form*, and in such a case it would be advisable to *date* the notice and serve it on the day of such date.

We have seen that when a declaration has been regularly *filed* in the proper office of one of the Courts, notice of such filing is to be given, and it is then usual, though not necessary in the *same* notice, to give the defendant notice to plead. (i) But the latter notice might be *subsequently* given on a separate paper, and as in the subscribed form. (k)

SECT. II.—RULE TO PLEAD.

Rule to plead (l)  
when necessary.

The former practice relating to the *rule to plead* continues unaltered, excepting that the Reg. Gen. Hil. T. 2 W. 4, r. 42, declares, that in all the Courts, "where an amendment of the declaration is allowed, no new rule to plead shall be deemed necessary, whether such amendment be made of the

(i) *Ante*, 494, 495, in notes, where see a form.

Form of a detached or separate notice to plead.

(k) In the Court of —.

Between { A. B., plaintiff,  
and  
C. D., defendant,

Take notice, that the defendant is hereby required to plead to the declaration in this cause already delivered, [or, if filed, "of the filing whereof in the office of — you already have had notice,"] in four [or "eight"] days from the day of your receiving this notice, otherwise judgment. Dated this — day of —, A.D. —.

To Mr. C. D., the above named  
defendant, and Mr. G. H.,  
his attorney.

Yours, &c.  
E. F.,  
Plaintiff's attorney.

(l) See former practice fully, 1 Sellow's 473—475; 1 Arch. K. B. 4th edit. 234, Pra. 1st edit. 335—338; Tidd, 9th edit. 235; 1 Arch. C. P. 106, 107.

"same term as the declaration or of a different term." (m) Before that rule it was decided in the Common Pleas, that where the declaration had been delivered in a prior term or vacation judgment might be signed in the following term, without giving a new rule to plead of the term of which the judgment was signed, (n) and if the proceedings had been stayed at the request of the defendant, then also no fresh rule to plead of a subsequent term was necessary before judgment. (n) Another implied alteration is, that though previously a rule to plead could only be entered in term time, (o) yet, since the 2 W. 4, c. 39, authorizes all proceedings to judgment and execution *during the vacations*, such rule may be entered in vacation, excepting between the 10th of August and 24th of October.

This rule must be *entered* by the proper officer in a book kept for that particular purpose, in all cases, whether the defendant has appeared or the plaintiff has entered an appearance for him, except the defendant be under terms by rule or judge's order actually drawn up to plead within a fixed time, when the giving any rule to plead is considered to have been dispensed with; (p) and, although it has been decided otherwise, (q) yet even a mere summons for time, upon which no order has been made, dispenses with the necessity for giving a rule. (r)

We learn historically that the notice to plead, rule to plead, and demand of plea, were anciently *successively* given, and not, as at present, crowded together and current at the same time. But now the three may be given nearly at the same time, so as to be all current together, and, in a great measure, defeat the original object in requiring them. The *notice to plead* ought, however, to precede or, at least, *not be subsequent*, to the rule or demand of plea. The rule, which expires in four days exclusive, may be *entered* on or after the day on which the declaration is delivered or filed, and should, at all events, be given so as to expire *before* or on the same day as the time for pleading expires, so as to enable the plaintiff to sign judgment on the following day. Correctly, the rule ought to be given before *demand of plea*, and, on that account, in the Common Pleas, it was necessary to wait twenty-four hours after the rule had expired. (s) But in the King's Bench the rule may be entered after demand

Time of entering  
rule to plead.

(m) See the rule and the alterations it effected in practice, Jervis's Rules, 53, note (r).

(n) *Usbone v. Pennell*, 1 Bing. N. C. 330; *Mould v. Murphy*, 3 Tyrw. 538; 2 Dowl. 54, S. C.; *Pryer v. Smith*, 2 Dowl. 114.

(o) *Pryer v. Smith*, 1 Cr. & M. 855; 2

Dowl. 114.

(p) *Nias v. Spratley*, 4 Bar. & Cres. 386; *Donne v. Marsh*, 7 Taunt. 587.

(q) *Dicker v. Shedden*, 3 Bos. & P. 180.

(r) *Nugee v. M'Donnell*, 3 Dowl. 579.

(s) *Hewit v. Palmer*, 4 Taunt. 51; *Impey's C. P.* 280; *Sellon's Pra.* 339.

CHAP. XVI.  
COMPELLING  
DEFENDANT TO  
PLEAD.

Mode of ruling  
to plead.

of plea. (t) The rule to plead, however, must not be entered or served before notice of declaration, or it would be void. (u)

In order to enter a rule to plead, the practice is to make out a *precipe* or memorandum on plain paper, as *instructions* to the officer, in the subscribed form, but *dated* of the day of the month and year when entered. (x) This is to be taken to the proper officer, viz. in King's Bench, to the Clerk of the Rules, or in Common Pleas, to the Secondary, or in Exchequer, to the Clerk of the Rules, who enters it in a book kept for that purpose, and draws up the rule itself on paper in the subscribed form. (y) It is a four day rule, *exclusive* of the day of giving it. (z) It seems that there is not any necessity for *serving* any copy of this rule on the defendant, or his attorney, (a) but the defendant is bound to *search* the proper office, which he should do just before his ordinary time for pleading has expired; and if, when necessary, no rule has been entered, the defendant need not plead till a regular rule has been entered, and is about to expire. (b)

Inutility of this  
proceeding.

As a rule to plead is not served, nor is, in fact, any notice thereof, or warning, *communicated* to a defendant, (excepting when he searches the proper offices to ascertain whether any such rule has been entered,) its only utility can be as a formal intimation in a public book that, unless the defendant pleads in

(t) *Maxwell v. Skerrett*, 5 East, 547; 1833; 1 Arch. K. B. 4th edit. 234, 235. and see Tidd, 9th edit. *id.* Suppl. A.D. (u) *Grey v. Saunders*, Barnes, 248.

(x) Impey, K. B. 312; I. C. P. 278; 1 Sellon's Pra. 335, 1st edit. The form is thus:—

Form of *precipe*  
or memoran-  
dum, as in-  
structions for  
rule to plead.

In the K. B., [or "C. P.," or "Exchequer of Pleas."]

B. }  
v. } Rule to plead,  
D. }

E. F., Plaintiff's attorney,  
[or "agent,"] — day of June,  
A.D. 1835.

(y) See form, 1 Sellon's Pra. 335, 1st edit. :—

Form of entry  
of rule to plead.

B. } Unless the defendant shall plead within four [or "eight"] days, let judg-  
v. } ment be entered for the plaintiff.  
D. }

By the Court.

(z) *Quare*, in C. P. *inclusive*, R. M. 1654, r. 15; 1 Arch. C. P. 107; but now see Reg. Gen. Hil. T. 2 W. 4, reg. 8., where the first day is to be excluded in all cases; 1 Arch. K. B. 4th edit. 235.

(a) "The rule is merely *entered*, not *served*," 1 Arch. C. P. 107. But see 1 Sellon's Pra. 335, that the rule should be served. N. B. The case *Pound v. Lewis*,

2 Dowl. 744; 3 M. & Scott, 210, S. C., only applies to the *service* of a *rule* to *reply*, or respecting *subsequent* pleading pursuant to express directions of Reg. Gen. Hil. T. 2 W. 4, r. 54.

(b) Tidd, 9th edit. 435; 1 Arch. C. P. 107; but see 1 Sellon's Pra. 335, that the rule must be served.

due time, the plaintiff intends to sign judgment against him; and which seems to be a proceeding wholly unnecessary *in addition* to the notice to plead and demand of plea, and might well be dispensed with.

CHAP. XVI.  
COMPELLING  
DEFENDANT TO  
PLEAD.

SECT. III.—OF THE DEMAND OF PLEA.

The practice as regards the *demand of a plea* has been altered by the late *Reg. Gen. Hil. T. 2 W. 4, r. 43*, and by the subsequent *Reg. Gen. Trin. T. 3 W. 4, r. 2*, and by *Reg. Gen. Hil. T. 2 W. 4, r. 66*. The former rule declares, that “a *demand of plea* may, in all the Courts, be made at the time “when the declaration is delivered, and may be indorsed “thereon,” thus assimilating the practice of Common Pleas and Exchequer to the former practice in King’s Bench. (d) The other rule orders, that prisoners in custody of the marshal, or warden, or a sheriff, shall plead at the same time, and under the same rules as in actions against defendants not in custody; and hence it follows, that a *demand of plea* is equally necessary when the defendant is in custody as in other cases; (e) but we have seen that, as regards a *notice to plead*, it is not necessary when the defendant is a prisoner. (f) When, in consequence of the defendant not having himself appeared in due time, *the plaintiff has entered an appearance for him sec. stat.*, no demand of plea is necessary, the rule of *Trin. T. 1 Geo. 2, in King’s Bench*, and of *Mich. T. 1 Geo. 2, in Common Pleas*, having expressly declared, that in such a case a due notice of declaration, and requiring the defendant to plead in due time, having been duly served, and rule to plead given, if the defendant do not plead accordingly, the plaintiff, *without any other or further calling for a plea*, may sign his judgment; (g) and the same practice prevails in the Exchequer; (h) and if, after the plaintiff has regularly entered an appearance for the defendant, the defendant enter an appearance, and give notice of it, the plaintiff may proceed as if the second appearance

III. Of the demand of plea. (c)

(c) See in general *Tidd*, 9th edit. 475; 1 Arch. K. B. 236; 1 Arch. C. P. [79], 107.

(d) *Reg. Gen. Hil. T. 2 W. 4, r. 43*; *Tidd*, 9th edit. 476; *Jervis’s Rules*, 53, note (s). Before this recent rule it was irregular in C. P. to demand a plea at the same time, or by indorsement on the declaration when delivered, *Hewit v. Palmer*, 4 Taunt. 51.

(e) *Reg. Gen. Trin. T. 3 W. 4, r. 2*; it seems so to result from the terms of that rule, 1 Arch. K. B. 4th edit. 236.

(f) *Ante*, 498, note (r); *Clementson v. Williamson*, 1 Bing. N. C. 356, *sed quare*.

(g) In K. B. *Reg. Trin. 1 G. 2*, and in C. P. *Reg. Mich. 1 G. 2*; and see *Free v. Mason*, 5 Bar. & Cres. 763; *Davis v. Cooper*, 2 Dowl. 135.

(h) *Davis v. Cooper*, 2 Dowl. 135.

CHAP. XVI.  
COMPELING  
DEFENDANT TO  
PLEAD.

had not been entered, and may sign judgment without a demand of plea. (i) Nor is any demand of plea necessary, when a defendant is under a judge's order or rule to plead within a specified time.

Time of de-  
manding plea.

With respect to the *time* of demanding a plea, it would be a nullity if made *before appearance* has been entered by the defendant or the plaintiff for him, nor would a subsequent appearance aid the irregularity, (k) though if an attorney has undertaken to appear, but has neglected to do so, then a plea may be demanded after the time for appearance has expired, though before actual entry of appearance, because against an officer of the Court who has so undertaken, the obligation to appear is to be considered equivalent to actual appearance, (l) and, notwithstanding the above rule of Hil. T. 2 W. 4, r. 43, authorizing the indorsement of the demand of plea on the declaration when delivered, care must be observed not to waive the right to bail; and a declaration delivered absolutely, or a demand of plea indorsed thereon before bail put in, *in case* the defendant is not a prisoner, would be a waiver of bail; (m) and a demand of plea before justification would waive their justification. (n) So, *in a late case*, where the defendant on the 3d of May had removed the proceedings into King's Bench, and on the 4th of May plaintiff had ruled defendant to put in bail, and on the same day delivered a declaration indorsed, "*conditionally until bail be put in and perfected, and the plaintiff demands a plea,*" and the defendant immediately filed common bail, and pleaded the general issue, and the plaintiff then gave notice that he waived the demand of plea, and gave a rule for better bail; the Court held, that the demand of plea waived the plaintiff's right to bail, notwithstanding the declaration had been delivered conditionally. (o) So that in no case should a demand of plea be made before appearance or justification of bail; and when a plaintiff *delivers his declaration conditionally*, the demand of plea should not be *indorsed*, but should be served when necessary on the defendant's attorney after the defendant's appearance, or in aailable action, after the bail, when excepted to have justified. It has, however, been held, that the demand may be made before a rule to plead is given. (p)

(i) *Davis v. Cooper*, 2 Dowl. 133.

(k) *Venn v. Calvert*, 4 T. R. 578; *Martin v. Mahony*, 5 Dowl. & R. 609.

(l) Imp. C. P. 281.

(m) Reg. Mich. 8 Ann. r. 1; *Lister v. Wainhouse*, Barnes, 92; 1 Sellon's Pra. 152; *Law v. Stevens*, 1 Dowl. 425; *Jervis's Rules*, 53, note (e); 1 Arch. K. B.

4th edit. 174, 236.

(n) *Id.*; *R. v. London*, 1 Dowl. & Ry. 163; *R. v. Middlesex*, 4 Dowl. & Ry. 835; 1 Arch. K. B. 4th edit. 183, 256.

(o) *Law v. Stephens*, 1 Dowl. 425; *Jervis's Rules*, 53, note (i).

(p) *Maxwell v. Sherrett*, 5 East, 547.

The Reg. Gen. Hil. T. 2 W. 4, r. 66, orders, that judgment for want of a plea after demand, may, in all cases, be signed at the opening of the office, in the *afternoon* of the day after that on which the demand was made, *but not before.* (q) This rule, it will be observed, no longer requires *twenty-four hours* to elapse after the demand, and avoids all calculation and difficulty as to the exact time of the delivery of the demand, so that now, if the demand be served before nine o'clock in the evening of one day, the judgment may be signed in the afternoon of the next; but as the Court of Exchequer does not, as of course, open the office in the *afternoon* during the *vacations*, the defendant, in effect, gains an entire day, unless the plaintiff will incur the extra expense of opening the office in the afternoon, on purpose to sign judgment. (r)

CHAP. XVI.  
COMPELLING  
DEFENDANT TO  
PLEAD.

When the demand expires, and judgment may be signed.

By an ancient rule of Common Pleas demands of declarations, *pleas*, replications, and other pleadings, were required to be by *note in writing.* (s) We have seen that when the declaration is delivered *absolutely*, the demand may be *indorsed* on the declaration, (t) and then the form is thus: "The plaintiff demands a plea herein by E. F., plaintiff's attorney," [or "agent."] But when the demand is made *separately*, then the form is as subscribed. (u)

The form and mode of demand must be in writing, &c.

Form of demand.

The demand, whether indorsed on the declaration or on a separate paper, must be *delivered* to the attorney or agent of the defendant; or, if the defendant has appeared in person, then delivered to him, *or left at his residence*; and it has recently been decided that it cannot, even by leave of the Court, be stuck up in the King's Bench Office, although the defendant keeps out of the way; (x) however, in another case, not adverted to when the last decision took place, where the defendant was beyond sea, and his attorney dead, a rule was made absolute,

Demand of plea, how served.

(q) Jervis's Rules, 59, note (p); a judgment signed in the *morning* of the fifth day after the rule would be irregular; *Kemp v. Fyson*, 3 Dowl. 265.

(r) *Kemp v. Fyson*, 3 Dowl. 265.

(s) Reg. Mich. 1 Geo. 2, C. P.; and *Nott v. Oldfield*, 1 Wils. 134.

(t) Reg. Gen. Hil. T. 3 W. 4, r. 43, *ante*, 505.

(u) In the —.

Between { A. B., plaintiff,  
and  
C. D., defendant.

Form of separate demand of plea.

The plaintiff demands a plea in this cause, by yours, &c.  
To Mr. G. H., defendant's attorney, [or "agent."]

E. F., Plaintiff's attorney,  
[or "agent."]  
Dated 1st July, A.D. 1835.

(x) *Anonymous*, 1 Dowl. 68.

CHAP. XVI.  
COMPELLING  
DEPENDANT TO  
PLEAD.

---

that a demand of plea in the office should be deemed sufficient, upon affidavit of service of the rule to show cause, on one of the defendant's bail, and that the other could not be found. (y) Indeed, as notice of declaration, when filed, and the defendant's residence is unknown, may by express rule be stuck up in the Public Office, *with leave of the Court*, (z) and as notice of motion may also, with leave, be stuck up in the office, and another copy left at the defendant's last place of residence; (a) there seems no reason why a demand of plea, in similar circumstances, should not be permitted to be given in the same manner.

---

(y) *Bailey v. Semple*, Barnes, 307; Tidd, 475.

(z) Reg. Gen. Hil. T. 2 W. 4, r. 49.  
(a) *Watson v. Delcroix*, 2 Dowl. 396.



## CHAPTER XVII.

OF IRREGULARITIES, NULLITIES, AND NON-OBSERVANCE OF MERE DIRECTORY REGULATIONS, TIMES, AND MODES OF OBJECTING TO THE SAME ;—WAIVERS OF OBJECTIONS ;—NOTICES OF IRREGULARITIES, AND NOTICES OF APPLICATIONS, BEFORE SUMMONS OR MOTIONS ;—OF PLAINTIFF'S NOTICE OF HAVING ABANDONED HIS IRREGULAR PROCEEDING, OR HIS OFFER TO PAY COSTS ;—OF AFFIDAVITS, SUMMONS AND OF JUDGE'S ORDERS ;—OF MOTIONS, OF RULES *NISI* :—SHEWING CAUSE ;—RULES ABSOLUTE ;—COSTS ;—ATTACHMENTS, &c.

SECT. I. Of Irregularities, Nullities, 509	SECT. III. Of Summons and Judge's
&c. ....	Order..... 554
II. Of Affidavits, &c..... 535	IV. Of Motions, Rules <i>Nisi</i> , &c. 570

SECT. I.—OF IRREGULARITIES, NULLITIES, NON-OBSERVANCE OF MERE DIRECTORY REGULATIONS, &c.

1. Of these in general ..... 509	6. Of deviations from directory
2. Why objectionable to take advantage thereof. .... 510	rules..... 527
3. Time of application in respect of 512	7. Of notices of irregularities .... <i>id.</i>
1. Summary of the general rules relating to..... 515	8. Of notices of motions, &c..... 531
2. Chronological table of irregularities, &c..... <i>id.</i>	1. In cases of irregularity..... <i>id.</i>
4. Distinction between irregularities and nullities ..... 522	2. In other cases ..... 533
5. When the Court will <i>ex mero motu</i> object ..... 527	9. Of opponent's notice, and proceedings thereupon ..... <i>id.</i>
	10. Notices of motions in cases of <i>certiorari</i> and before motion for criminal information, &c... 534

1st. THE plaintiff having *declared*, the defendant must (if at all), within a *reasonable time*, and *before he himself* takes, and also before he suffers the *plaintiff* to take any other step, in the cause, avail himself of any recent *irregularity* to which he is still in a situation to object. *Irregularity* is the technical term for every defect in *practical proceedings* or the mode of conducting an action or defence as distinguishable from defects in *pleadings*, which can only be objected to by *demurrer* or motion in arrest of judgment, or by writ of error. It is a comprehensive term, including all formal objections to *practical* proceedings, and is of three descriptions, viz. *First*, Such deviations as constitute a total *nullity*; *Secondly*, Such defects as are mere *irregularities*, and can only be objected to within a reasonable time, and subject to certain qualifications; and,

## CHAP. XVII.

SECT. I.  
OF IRREGULARITIES, &c.

## 1st. Of Irregularities in general.

CHAP. XVII.  
SECT. 1.  
OF IRREGU-  
LARITIES, &c.

*Thirdly*, The non-observance of certain rules or enactments that have been deemed merely *directory*. We have in part considered those subjects in a preceding chapter, to which reference must be had. (a)

An *irregularity* may arise in every stage of an action, from the affidavit to hold to bail, to the entry of satisfaction on the roll after judgment and execution. There is, therefore, no particular stage in a cause in which *this subject* can be more properly arranged or considered than in another; but as there are some applications in respect of irregularity, *that must be made immediately after the plaintiff has declared and before the defendant pleads*, and as the *modes* of taking advantage of an *irregularity* whether by *Affidavit*, *Summons*, and *Judge's order*, or by *Motion* to the Court, *Rule Nisi*, *Argument* thereon, &c. are much the same as in *other applications*, it seems more expedient to examine these subjects in this place than elsewhere.

2nd. When or not objectionable to take advantage of defects, &c. (b)

It has been objected, that much of the practice of the superior Courts is liable to the censure imputed by Bishop Burnett to the ecclesiastical Courts in his time, viz. "*They have but little practice, but contrive to make the most thereof withall;*" because even the *smallest irregularity* or deviation from the strictly prescribed practice, however immaterial to the merits, too frequently becomes the subject of vexatious, dilatory, and expensive proceedings, when, if the party complaining of the irregularity or seeking any other object, were *always first compelled* to apply to his opponent to rectify his error, or to accede to any other reasonable request, the actual or imaginary grievance would in most cases immediately be removed, at least much sooner than by an expensive application to a judge or the Court. But such amicable proceedings would not answer the *object* of that grade of practitioners who seek not either the honour of their profession, or the *true* interests of their clients, or care about the correctness of the practice of the Courts in general; but merely seek the indulgence of some feeling of resentment towards the opponent, or still more commonly to indulge the appetite *for costs*; and they in reality desire *not* to attain the very object they profess to pursue, but hope that the opponent will not discover his irregularity, but will resist the application, so that the costs may thereby be increased. We have, moreover, seen that the Courts some-

(a) *Ante*, vol. iii. ch. ii. p. 64 to 88.

(b) See also *ante*, vol. iii. p. 76 to 81; 275 to 281.

times have perhaps *carried too far the principle* that it is essential to enforce the rules of practice in order to secure their observance even to a letter; (c) as, for instance, by resolving that the mis-spelling of the defendant's name Calver instead of Calvert, in the copy of a rule served upon him personally, rendered such rule wholly inoperative and invalid, and even allowing the defendant the costs of his application to set the same aside, assigning as a reason, that not to give costs would be a *bounty on negligence*; and this, although on service of such defective copy of the rule, the defendant promised to call and pay. (d)

However, the recent growing spirit of improvement, and the dignified resolution of some of the present judges to discourage such practitioners, as far as statutes and rules permit, are certainly calculated to ameliorate the conduct of the practitioners to whom we have alluded, and have introduced some few alterations imposing restraint on sharp and contemptible practice, especially by refusing costs. But still so many advantages may be taken of trifling errors, that it is essential to give them consideration in this chapter.

With deference it is submitted, that no summons or motion, in respect of a mere irregularity, should be given effect to, (except in cases of actual illegal imprisonment, or immediate urgent occasion,) unless it appear that there has been a *previous application in writing* for the very same purpose to the opponent, (e) or that costs of the application should not otherwise be allowed, nor should there be any *stay of proceedings* unless *by express leave of the Court*, nor then, unless it be sworn that an exact similar application in writing has been rejected, and that in all cases when notice of motion should be required, copies of affidavits intended to be used shall be served on the opponent, so as to enable him to show cause in the *first instance*, or that no costs be allowed; and to encourage the earliest and least expensive mode of disposing of applications of this nature, costs should be allowed in case of an effectual opposition at such earliest stage, though at present in general denied. (f)

(c) *Ante*, vol. iii. p. 68 to 72.

(d) *Smith v. Calvert*, 2 Dowl. 276. It is unquestionably essential that practitioners should be compelled to observe due care and accuracy; but as regards the *encouragement to those who would take advantage of an immaterial objection*, it would seem that a different theory has been permitted to prevail in the administration of justice than would be tolerated upon other subjects of ethics, the more especially as the unfortunate client, and

not the practitioner, is in general the sufferer.

(e) It will be observed that many of the modern rules either *imperatively require a previous application*, or qualify the terms granted by the Court; see Reg. Gen. Hil. T. 2 W. 4, reg. 102.

(f) See *Fitch v. Green*, 2 Dowl. 439; *Grove v. Parker*, *id.* 628; so that it is unfortunately the pecuniary interest of a practitioner not to show cause in the first instance, even in the clearest case

CHAP. XVII.  
SECT. I.  
OF IRREGU-  
LARITIES, &c.

Other objec-  
tions to applica-  
tions to set aside  
proceedings for  
irregularity.

We have in the preceding part stated some other reasons against applications to set aside any proceeding on account of irregularity, unless some positive injury has ensued. (g) Another strong reason, especially in cases of the least doubt, is, that there is an express rule of Court in K. B., "that in all cases where a rule is obtained to show cause why proceedings should not be set aside for irregularity with costs, and such rule is afterwards discharged generally, without any special directions upon the matter of costs, it is understood to be discharged with costs, and the latter rule must be drawn up accordingly." (h)

When the taking  
a technical ad-  
vantage may be  
proper.

It is well known that technical objections are taken principally on behalf of *defendants* and in delay of a just action; but not unfrequently they are taken on behalf of a plaintiff, and may be equally unjust: thus, when it is known that there is a bona fide intention to defend an action upon the merits, or on some fairly disputable point of law, the signing judgment as for want of a plea, merely because by accident the plea, although settled by counsel, was not signed by him, is, to say the least, a proceeding unworthy of a liberal profession. And although there may occur instances in which a party and his attorney may justly take advantage of the blunder of his opponent, as where there has been a harsh or vindictive arrest, or where, by taking the objection, the opponent may be compelled to submit to proper terms, which could not otherwise be obtained. Yet even in the few cases of this nature, the practitioner who wishes his character to stand high, should, in general, when the object has been accomplished, refuse to take more than his costs out of pocket, or actual expenditure, thereby evincing that individual profit constituted no part of the motives for adopting the proceeding.

3rd. Time of  
application in  
respect of irre-  
gularity or other  
relief.

Before Reg. Gen. H. T. 2 W. 4, r. 33, it was the *established practice* of the superior Courts that all applications, especially those to set aside proceedings for *mere irregularity*, should be made as early as possible, or, as it was commonly said, *in the first instance*; (i) and if a party *waived* the irregularity, or *omitted* to object to it *within a reasonable time*, or *took or suffered to be taken* (k) a subsequent step in the cause, and

(g) *Ante*, vol. iii. p. 76 to 81; 275 to 281.

(h) Reg. Mich. T. K. B. 37 G. 3.

(i) Tidd, 9th ed. 160, 513; Jervis's Rules, 51, (k); *Petres v. White*, 3 T. R. 7; *D'Argent v. Vivant*, 1 East, 334;

*Steele v. Morgan*, 8 Dowl. & Ryl. 450; — v. —, 3 Price, 37; *Warren v. Cross*, 9 Price, 637; *Monday v. Sear*, 11 Price, 125.

(k) *Rutty v. Auber*, 3 Tyr. 591; 1 Crompt. & Mee. 531; 2 Dowl. 47, S. C.

thereby *occasioned* or *permitted* increase of expense, he could not, at least in the King's Bench or Exchequer, afterwards revert back and object to the previous *irregularity* in a mere practical proceeding. (l) But the application of this rule was not uniformly certain, and there *was* a distinction between the practice of the Court of Common Pleas and that of King's Bench and Exchequer, for in the former a party was not bound to any particular time; and it *was considered* sufficient if he made the application, however late, before the opponent had taken a further step in the cause; (m) and when notice of the objection had been candidly given, it was deemed reasonable to assume that the party thus apprised of the defect in his proceedings would not venture to proceed any further, and that if he did, it was reasonable, after such proceeding, to move to set aside that which was irregular. (n)

But as respects *mere irregularities*, (now by Reg. Gen. M. T. 3 W. 4, r. 10, including all *omissions* in process or indorsements directed by statute 2 W. 4, c. 39,) the General Rule, H. T. 2 W. 4, r. 38, directs, that "*no application to set aside process or proceedings for irregularity shall be allowed, unless made within a reasonable time, nor if the party applying has taken a fresh step after knowledge of the irregularity.*" This rule is considered to have assimilated the practice of all the Courts, and to render it as necessary in the Common Pleas as in King's Bench and Exchequer, that the party objecting to any irregularity should observe *two* points, viz. *first*, to apply to set aside the irregular proceeding within a *reasonable time*, whether or not he has given notice of the objection; and *secondly*, at all events to make such application *before he himself has taken any step* in the cause; (o) and by the *general* practice of the Court, it seems that a *third* point is to be observed, viz. to make the application on account of the irregularity before the *party guilty of it has taken a fresh step* in the cause, in consequence of concealment of the objection, or obtaining possession of the irregular document. (p) And it would

(l) Tidd, 161, 513; *Ballentyne v. Wilson*, Forest's Rep. 31.

(m) Jervis's Rules, 51, n. (h).

(n) *Ballentyne v. Wilson*, Forest's R. 31; *Wickham v. Meuling*, 2 Price, 9; *Dand v. Barnes*, 6 Taunt. 5; *Fletcher v. Wells*, id. 191; *Rawes v. Knight*, 7 Moore, 461; 1 Bing. 132, S. C.; *Hompay v. Kenning*, 2 Chitry's Rep. 236; Tidd, 514.

(o) As to the applicant's taking any

step in the action after knowledge of the irregularity precluding him from objecting, see observations of Parke, B. in *Fynn v. Kemp*, 2 Dowl. 620. "You must always come before the next step has been taken, however short the time for doing it may be, and in a reasonable time."

(p) *Rutty v. Auber*, 3 Tyr. 591; 1 Crompt. & Mee. 531; 2 Dowl. 47.

CHAP. XVII.  
SECT. I.  
OF IRREGU-  
LARITIES, &c.

now seem, that although a party objecting to an irregularity has given explicit notice thereof, yet he must also take out a summons or move to set aside the proceeding within a reasonable time, unless his opponent give him notice that he abandons the irregular proceeding, or obtains leave to amend.

We have in the preceding part of this volume stated many of the decisions on this rule as to the *time* when an application to set aside *process*(*q*) or an *affidavit*(*r*) for a defect or irregularity must be made. It has been decided that this rule extends to *prisoners* continuing in custody, and who are therefore equally bound as persons at large promptly to take out a summons or move the Court to set aside any practical proceeding in respect of an irregularity.(*s*) It extends also even to proceedings to *outlawry*, which being filed in the sheriff's office, the defendant might search for, and thereby ascertain the objection, and this although he swear that he remained in ignorance of the proceeding for several weeks, and until he did apply.(*t*)

If the irregularity occur in *vacation* and be known, (or even *capable of being known by due search*),(*u*) we have seen that the application must be made *promptly*, i. e. in general *within eight days* after service of serviceable process, or arrest on bailable process, and it would certainly be too late to apply to the Court in the next term.(*x*) But if the irregularity be unknown, and not capable by search of being readily ascertained, no laches can reasonably be imputed, nor can there in such case be any waiver implied of the right to object;(y) for it will be obvious that "*reasonable time*" in the rule is a relative term, depending on the circumstances of each case; and if without default of the defendant, and still more if attributable to the plaintiff's default, the defendant is delayed in knowledge of the irregularity, then, if he come within a reasonable time after he has intimation of the objection, his application ought (if in any case) to be given effect to.(*z*)

(*q*) As to process and indorsements thereon, *ante*, vol. iii. 226 to 233, 244; *objections to writ of summons*, *id.* 275, 276.

(*r*) As to affidavits, vol. iii. 340.

(*s*) *Primrose v. Baddeley*, 2 Dowl. 350.

(*t*) *Lewis v. Davison*, 3 Dowl. 272, 274; *Anderson v. Stirling*, 2 Dowl. 267.

(*u*) *Lewis v. Davison*, 3 Dowl. 272, 274; *Anderson v. Alexander*, 2 Dowl. 267.

(*z*) *Ante*, vol. iii. 227, 237, 238; *Cox v. Tullock*, 3 Tyr. 578; 1 Crompt. & Mee.

531; 2 Dowl. 47; *Anderson v. Alexander*, 2 Dowl. 267; *Elliston v. Robinson*, 2 Crompt. & Mee. 343; 2 Dowl. 241; *Routledge v. Giles*, 2 Crompt. & Jer. 163; *Wright v. Warren*, 3 Moore & Scott, 163; *Rutty v. Auber*, 3 Tyr. 591.

(*y*) *Cox v. Tullock*, 3 Tyr. 578; 2 Dowl. 47.

(*z*) *Wright v. Warren*, 3 Moore & Scott, 163; 2 Dowl. 724; *Anderson v. Alexander*, 2 Dowl. 269; *Tidd*, 71; *ante*, vol. iii. 227.

It is obviously reasonable that all objections contemporaneously existing, and discovered at the time of making any application to the Court on account of supposed irregularity, should then be brought forward, and not kept in reserve, in order afterwards to sustain another application of the same nature; and the practice accords. But an application of a distinct nature may reasonably be delayed until one for irregularity has been disposed of. (a) Thus the pendency of a motion to set aside proceedings for irregularity, was deemed a sufficient excuse for delay in an application, even for several terms, to have money paid into Court in lieu of bail restored to the defendant, where the defendant had been arrested whilst privileged from arrest. (a)

The *principle* requiring applications in respect of irregularities to be made within a reasonable time, extend also to other cases, as to applications under the interpleader act. (b)

Many of the decisions relating to the *time* within which an application must be made in respect of a *more* irregularity antecedent to declaration, proceed on the same principle, and have been already noticed in the most authentic works; (c) and when we examined *process*, (d) *affidavits* to hold to bail, (e) and other proceedings in the preceding part of this volume, the more recent decisions were noticed. (f) We have shown how early objections to each must be taken, and what acts waive or preclude a party from taking an objection. It may however assist in practice here to give a summary of the times when objections to irregularities in proceedings must in general be taken by summons or motion, and what acts waive the objection.

*Attorney*.—An irregularity by taking a proceeding in the name of a new attorney, without having obtained a judge's order for the change, may be waived by the opponent's taking any subsequent proceeding, as by taking a plea pleaded by a new attorney out of the office, or by keeping it. (g)

*Affidavit to hold to Bail*.—An affidavit to hold to bail is not

CHAP. XVII.  
SECT. I.  
OF IRREGULARITIES, &c.

All objections must be taken at once and not successively; but *aliter* as to applications of a different nature.

Summary of the times of objecting, &c.

Chronological enumeration of the principal irregularities, and times of objecting to same.

(a) *Pitt v. Coombs*, 4 Nev. & Man. 535.

(b) *Foot v. Dick*, 1 Harr. & Wol. 207; *Ridgway v. Fisher*, *id.* 191; 3 Dowl. 567.

(c) *Tidd*, 9th ed. 160, 513; 2 Arch. K. B. 4th ed. Arch. C. P. ; *Chitty's Summary*, 96 to 99; 2 Harrison's Index, 326, 327.

(d) *Ante*, vol. iii. part 5, p. 227, 228, 237, 238, 368, 369.

(e) *Ante*, vol. iii. part 5, p. 340, 368, 369.

(f) *Ante*, vol. iii. part 5, *per tot.*

(g) *Margeson v. Mahilweine*, 2 New R. 508; *Farley v. Hobbs*, 1 Harr. & Wol. 203; 3 Dowl. 538, 8. C.

CHAP. XVII.  
SECT. I.  
OF IRREGU-  
LARITIES, &c.

strictly "*process*," nor a "*proceeding*" within the General Rule Hil. T. 2 W. 4, reg. 33; (g) but still according to the general principle and practice of the Courts, objections to its regularity or validity must be taken within a *reasonable time*, or the Courts will not interfere on summary application to set aside the arrest or bail-bond, or imprisonment upon the same; and if the defendant has taken any inconsistent step, admitting that he was bound to submit to its operation, it will be too late to apply. (h) Therefore it is too late to object on summons or motion to such affidavit after the defendant has put in bail, (i) or has deposited the sum sworn to and 20*l.* in lieu of bail above, (k) or has obtained time to put in bail above, (l) or after the time for putting in bail above, viz. eight days, inclusive of the day of arrest, has elapsed; (m) nor after any other unreasonable delay, (n) nor after the defendant has ineffectually attempted to justify bail, though the Court may be induced to give further time, partly in respect of an objection to the affidavit, (o) and where the arrest was on the 22d May, it was held too late on 4th June to apply for defendant's discharge on the ground of a defect in the affidavit, the sheriff having in the mean time been ruled to return and marked his return, (p) and where a defendant induced the plaintiff's attorney to accept certain persons as bail without opposition, by affecting to submit to a judge's decision respecting the sufficiency of the affidavit to hold to bail, it was held that he could not afterwards sustain a rule nisi for discharging the defendant out of custody, on the ground that the affidavit was defective. (q) But the circumstance of the affidavit having been mislaid in the office, so that the defendant was delayed in ascertaining the objection, may excuse delay. (r) It has been recently decided, that in an action for false imprisonment for an arrest, upon a writ of *capias* issued on an informal affidavit, the defendant may justify under the writ, unless it has been set aside, so that it would seem that notwithstanding the 12 Geo. 1, c. 29, requires a sufficient affidavit to be filed before an arrest, it is essential that a de-

(g) Per Bayley, B. in *Smith v. Stephens*, 3 Tyrw. 220.

(h) *Ante*, vol. iii. 340.

(i) *Reeves v. Hacker*, 2 Tyr. 161; 2 Crom. & J. 44. S. C.; *Morgan v. Bayley*, 3 Dowl. 117; *Green v. Glasbrook*, 1 Bing. N. C. 516; 1 Hodges, 27; and see the cases before Reg. Gen. Hil. T. 2 W. 4, c. 33, Tidd, 188.

(k) *Green v. Glasbrook*, 1 Hodges, 27; 1 Bing. N. C. 516, S. C.

(l) *Urquhart v. Dick*, 9 Legal Obs.

221, 222.

(m) *Tucker v. Colegate*, 2 Crom. & J. 489; 2 Tyr. 496; *Firley v. Rallett*, 2 Dowl. 708.

(n) *Firley v. Rallett*, 2 Dowl. 708.

(o) *Morgan v. Davis*, 5 Moore & S. 93; *Downes v. Witherington*, 2 Taunt. 213.

(p) *Firley v. Rallett*, 2 Dowl. 708.

(q) *Mammatt v. Mathews*, 2 Dowl. 797.

(r) *Ladbroke v. Phillips*, 1 Harrison R. 109.



fendant, who would take advantage of a defect in the affidavit, should apply to the Court within a reasonable time, or he could not sustain any action for the imprisonment or other proceeding. (s) If the affidavit be so defective as to be void, and the writ and arrest on that account set aside, the defendant would, unless restrained by express rule, be entitled to an action of trespass for the illegal arrest; but it is usual upon motion for discharging the defendant out of custody on that ground, to make the rule absolute with costs, on the terms that the defendant shall not bring an action of trespass, but only case for a malicious arrest, which could only be sustained in case the sum sworn to was not due, and the arrest was without probable cause, or to refuse the costs of the application. (t)

*Writ or Copy, Time or Mode of Service.*—Applications, whether by summons or motion, in respect of any irregularity in a writ, or in the indorsements thereon, or in the copy thereof, or in the time or mode of service, should be made within eight days inclusive, after the service or arrest, whether in vacation or term, being the time allowed for entering the defendant's appearance, or putting in bail above. (u)

And if a writ has been improperly *indorsed* with a non-existing place, but was served on 25th October, application to set aside the service of a copy of the writ for irregularity on the 3d November, was holden too late, for the application should have been made *within eight days* inclusive after service, either to a judge in vacation or to the Court in term, and the application should have been on or before the 1st November; (x) and where an arrest was on the 29th January, and on the 10th March following the defendant, continuing in custody, applied to a judge to be discharged on account of irregularity in the *capias*, it was held he was too late. (y) And where in proceedings to outlawry the first writ had been irregularly indorsed, yet as such writ had, according to the usual practice, been filed at the sheriff's office, and the defendant might by search have ascertained the objection, it was held that after six weeks had elapsed it was too late to object, although he swore that he did not in fact know of the objection till such six weeks had elapsed; (z)

(s) *Riddell v. Pakeman*, 1 Gale, 104; 3 Dowl. 714, 721, S. C. But in *Finch v. Cocker*, Exchequer, 4th May, 1835, MS.; 3 Dowl. 678, it was held, on motion in arrest of judgment, that an action could not be sustained on a bail bond executed on an affidavit and process against the defendant by a *wrong name*, for the arrest being illegal and void, the bail bond therefore was also void.

(t) *Gray v. Shepherd*, 3 Dowl. 442.

VOL. III.

(u) See in general, *ante*, vol. iii. 227, 237, 276, 368, 369; *Raues v. Knight*, 1 Bing. 132.

(x) *Tyler v. Green*, 3 Dowl. 439; 9 Legal Obs. 173; *Cox v. Tullock*, 3 Tyr. 578; 1 Cr. & M. 531; 2 Dowl. 47, (a); and see *Fynn v. Kemp*, 2 Dowl. 620; *Rust v. China*, 3 Dowl. 565.

(y) *Foot v. Dick*, 1 Har. & Wol. 207.

(z) *Lewis v. Davison*, 3 Dowl. 272.

CHAP. XVII.  
SECT. I.  
OF IRREGU-  
LARITIES.

and eighteen days delay after the service of a *distringas*, in applying to set it aside, was holden unreasonable, as the defendant could not show that he was prevented from coming earlier. (a) At all events, however, an application *six* days after an arrest is not too late to object to an irregularity in the writ or copy. (b)

An irregularity *in service* of process is *waived* by defendant's attorney having written to plaintiff's attorney, after the process was served, undertaking to appear; (c) so by admitting the debt after service, and requesting time to pay it. (d) And a defendant waives an objection to process on account of *misnomer*, by obtaining a judge's order upon a summons, using the name by which he was arrested; or rather such an act affords evidence that the defendant is known as well by one name as the other, in which case a judge will not interfere. (e) And it has been decided, that by executing a bail bond in the full Christian and surnames, waives an irregularity in the writ, describing the party by his initial only. (f) And although it might have been supposed that if no process had been served at all, subsequent proceedings might be utterly void; yet if notice of declaration be served before any process, the defendant must take advantage of the objection before judgment by default be signed. (g)

*Appearance*.—An irregularity in an appearance, entered by the plaintiff for the defendant, must be taken advantage of before judgment by default; (h) though if there were no appearance at all, then a declaration delivered, or interlocutory judgment signed, would be a nullity that could not be waived. (i)

*Bail above and Notice of Justification, &c.*—An irregularity in a notice of bail is waived by obtaining time to inquire after them; (k) and an irregularity in omitting a proper description of bail in a *notice of justification* was held aided by entering an exception; (l) and although before the Reg. Gen. Hil. T. 2 W. 4, r. 33, it was held in the King's Bench that the omission to enter an exception to bail was not waived by even two notices of justification, (m) the contrary has since that rule

(a) *Wright v. Warren*, 3 M. & Scott, 163; 2 Dowl. 724.

(b) *Smith v. Pennell*, 2 Dowl. 654.

(c) *Anonymous*, 1 Chitty's R. 129; *Hompay v. Kenning*, 2 Chitty's R. 236.

(d) *Rauces v. Knight*, 1 Bing. 132; but see 1 Dowl. 23.

(e) *Nathan v. Coken*, 1 Harr. & Woll. 107; 3 Dowl. 370.

(f) *Kingston v. Llewellyn*, 4 Moore, 317; 1 Brod. & Bing. 529, 8. C.; *Howell v. Coleman*, 2 Bos. & Pul. 466; Tidd, 148; but see *Taylor v. Rutherman*, 6 Moore, 264; *Lake v. Silk*, 3 Bing. 296.

(g) *M'Quick v. Davis*, 2 Chitty's R. 164; and see *Williams v. Strahan*, 1 New Rep. 309; Pr. Reg. 32.

(h) *Williams v. Strahan*, 1 New R. 309; Pr. Reg. 32.

(i) *Roberts v. Spurr*, 1 Harr. & Woll. 301; 3 Dowl. 551, 8. C.

(k) *Foster's bail*, 2 Dowl. 586.

(l) *Bigg v. Dick*, 1 Taunt. 17; Tidd, 266.

(m) *Hodson v. Garrett*, 1 Chitty's R. 174; *Rex v. Middlesex*, 5 Bar. & Cress. 389; Tidd, 301; ante, vol. iii.

been determined.(n) But it has been held that, although the parties in an action do not themselves object to the insufficiency of an *affidavit* of justification, in not stating the residences of the bail during the last six months, yet the Court *ex mero motu* will not allow the justification to stand, though they gave leave to amend. (o)

CHAP. XVII.  
SECT. I.  
OF IRREGU-  
LARITIES, &c.

*Declaration, and Delivery or Filing same, and Notice thereof.*

—If a declaration has been delivered absolutely, although no appearance has been entered by the defendant or the plaintiff for him, the defendant may apply to set aside such declaration, although it amounts to a nullity; (p) and if a notice of declaration, or the declaration itself describe a different form of action to that expressed in the writ, or otherwise materially vary therefrom, the irregularity may be taken advantage of by summons or motion. (q) An irregularity in the *notice of or filing or delivery* of a declaration, must be taken advantage of before appearance, (r) and a fortiori before plea, and before taking out a summons to stay proceedings on bail-bond, (s) and before judgment has been signed for want of a plea, although no process had been served on the defendant. (t) If a declaration be improperly filed, instead of delivered, and notice of inquiry be given on 4th November for the 12th November, a motion to set aside interlocutory judgment on the latter day is too late; (u) and if the irregularity be in the delivery, filing, or notice of declaration, it was held in some older cases that the application should be made if possible two days before the time appointed for executing the inquiry; (x) and if bail have consented to a stay of execution, the Court will not afterwards relieve them on account of a *variance* between the affidavit to hold to bail and the *declaration*. (y) Where a defendant had duly entered his appearance, but the plaintiff's attorney had in searching overlooked the entry, and in consequence irregularly *filed* the declaration, and served the defendant with notice thereof on 28th January, and the latter, instead of informing the plaintiff's attorney of his irregularity in conversation, concealed any intimation of it, but suffered him to proceed, and judgment for want of a plea was signed on 4th February, the Court re-

(n) *Hanwell's bail*, 3 Dowl. 425.

(o) *Sywood and Dogherty's bail*, 3 Dowl. 116; 1 Bing. N. C. 258, but differently reported.

(p) *Roberts v. Spurr*, 1 Harr. & Woll. 201.

(q) *Edwards v. Dignam*, 4 Tyr. 213; *ante*, vol. iii. 197, 228, note (p).

(r) *Fynn v. Kemp*, 2 Dowl. 620.

(s) *Davis v. Owen*, 1 Bos. & Pul. 342.

(t) *Smith v. Clarke*, 2 Dowl. 218; *M'Quick v. Davis*, 2 Chitty's R. 164.

(u) *Scott v. Cogger*, 3 Dowl. 212.

(x) *Guire v. Goodman*, 2 Smith, 391; *Minster v. Coles*, 2 Chitty's R. 237; *Moffat v. Carter*, 2 New R. 75; *Cole v. Bennett*, 6 Price, 15.

(y) *Coppin v. Potter*, 1 Bing. N. C. 443.

CHAP. XVII.  
SECT. I.  
OF IRREGU-  
LARITIES, &c.

fused to set aside the proceedings for irregularity. (s) But where upon serviceable process the plaintiff had irregularly declared too soon *de bene esse* on 7th November, it was holden not too late to apply to set aside such declaration and notice thereof on the 25th November following; but then the debt and costs indorsed on the writ had been paid on the 7th November, and the question in a great measure turned on the right to the costs of the premature declaration. (a)

*Taking Declaration out of Office.*—We shall in the next chapter advert to the effect of the defendant's taking a declaration, when filed, out of the office, (b) which waives an irregularity in its having been filed conditionally. (c) That act, however, only waives objections to the process or the service of it, but not to the declaration itself. (d) Where a declaration was delivered at the same time as insufficient particulars, and another order was obtained for better particulars, it was held that the defendant's not returning the declaration was a waiver of the irregularity. (e)

*Notice to Plead, Rule to Plead, and Demand of Plea.*—Pleading any plea, though a nullity, as a plea in abatement, without an affidavit, waives the omission of a rule to plead and demand of plea. (f) And though it was formerly held otherwise, it has recently been decided that a summons for time to plead does dispense with the necessity for a rule to plead. (g) It was held that an irregularity in the plea roll should be taken advantage of before the defendant has accepted the issue. (h)

*Plea.*—Taking a plea out of the office (when the practice was to file pleas) and keeping it, was holden a waiver of the objection to the plea, that it had been pleaded by a new attorney, without any order to change the attorney, and the acceptance of or keeping a plea would have the same effect. (i) It was, however, held that a plaintiff's demanding particulars of set-off did not waive his right to sign judgment as for want of a plea, where the plea is a nullity; (k) but that was in Common Pleas before Reg. Gen. Hil. 2 W. 4, r. 33, which, we have seen, directs that a party taking *any step* shall preclude him from taking advantage of an irregularity. (l)

(s) *Rutty v. Arbur*, 2 Dowl. 36.

(a) *Fish v. Palmer*, 2 Dowl. 460.

(b) *Post*.

(c) *Gilbert v. Kirkland*, 1 Dowl. 153.

(d) *Chapman v. Eland*, 2 New Rep. 83; *Rees v. Horne*, 4 T. R. 349; *Archer v. Barnes*, 3 East, 342.

(e) *Aspinal v. Smith*, 8 Taunt. 592.

(f) *Perry v. Fisher*, 6 East, 549; *Tidd*, 476.

(g) *Nugee v. M'Donell*, 3 Dowl. 579; but see *Decker v. Shaddon*, 3 Bos. & P. 180.

(h) *Combs v. Pitt*, 1 Bla. R. 525; 3 Burr. 1682, 8. C.

(i) *Margerum v. Makilwaine*, 2 New R. 508, 509; and *Farley v. Hebbes*, 1 Harr. & Wol. 203.

(k) *Ford v. Bernard*, 6 Bing. 534; *Garraitt v. Hooper*, 1 Dowl. 28.

(l) *Ante*, 513.

*Affidavits and Rules.*—It is no waiver of the right to object to the sufficiency of an affidavit in support of a rule nisi, that the opponent has produced affidavits in opposition, and argued upon the merits, (m) and if the copy of a rule nisi be incorrectly or not duly intituled in the cause, the appearance of counsel in opposition does not waive the defect. (n)

*Judgment, signing of.*—Defendant's attending the taxation of costs waives an irregularity in signing judgment too soon; (o) and as an irregularity in the interlocutory judgment cannot be shown as cause against a rule nisi to compute, the only course is to obtain a cross-rule to set aside the judgment, and to arrange that both rules shall come on together. (p) And the Court refused to set aside an interlocutory judgment which had been irregularly signed three years previous, without a rule to plead. (q)

*Writ of Inquiry and Inquisition thereon.*—If eight instead of fourteen days' notice of inquiry be given, when defendant resided more than forty miles from London, he should return it, and if not, although the Court will, even on a late application, set aside the inquiry, yet they will not give costs. (r)

*Issue and Paper Book.*—Accepting and not returning the Issue or Paper Book admits it to have been properly made up; (s) and therefore if there be any variance therein from the pleadings previously delivered, without an order to amend, or other irregularity in making it up, the defendant's attorney should return it forthwith, (usually within twenty-four hours,) and immediately take out a summons for setting it right; as he could not otherwise take advantage of the irregularity. (t)

*Notice of Trial or Inquiry.*—If a notice of inquiry, or of trial, be insufficient, it should be forthwith returned; and if it be irregular as to the time or place when or where it will be executed, the objection will be aided by the defendant or his attorney attending on the execution of the inquiry, or the trial, and making defence; though his merely attending by counsel, who takes notes, but does not otherwise interfere, would not preclude him from afterwards applying to set aside the proceedings. (u)

(m) *Clothier v. Es*, 3 Moore & S. 216; 2 Dowl. 731; *Barham v. Lee*, 4 M. & Scott, 327; 2 Dowl. 779, post, 546, note (q).

(n) *Wood v. Critchfield*, 3 Tyr. 235.

(o) *Tidd*, 930; 2 Arch. K. B. 4th ed. 887.

(p) *Branning v. Paterson*, 4 Taunt. 487; *Jones v. Chune*, 1 Bos & Pul. 363; *Marryatt v. Wingfield*, 2 Chit. 119.

(q) *Lewis v. Brown*, 3 Dowl. 700.

(r) *Stevens v. Pell*, 2 Cr. & M. 421; 2 Dowl. 355.

(s) *Shepley v. Marsh*, 2 Stra. 1131; *Thompson v. Tiller*, id. 1266; *Doe v. Cotterill*, 1 Chit. Rep. 277.

(t) *Mather v. Brinker*, 2 Wils. 243; *Doe v. Cotterell*, 1 Chitty's R. 277; *Tidd*, 727.

(u) 2 Arch. K. B. 4th edit. 887.

CHAP. XVII.  
SECT. I.  
OF IRREGU-  
LARITIES, &c.

**Scire Facias.**—If a defendant plead to a scire facias pending a rule he had obtained to set aside the same for irregularity, it was held that he waived the irregularity by his plea.(u)

**Execution.**—If an execution be issued after a year without a scire facias, or an agreement that it shall not be necessary, it will be a nullity, and a defect, not waived by delay, in the application even of several years.(x) But if notice of taxing costs be omitted before judgment, and execution be therefore irregularly levied against defendant's goods, he must apply immediately to set the same aside.(y)

**Prisoners,** though supersedable before judgment, as for want of declaring in due time, may waive the right to be superseded, by afterwards pleading;(x) and after the lapse of two terms the Court will not discharge the defendant out of custody, on the ground that his addition and place of abode were not indorsed upon the ca. sa.(a)

4. Distinction between such informalities as constitute mere irregularities, or are nullities.(b)

There is a marked, and in many respects important and substantial distinction, between such defects in practical proceedings as constitute *mere irregularities*, and such that render the proceedings a *total nullity, and altogether void*; for although an irregularity may be waived, and must be objected to within a reasonable time, it has been considered to be a general rule, that a *nullity, or essential defect*, may be taken advantage of at *any subsequent stage* of the action;(c) though that expression must be understood with *some qualifications*.(d) The number of NULLITIES before the uniformity of process act, 2 W. 4, c. 39, and when mistakes in the teste and return days of writs were so frequent, was much greater than at present; for we have seen that as regards process and its requisites, the judges have, by the express Reg. Gen. Mich. T. 3

(u) *Sloman v. Gregory*, 1 Dowl. & Ry. 181.

(x) *Mortimer v. Piggott*, 2 Dowl. 615, *sed quare*, 523, 524, note (f).

(y) *Routledge v. Giles*, 2 Crom. & Jer. 163; and see *post*, as to costs.

(z) *Primrose v. Baddeley*, 2 Dowl. 350; *Robertson v. Douglass*, 1 T. R. 191; *Pearson v. Rawlings*, 1 East, 77; 6 T. R. 224, S. C.

(a) *Constable v. Fothergill*, 2 Dowl. 591.

(b) See in general, Tidd, 9th edit. b15, 152, s. 160, 161, 218, b; 2 Archb. K. B., 4th edit. 288; Bagley's Chamber Pract. 97.

(c) *Id. ibid.*; Bagley's Ch. Pract. 97, and cases there cited.

(d) Thus a plea in abatement, without a correct affidavit of its truth having been annexed, may be treated as a nullity, and the plaintiff might sign judgment as for want of a plea. So if a special plea, requiring the signature of counsel, be delivered without such signature, it may be treated as a nullity, and plaintiff might sign judgment. But in each of these cases of nullities, if the plaintiff, instead of signing judgment, reply to the plea, he waives the objections, and could not afterwards take advantage of it as before he might have done.

W. 4, r. 10, ordered "that if the plaintiff or his attorney shall *omit* to insert or indorse on any writ, or copy thereof, any of the matters *required by the act*, 2 W. 4, c. 39, to be by him inserted therein, or indorsed thereon, such a writ or copy thereof *shall not* on that account be *held void*; but may be set aside as *irregular* upon application to be made to the Court out of which the same shall issue, or to any judge." It is obvious, from the terms of this rule, that the learned judges intended to *diminish*, rather than create new difficulties or objections; and, at all events, to prevent any deviation from the prescribed *new* forms being treated as a *nullity*, or rendering the same *void*, or subjecting the plaintiff or his attorney to an action on account of any irregularity, many instances of which were previously known in practice. (e) So that now there are but few defects that render process a *nullity*. But there are still some few defects which have been considered wholly to *nullify* the proceedings. Thus it would seem, that if a defendant be arrested upon a writ issued against him by a *wrong name*, a bail bond executed thereon would be void, and no action thereon can be supported; (f) and the delivery of a declaration before an *appearance* to serviceable process has been entered, has been holden to be such an utter nullity, that it was not waived by the defendant's keeping the declaration a month, and omitting to plead, and permitting, after notice, judgment by default to be signed. (g) So is the filing a plea in abatement, without an affidavit of its truth, peremptorily required by the statute 4 Anne, c. 16. (h) So if in the title of an affidavit, or an order or a rule, the names of the parties be so transposed as to cause an ambiguity, although the latter might be amended, yet the same would until amended be a nullity. (i) And if after a year the defendant be taken in execution upon a judgment, without a *scire facias* to revive the judgment, it will be a nullity; and although the defendant have continued in execution for twelve years, he is not too late to apply. (k) It is necessary, however, to state that that decision was contrary to prior decisions not cited, according to which an execution after a year, without a *scire facias*, is not absolutely void, but only voidable by writ of error, or application to the Court, or a

(e) *Ante*, vol. iii. 75, 76, and Arch. C. P. [49, 50.]

(f) *Finch v. Cochar*, Exchequer, 4th of May, 1835, *ante*, 517, (e). And yet we have seen, that unless a writ has been set aside, on the ground that the affidavit was defective, an arrest under it may be justified.

*Baddell v. Pakeman*, 1 Gale, 104; 3 Dowl. 714—721, S. C.; *ante*, 516, 7, *sed quare*.

(g) *Roberts v. Spurr*, 1 Harr. & Woll. 201; 3 Dowl. 551, S. C.

(h) *Id.*; *Garratt v. Hooper*, 1 Dowl. 28.

(i) *Price v. James*, 2 Dowl. 435.

(k) *Mortimer v. Piggott*, 2 Dowl. 615.

CHAP. XVII.  
SECT. I.  
OF IRREGU-  
LARITIES, &c.

judge, within a reasonable time.(l) And yet, though notice of declaration be served before process, the defendant must take advantage of the defect before judgment signed;(m) though if he had no notice whatever of any proceeding, nor was bound to search, then an application, as soon as the defendant had actual intimation of the irregularity, would suffice, however late.(n)

The distinction between an irregularity and a nullity is thus far material, that an irregularity must, as well by general ancient practice as by the express terms of Reg. Gen. Mich. T. 3 W. 4,(o) be objected to promptly, or within a reasonable time, and before any step adopting it has been taken, or it will be considered waived, and too late to be objected to. But it has been considered that a proceeding that is a *mere nullity* cannot be waived, and may be taken advantage of notwithstanding an inconsistent step by the party objecting, and neither delay nor the taking such step will prevent the party from applying to the Court;(p) as in the instance of delivering a declaration on serviceable process on 6th of April, before any appearance had been entered, and signing judgment for want of a plea on 29th of April, although a rule to set it aside was not obtained until the 5th of May, and which judgment, notwithstanding the intermediate proceedings and delay in the application, was set aside on the above principle;(p) and where the affidavit annexed to a plea in abatement was defective, although the plaintiff afterwards took out a summons to amend his declaration, and amended the same, and the defendant ruled the plaintiff to reply, and signed judgment of non-pros, and the plaintiff thereupon paid the costs to avoid execution, yet it was held that the plaintiff might effectually move to set aside such judgment, on the ground that the plea continued a nullity, though, as the plaintiff came so late, the Court did not give him the costs of the application;(q) and if the affidavit in support of a rule nisi be defective, as wrongly intituled, the opponent does not waive the objection by appearing to the rule, and producing affidavits in answer, and arguing upon them.(r)

If a proceeding be declared *void by statute*, as the service of process on a Sunday, then also it has been considered that the

(l) *Patrick v. Johnson*, 3 Lev. 404; *Shirley v. Wright*, 1 Salk. 273; 2 *Ld. Raym.* 775, S. C.; 2 *Arch. K. B.* 4th edit. 688, 888.

(m) *M'Quick v. Davis*, 2 *Chitty's Rep.* 164.

(n) *Semble*.

(o) *Ante*, 513.

(p) *Robarts v. Spurr*, 1 *Harr. & Woll.* 201; 3 *Dowl.* 551, S. C.

(q) *Garratt v. Hooper*, 1 *Dowl.* 28.

(r) *Clothier v. Ess*, 3 *M. & Scott*, 216; 2 *Dowl.* 731, S. C.; *Barham v. Lee*, 4 *M. & Scott*, 327; 2 *Dowl.* 779, S. C.



defect could not be aided by delay. (s) And if the direct words of a *statute* require a plaintiff to take a particular proceeding, if it has not been adopted the Courts must consider that the omission renders the plaintiff's proceeding a nullity. (t) And a complete *defect* in the proceedings cannot, like a mere irregularity, be waived. (u) But cases of this nature require much consideration, and it cannot be supposed that the doctrine, that a nullity in an early stage of a cause may not be waived; thus, if a defendant plead in bar, and there has been a regular trial and verdict, it is not to be supposed that the latter, or the judgment and execution thereon, would afterwards be set aside on the ground that there was no writ of summons, or no formal appearance for the defendant entered.

CHAP. XVII.  
SECT. I.  
OF IRREGU-  
LARITIES, &c.

The Courts are of late more disposed to treat deviations from prescribed practice as *irregularities* than as *nullities*, and most of the recent rules have been framed with that view, as especially the Reg. Gen. Mich. T. 3 W. 4, r. 10, declaring, that *omissions* in writs and indorsements *shall not be deemed nullities*, but merely as *irregularities*, to be objected to within a reasonable time, and before any step taken by the party objecting. So, Reg. Gen. Hil. T. 4 W. 4, requiring the points of demurrer to be stated in the *margin* of a demurrer, merely declares, that if it be omitted, the demurrer may be set aside as *irregular*, yet it only authorizes the *signing judgment* as for want of a plea, and when *express leave of the Court or a judge* has been *first obtained for that purpose*. But there are still some deviations, defects, or omissions, which may be treated as a *nullity*, so that the party who has discovered the mistake may *immediately* sign judgment as for want of a plea, and, *in an action of debt, immediately issue execution* without any notice or intimation to his opponent of his mistake, or any previous application to a Court or a judge;—so, if a plea in abatement be filed or delivered without an affidavit of its truth annexed when necessary, or a special plea, requiring counsel's signature, delivered without having been signed, or a plea not issuable delivered, when a defendant is under terms of pleading issuably, in either of these cases the plaintiff may, in strictness, after the time for pleading has elapsed, sign judgment, and otherwise proceed as if, in fact, no plea had been delivered.

5. Of nullities and sudden advantages taken thereof, and when or not they may be justifiably taken.

(s) *Taylor v. Phillips*, 3 East, 155; *Roberts v. Monkhouse*, 8 East, 547.

(t) Per Lord Denman, C. J., in *Morstimer v. Piggott*, 2 Dowl. 616; and per Williams, J. in *Roberts v. Spurr*, 3 Dowl.

554.

(u) *Osborne v. Taylor*, 1 Chitty's Rep. 400; *Anonymous*, 2 Chitty's Rep. 237; Tidd, 515.

CHAP. XVII.  
SECT. I.  
OF IRREGU-  
LARITIES, &c.

When it is *certain* that there is no colour or pretence of *just defence*, but that on the contrary, the defendant is merely defending for time, and with a view of ultimately favouring other creditors, without reserving any funds towards the satisfaction of the plaintiff's debt or costs, then the attorney of the latter may justly take advantage of the blunder and sign and endeavour to retain his judgment and the advantage arising from such unexpected priority. But when, from previous affidavit in the cause, or the nature of the action, or otherwise, the plaintiff's attorney knows that the defendant can and will swear to a defence on the merits, or that the action is fairly disputable, then it is as unfair and unhandsome in practice as it is unjust to snap a judgment on such a ground; indeed, the so doing will most frequently be very injurious to the plaintiff, because the defendant will almost, as of course, be let in to plead more formally, and try the cause, and the time consumed in and relating to the motion for that purpose will probably occasion very considerable delay on the trial, and although the plaintiff's attorney may, in general, (though not always so,) obtain some costs, yet it will be at the expense of his character for liberality, and dispose his opponent, in his turn, to take some other petty advantage; (x) and instead of the cause proceeding and being tried fairly, each practitioner will afterwards meet each other with hostility, and the respective clients suffer.

On this account it will be found that the judges, in general, censure the taking advantages of this nature, without previous notice or leave of a judge, unless the defence is wholly without pretence, when only a practitioner may and, perhaps, ought to avail himself of every opportunity of obtaining priority over other creditors, according to the maxim *vigilantibus non dormientibus leges subservient*. When a party is under terms of pleading issuably, and a plea be pleaded which it is doubtful whether it is within the meaning of that term, it has always been recommended as a measure of prudence to apply to the Court or a judge *for leave* to sign judgment, especially as a defendant cannot now without leave waive his plea and plead another. (y) Perhaps it would be well, if in all cases, at least before issuing execution, on account of any defective plea or proceeding, it were requisite first to obtain leave to treat the proceeding as a nullity, as in the terms of the before mentioned rule relative to the points of demurrer.

(x) See *ante*, vol. iii.

(y) Tidd, 473, 564, 565, 673, 674;

*Hill v. Alexander*, in note, 1 Chitty's R. 525, 526.

There are some instances in which, although neither of the litigating parties have objected to an irregularity or informality, the Court itself will not suffer the defective proceeding to be allowed to stand as of any validity, as where some useful object might be defeated, or the records and proceedings of the Court might continue slovenly. Thus, although bail be unopposed, the Court will not allow them to justify, if it have been established in a previous case that they are unfit.(z) And where the affidavit of justification of bail had not, pursuant to the express rule, stated the residences of the bail during the last six months, although it was suggested that the plaintiff had waived the objection, by not taking it at the time of the bail justifying, yet the Court considered that *they* were bound not to let the bail stand, though they gave time to amend the affidavit.(a) So, where the commencement of the declaration varied from the usual form, although the Court held the deviation not a ground of demurrer, yet they directed the plaintiff to amend on account of the untechnical deviation.(b)

CHAP. XVII.  
SECT. I.  
OF IRREGULARITIES, &c.

6. When the Court will ex mere motu object to an irregularity.

Some practical proceedings, whether enjoined only by *rule of Court*, or even by *statute*, have been treated as merely *directory*, in which cases, although the non-observance would probably be censured, yet the error would not be *deemed an irregularity* affecting the *validity* of the proceedings. Thus, the rule of Mich. T. 1 W. 4, requiring the day of the month and year to be indorsed on process, was holden to be *merely directory*, and, therefore, a motion to set aside the service of a writ, not conforming to the rule, *as irregular*, was discharged.(d) But we have seen that of late more judiciously the Courts are inclined to enforce every rule, by treating the non-observance of every useful rule as an irregularity.(e)

Of violations of rules merely directory.(c)

In *some* cases it is necessary, (f) and it would be well if it were *indispensable in all*, that full notice of the particular irregularity were required to be given a *reasonable* time before

8. Notices of irregularity and application to opponent to

(z) *Laporte's Bail*, 3 Dowl. 110.

(a) *Welsh v. Lywood*, 1 Bing. N. C. 258; 3 Dowl. 116, S. C., but stating the defect to have been in the notice.

(b) *Dobson v. Herve*, 1 Bos. & Pul. 366.

(c) *Ante*, vol. iii. 72 to 76.

(d) *Miller v. Bowden*, 1 Crom. & Jer. 563; and see *Whishard v. Wilder*, 1 Burr. 330; *Grice v. Allen*, Barnes, 414; *Leing v. Cundale*, 1 Hen. Bla. 76; *Evans v. Bidgood*, 4 Bing. 63; *Coleby v. Norris*, 1

*Wils.* 91; *Windle v. Ricardo*, 3 Moore, 249; *Sheppard v. Shum*, 2 Tyrw. 742.

(e) See cases, *ante*, vol. iii. 72 to 74.

(f) As where too short notice of trial or inquiry has been given, *Stevens v. Pell*, 2 Cr. & M. 421; 4 Tyr. 267; 2 Dowl. 355, S. C. i. e. it is so far necessary that costs will not be given, unless notice were given, but still in that case the principal prayer of the application will succeed.

CHAP. XVII.  
SECT. I.  
OF IRREGU-  
LARITIES, &c.

have the same  
corrected before  
any summons  
or motion.

any application to the Court or a judge. If such notice has not been given, the Court will sometimes refuse any rule until an application to the party requiring him to amend has been ineffectual, (e) or will not allow a stay of proceedings pending the rule, or will either refuse costs, (f) or give only the costs that would have been payable upon a judge's order, or direct that instead of the applicant immediately receiving costs, they shall only be costs in the cause. It is obvious that whether a party object to the regularity of a proceeding, or whether he have any other object to attain, good sense and reasonable candour require that he should, before he troubles a judge or the Court, or puts his opponent to any expense, endeavour to attain his object by *civil* application, and nothing but existing imprisonment and the anxiety to obtain an immediate discharge can justify a precipitate application to the Court or even a judge, without first trying the result of an application to the opponent or his attorney; and even in case of illegal imprisonment, an intimation of the irregularity and request for an order on the officer to discharge the party would be in general advisable; for then, if not acceded to, the Court or judge would be the more disposed to award *costs*, and as the *continuance* of the imprisonment would be wilful, a jury would probably award *larger damages* in case an action for the illegal imprisonment should afterwards be tried, and in general the application could not occasion more than a very short delay, probably not an hour. We have seen that this is a general acknowledged principle in equity, and how it may there affect the costs as respects the filing a bill of discovery. (g) Unfortunately, however, according to the existing practice *at law*, a previous application or notice is not *in general* required; and hence the infinity of contemptible applications to the Court or a judge, *professedly* to have mistakes corrected, but which in most cases the opponent would on the least intimation instantly amend; and although costs may not be allowed, yet time is gained, and the defendant is content to bear his own costs as the price of the time he gains, and the temporary victory over his opponent. The form in the note was adopted in a modern

(e) *Hart v. Dally*, 2 Dowl. 257.

(f) *Stephens v. Pell*, 4 Tyr. 267; 2 Cr. & M. 421; 2 Dowl. 355.

(g) *Ante*, vol. i. 459; *Weymouth v. Boyer*, 1 Ves. jun. 416; 1 Mad. Ch. Prac. 216; *Collyer v. Dudley*, 1 Turner & Russ. 421. "Men should try to obtain

their object in the way in which men acting with each other ought first to ask their rights." The same principle prevails in the ecclesiastical Courts, *Constable v. Tufnell*, 4 Hagg. 508; *Coppin v. Dillon*, *id.* 375.

case, and the Court spoke highly of the candour of the writer. (h)

CHAP. XVII.  
SECT. I.  
OF IRREGU-  
LARITIES, &c.

Where a party made an application to the Court and failed, and it appeared that he had not *previously applied* to the opponent or third party, as for the production of a document, and the latter swore that he had always been ready to produce the same if he had been applied to, the Court on that very account discharged the rule *with costs*; (i) and there have recently been some excellent and salutary instances of the just exercise of the discretionary jurisdiction of the superior Courts as regards *costs* in cases of this nature, where a party relying on an irregularity had evinced a want of *due professional candour* and an *unworthy eagerness to increase costs*. In one instance in the King's Bench, a defendant's attorney obtained a rule nisi to set aside a declaration for irregularity, because it had been delivered when common bail for one of nineteen defendants had inadvertently not been filed, and immediately after service of the rule the plaintiff's attorney wrote to the defendant's attorney to know the amount of costs, and offered to pay them, but received no answer, and the plaintiff's attorney afterwards offered 5*l.* and requested the defendant's attorney to take the amount, but he refused, "saying the matter must take its *re-*

(h) In the K. B.

Between { A. B. Plaintiff,  
and  
C. D. Defendant.

Form of letter from a defendant's attorney, intimating an irregularity in the plaintiff's proceeding.

Sir,

As perhaps my professional duty would not otherwise have authorized my waiving a technical objection to your proceedings, I have stated to my client that the proceedings on the part of the plaintiff have been irregular in the subscribed particulars; and with his sanction I beg thus to communicate the points to you, that you may have an opportunity of correcting the errors, without incurring expense. Be pleased to inform me before — o'clock to day whether you will amend, for otherwise it will be my professional duty immediately afterwards to obtain a summons or move the Court, as I may be advised.

I am, sir, yours, &c.

G. H.

To Mr. E. F. Plaintiff's Attorney.

The irregularities above referred to are as follows [*stating all explicitly*].

In K. B.

Sir,

I think it due, in professional candour, to inform you, that your proceedings in this action are irregular in the subscribed particulars. To prevent loss of time and as the defendant is in custody, I have been advised that it was essential on the behalf of the defendant [or "plaintiff"] immediately to commence proceedings on account of such irregularity, and I therefore send herewith a copy of a summons [or rule nisi] and of the affidavit in support thereof, and to prevent any increase of expense, I will delay any further proceedings until the hour of —, on, &c. before which time I hope to hear from you. But I request you immediately to cause the defendant to be discharged out of custody in this action. Dated, &c.

[The irregularities, &c. same as before.]

Between, &c.

The like, accompanying a copy of summons or rule nisi, and of affidavit in a case where an immediate application to the Court or a judge was necessary, defendant being in custody.

(i) *Ex parte Crisp*, 2 Dowl. 455, 456.

CHAP. XVII.  
SECT. I.  
OF IRREGU-  
LARITIES, &c.

*gular course,"* whereupon the Court made the rule absolute on payment by the *defendant* of all the costs incurred subsequent to the offer made by the plaintiff's attorney; (*k*) and there is a similar decision in the Court of Exchequer, where the Court ordered *the plaintiff's attorney* to pay the costs incurred subsequent to the offer to pay costs. (*l*) In another recent case, though the plaintiff's attorney had once returned a plea because it was insufficient; but on a second occasion a special plea having been delivered without counsel's signature, the plaintiff's attorney signed judgment as for want of a plea, a learned baron expressed his regret that the plaintiff's attorney had not on the *second* occasion followed his first good example by *returning the special pleas for the purpose of having them signed*; (*m*) and although Reg. Gen. Mich. T. 1 W. 4, reg. 9, requires all proceedings to be served before nine o'clock at night, and a defendant irregularly delivered his plea after that hour, and the plaintiff on a subsequent day signed judgment as for want of a plea, the Court held that the plaintiff's attorney should have returned the plea or given notice of the irregularity, and that therefore the judgment was irregular; (*n*) and if eight days' notice of inquiry instead of fourteen be given, the defendant must return it, or will not recover the costs of setting aside the inquisition, &c.; (*o*) and although it is clearly irregular to file a declaration and give notice thereof, after knowledge that the defendant has entered his appearance, yet if the defendant's attorney neglect to inform the plaintiff's attorney of his irregularity, and take no steps to apprize him thereof by taking out a summons or moving to set aside the notice of declaration, and in consequence the plaintiff's attorney signs judgment for want of a plea, it is afterwards too late to object; (*p*) and although a defendant, under terms to take short notice of *trial*, is not bound to take short notice of executing a writ of *inquiry*, and therefore an eight days' notice served upon him was irregular, and the Court set the inquisition aside; *yet as he had neglected to return the notice immediately, as he ought, according to the established practice, to have done*, in order to prevent expense, but he let six days out of the eight elapse before he gave notice of motion to set aside

(*k*) *Beeston v. Beckett*, 4 Man. & Ryl. 100; and see *Rutty v. Arbur*, 2 Dowl. 36.

(*l*) *Halton v. Stocking*, 2 Crompt. & J. 60; 1 Dowl. 296; 2 Tyr. 165.

(*m*) *Hearne v. Battersby*, 3 Dowl. 213.

(*n*) *Horsley v. Purdon*, 2 Dowl. 228;

but see *ante*, vol. iii. 110; *semble contra*.

(*o*) *Stevens v. Pell*, 2 Dowl. 355; 2 Cr. & M. 421, S. C.

(*p*) *Rutty v. Arbur*, 3 Tyr. 591; 2 Dowl. 36.

the proceedings for irregularity, and then gave only a general notice, not pointing out what it was, the Court refused costs. (q) It would be very desirable and greatly ameliorate the conduct of *some practitioners*, (r) and relieve the administration of justice from much obloquy, if the principle of these decisions were embodied in a *general rule*, requiring in all cases, excepting those of prisoners in actual custody, and executions requiring *immediate* application to the Court or a judge, a *notice* of summons or motion to precede every application in respect of irregularity, or before any costs can be prayed for on any summons or rule. (r)

CHAP. XVII.  
SECT. I.  
OF IRREGULARITIES, &c.

There was always an excellent practice in the Court of Exchequer, that no rule nisi shall be drawn up with a *stay of proceedings* in any case, unless a *notice of motion* has been served two days before the day of moving; (s) and which has recently been confirmed even in cases under the interpleader act; (t) and the same practice prevails in C. P., especially in motions for setting aside proceedings for irregularity. (u) And in all the Courts we have seen, that before a motion for a stay of proceedings until security for costs has been given on behalf of a plaintiff residing abroad, there must be a notice of

9. Notice of motion and consequence of omission, and of obtaining a stay of proceedings.

(q) *Stephens v. Pell*, 4 Tyr. 267.

(r) It is due to the profession to state that certainly the instances of what is termed "*Sharp Practice*" are now comparatively rare. But the instances of *trifling and degrading* summonses and motions in respect of alleged *irregularities*, are much too frequent, and every member of the profession, anxious to maintain its character, should strongly advocate the annihilation of all such objections, the habit of taking which not only prejudices the character of individuals for fairness and liberality, but ultimately destroys even their *moral probity*, since an individual, who has degraded himself, even in his own estimation as well as in the consideration of his brother practitioners, will gradually be prone to the commission of even more dishonourable practices. A few years since it occurred that an action by a member of parliament upon a money bond, against certain eminent country bankers, was commenced in pique, because one of the partners had voted against the plaintiff on a recent election. The defendants pleaded payment of part and a set-off on the plaintiff's banking account with the defendants, and paid 1500*l.* into Court. By inadvertence, although the draft of pleas was signed by a serjeant, the fair engrossment filed was

not, which irregularity having been discovered by the plaintiff's attornies, (a London firm of great business and eminence,) they wilfully signed judgment as for want of a plea, and took all the active partners in execution in their banking house on a market day for 3000*l.* although it was well known to them to be a justly disputed claim. The consequence was a run upon the bank, which, with the greatest difficulty, although the bank had a surplus of 120,000*l.* was fortunately met, and the execution was afterwards set aside. Ought any practitioner to have it in his power, under colour of law, to inflict so serious an injury with impunity, still less benefit by the costs he has occasioned? It is due to the rest of the profession to state that the firm of the plaintiff's attornies no longer exists. But it is desirable, by rule of Court, to require some notice of so small an irregularity to be given, at least before execution, and thereby prevent a repetition of such contemptible sharp practice.

(s) 9 Price, 14; Dax's Pr. 137; Price's Pr. 288; Jervis's Rules, 55, note (a.)

(t) *Smith v. Wheeler*, 3 Dowl. 431; 1 Gale, 15, S. C.

(u) *Rolfe v. Brown*, 1 Hodges, 27.

CHAP. XVII.  
SECT. I.  
OF IRREGU-  
LARITIES, &c.

the motion, and an affidavit of the previous application. (x) But in the King's Bench it has in general been the practice to draw up rules nisi, with a stay of proceedings as of course, without any previous notice of motion, (y) or even counsel naming the point to *the Court*, still less without expressly requesting the Court to direct a stay of proceedings; so that in a mere *ex parte* application a defendant might for a time stay the plaintiff's proceedings, although it turned out that there was no pretence for so doing. It is true that in such a case the plaintiff may, if he be confident that the objection is not tenable, notwithstanding the express terms of the rule, proceed in his action, at the risk of the motion being decided against him; but that is a hazard which few plaintiffs will venture to incur. In general a rule nisi, "expressly in the meantime staying all proceedings," precludes a plaintiff from regularly taking any proceedings before the rule has been disposed of, (z) and the time for putting in bail and for pleading remains the same after the rule has been discharged as it was at the time it was obtained; and though the taking an assignment of a bail bond is not strictly a proceeding in the action, yet it cannot regularly be taken pending such a rule. (x)

There is however a distinction between rules obtained by a *plaintiff* and by a *defendant*; for if obtained by a *plaintiff*, the defendant is allowed the same time after the rule is disposed of, to take the next step, that he had when the rule nisi was served upon him; but if the rule were obtained by the *defendant*, then he must take the next step on the same day the rule is disposed of, at his peril, but he is allowed the whole of that day so to do. (a) He will not, however, be bound to do so if the rule nisi expressly provide (as it sometimes properly does) that the defendant shall have the same time to take the next step after the rule is disposed of as he had at the time he obtained it. (a) The defendant ought therefore (if the rule do not contain this express provision) pending the rule, take all proceedings essential to be completed by the time the rule will be disposed of, such as justifying bail, expressly declaring that he does so without prejudice, &c. (b)

(x) *Jones v. Jones*, 2 Crom. & J. 207. See form of notice and affidavit, Tidd's Forms, 180.

(y) *Stratton v. Regan*, 2 Dowl. 585, where the clerk of the rules of K. B. so certified; *semble*, overruling the previous decision in K. B., of Parke, J. in *Fortes-*

*cue v. Regan*, 1 Dowl. 524.

(z) *Swain v. Cramond*, 4 Term R. 176.

(a) *Hughes v. Walden*, 5 Bar. & Cres. 771; *St. Hanlaire v. Byam*, 4 id. 970; 7 D. & R. 458, S. C.; Tidd, 301.

(b) *St. Hanlaire v. Byam*, 4 Bar. & Cres. 970; 7 Dow. & Ry. 458, S. C.



Besides applications on the ground of irregularity, there are *instances* in other cases where the neglect to make previous application, (c) or to give notice of motion, will materially affect the result. Thus on an application under the interpleader act, it was held that if a party applies to the Court by motion, without having made application to the opposite party to do what the rule calls on him to do, he is not entitled to the costs of the rule if the opposite party, on showing cause, confine himself to the question of costs, i. e. do not contest and argue upon the merits of the application. (d) And if a prisoner do not give notice of his intended motion to be discharged out of custody, on the ground that he has been a prisoner for twelve months for a debt under 20*l.*, the Court will only grant a rule nisi in the first instance; though if such notice had been given, the rule might at once have been absolute. (e) And if a defendant move to put off a trial on account of the absence of a witness, if he neglect to give notice to the other side, he will have to pay all intervening expenses incurred by want of notice. (f) And if a motion for security for costs be made without previous application and notice, no stay of proceedings will be granted. (g)

CHAP. XVII.  
SECT. I.  
OF IRREGULARITIES, &c.  
Utility of notice of application in other cases.

The before-mentioned observations suggest the expediency of the plaintiff or the party, the regularity of whose proceedings has been objected to, immediately to give notice that he waives so much of his proceeding as is irregular; and if before the defendant has entered his appearance, we have seen that it might be advisable to serve a written notice not to appear; (h) and it has been stated that the plaintiff, immediately after such notice, may issue and serve regular fresh process; (i) but if the defendant has previously appeared or incurred any expense, it may be necessary, before the commencement of any fresh action, to discontinue, and tax and pay or tender the costs; for otherwise the defendant might plead in abatement the pendency of the first action, however irregular the proceedings therein may have been. We have seen the advantage that will in general arise from a party, immediately after he has any intimation of an irregularity in his proceeding, serving

10. Proceedings on receiving notice, &c., and of the party guilty of an irregularity immediately after notice thereof amending or countermanding defendant's appearance to the writ, or otherwise.

\* (c) See *Bowen v. Bramridge*, 2 Dowl. 213.

(d) *Id.*

(e) *Jones v. Fitzaddams*, 2 Dowl. 111; 1 Crom. & M. 85, S. C.

(f) *Attorney General v. Hall*, 2 Dowl. 111.

(g) *Bohrs v. Session*, 2 Dowl. 710.

(h) *Ante*, vol. iii. 234, note (b), where see a form of notice; Bagley's Chamber Pr. 152.

(i) *Ante*, vol. iii. 254, (e); Bagley's Chamber Pr. 132, cites Tidd, Supp. 65; Chitty's Sum. Prac. 50.

CHAP. XVII.  
SECT. I.  
OF IRREGU-  
LARITIES, &c.

a notice on the opponent, that he is ready to amend his proceeding, and to pay the costs if any incurred by the party complaining of the alleged irregularity, and actually to tender the amount. (k) But if the party guilty of the irregularity merely offer that the expenses shall be *costs in the cause* instead of being paid *immediately*, that proposition being unreasonable, the opponent may proceed to make his rule absolute, with costs. (l) The form of the notice must of course vary according to circumstances; that in the note may assist. (m)

11. Notice of motion for criminal information against a justice, or for a certiorari.

In some *criminal cases*, and others of a *public nature*, as before any motion for a writ of certiorari to remove a conviction, or for a criminal information against a magistrate, there must be a *notice of motion*, so as to enable the party to show cause in the first instance, and prevent the rule nisi being obtained; and at the time of moving, there must be an *affidavit* in Court of the due service of such notice. The 13 G. 2, c. 18, s. 5, extending in terms to all *convictions*, judgments, orders, and other proceedings *before justices*, requires *six days* previous written notice of the intended motion, to be signed and delivered, with certain prescribed requisites. (n) The practice as to notices of the intention to move for *Criminal Information* has already been fully stated. (o)

(k) *Ante*, 529, 530.

(l) *Clarks v. Crockford*, 3 Dowl. 693.

Form of written offer to amend the alleged irregularity, and to pay all reasonable costs, if any, that the party objecting may have incurred.

(m) In the —.

Between, &c.

You having intimated that there is some technical objection to the proceedings in this action on the part of the plaintiff, [or "defendant,"] I beg you to state the particulars thereof immediately, and, if well founded, such objections shall be rectified, or the proceedings will be abandoned; and I hereby give you notice that I am ready to pay all reasonable costs incurred by you or your client by any such objectionable proceedings, upon your informing me of the items and amount; and I have instructed the bearer to tender you a sufficient sum to cover the amount; and I request you not to increase the costs by any proceeding, as I am ready immediately to comply with any reasonable terms you may require, and to consent to a judge's order to the same effect. Dated this — day of —, A. D.

To Mr. G. H.,  
Attorney, [or "Agent,"]  
for the Defendant.

Yours, &c.  
E. F.,  
Attorney for the Plaintiff.

(n) *Ante*, vol. ii. 377, 378.

(o) 1 Chitty's Crim. Law, 873 to 877; Tidd, 498; *ante*, vol. ii. 363 to 365.

SECTION II.—OF AFFIDAVITS IN SUPPORT OF OR AGAINST APPLICATIONS TO A JUDGE OR COURT BY SUMMONS OR MOTION. CHAP. XVII,  
SECT. II.  
AFFIDAVITS,  
&c.

1. When or not an affidavit is necessary.....	535	or not .....	549
2. By whom to be made.....	537	14. Consequences of affidavits not being sufficient in first instance .....	<i>id.</i>
3. Title of Court.....	<i>id.</i>	15. When or not an amendment in affidavit is permitted, or supplemental one received ....	550
4. Title of the cause .....	538	16. When or not objection waived ..	<i>id.</i>
5. Addition of deponent.....	539	17. Of delivering copies of affidavits to opponent's attorney	551
6. The commencement .....	540	18. Of opponent's taking office copies .....	<i>id.</i>
7. The body or substance of the affidavit .....	<i>id.</i>	19. Affidavit in answer to a summons or rule nisi .....	552
8. Deponent's signature to affidavit .....	545	20. Time of swearing the same....	553
9. Before whom sworn .....	<i>id.</i>	21. Affidavit in answer, when defective merely in form, may be amended.....	554
10. Of the jurat .....	546		
11. At what time an affidavit must be sworn, produced, and filed ..	<i>id.</i>		
12. Documents to be annexed to, and exhibited with, affidavit	548		
13. Affidavits previously used, when they must be re-sworn			

THE subject of affidavits has been so fully and ably considered in other works, (*o*) that it is here only intended to add a few points, and notice the most recent decisions. When considering affidavits to hold to bail, we also stated many requisites, some of which equally apply to affidavits in general. (*p*)

When any application to the Court or a judge is founded on the notes of one of the *judges of the superior Courts*, taken on a trial before him, unqualified credit is given to his accuracy, and no affidavit in support of them can be required; and in case of supposed mistake or discrepancy between such notes and those of counsel, the notes of the judge are *conclusive*, unless he think fit to correct them. With respect also to arrangements or agreements made between the respective *counsel* on each side as to matters in a cause, more peculiarly within their knowledge, so much credit is given to their integrity and accuracy, that no affidavit to establish the fact is required, and their statement is received without corroboration on oath; (*q*) a high privilege, obviously calculated to induce the utmost honour, care and accuracy on the part of counsel, when stating their recollection of what has occurred, and a privilege in no case to be surrendered or waived; (*q*) so if counsel has attended a trial before a sheriff his statement is received in lieu of an affidavit, (*r*) though otherwise such affidavit is indispensable. (*s*) Indorsements by counsel upon their briefs of agreed terms of reference, or upon any other subject in a cause, are also

1. When or not an affidavit is necessary.

(*o*) Tidd, 9 ed. 491 to 497, 501; *id.* Supplement, A. D. 1833, Index, tit. Affidavit; 2 Arch. K. B. 4 ed. 1014 to 1022; 2 Arch. C. P. 319 to 322; Bagley's Chamb. Prac. Index, tit. Affidavit.  
(*p*) *Ante*, vol. iii. 330 to 341.

(*q*) *Iggulden v. Terson*, 2 Dowl. 277; 4 Tyr. 309.  
(*r*) *Barnett v. Glossop*, 3 Dowl. 625.  
(*s*) *Johnson v. Wells*, 2 Dowl. 352; 2 Crom. & M. 428, S. C.

CHAP. XVII.  
SECT. II.  
AFFIDAVITS,  
&c.

evidence. (r) But in most other cases, excepting in matters quite of course, whether of summons or motion, it is either indispensable or advisable to support or answer the proceeding by affidavits, containing a faithful, concise, but explicit statement of the fact. (s) But each Court takes judicial notice of *its own officers*, and therefore no affidavit that a party moved against is an attorney of the Court is required. (t) And the Court in banc, or a judge at chambers, *may* act without affidavit, as in ordering a special jury to be struck the next day, upon the mere statement of the plaintiff's attorney that the rule for a special jury had been obtained for delay. (u)

In general, whenever any part of the ground of an application is an *extrinsic fact* not apparent on the face of the proceedings, there must be an *affidavit* of its existence; and even when something apparent on the face of proceedings in a cause not yet upon record, is the subject of application, such proceeding, or a copy, must in general be annexed to an affidavit and verified. Thus a defendant cannot move to set aside process on the ground that the amount of the plaintiff's claim for debt and costs has not been indorsed thereon, without producing an affidavit that the action is for a *debt* within the terms of the rules Hil. T. 2 W. 4, reg. 2, and Mich. T. 3 W. 4, s. 5; (r) and upon a motion after verdict, on behalf of a plaintiff, to have out of Court money deposited in lieu of bail, although a judge's order had been obtained by consent for having such money paid out to the plaintiff, the Court said, "*it was necessary that there should be an affidavit to put them in possession of the circumstances, or else that the judge's order should be made a rule of Court.*" (y) And in support of an application for a motion for a new trial of an issue tried before the undersheriff, under 3 & 4 W. 4, c. 42, the accuracy of his notes must be verified by affidavit, or the Court will discharge a rule nisi previously obtained. (z) And an affidavit must be produced before the master on any reference to him, and without special direction he cannot receive parol evidence. (a) If, however, the proceedings in a cause *be expressly referred to in the rule nisi*, (but not otherwise,) they may sometimes be read or referred to by the Court; and if they supply sufficient materials to support the application, a defective affidavit may be dispensed with. (b) By the express Reg. Gen. Hil. T. 4 W. 4, reg. 2, an

(r) *Porter v. Cooper*, 6 Car. & P. 354.

(s) *Johnson v. Wells*, 2 Crom. & M. 429.

(t) *Ex parte King*, 5 Dowl. 41; *Ex parte Hare*, id. 600; 1 Harr. & Wol. 211, S. C.

(u) *Joseph v. Perry*, 3 Dowl. 699.

(z) *Curwin v. Moseley*, 1 Dowl. 432.

(y) *Haines v. Nairn*, 2 Dowl. 43.

(z) *Johnson v. Wells*, 2 Crom. & M. 428, 429, or counsel's statement, *Barnett v. Glossop*, 3 Dowl. 625.

(a) *Noy v. Reynolds*, 1 Harr. & Wol. 14; ante, vol. iii. 56, 37.

(b) *Howorth v. Hubbersty*, 3 Dowl. 456; 1 Gale, 47.

affidavit of its truth must accompany every plea puis darrien continuance. (a) But express rules sometimes dispense with the necessity for any affidavit, as Reg. Gen. Hil. T. 2 W. 4, r. 47, which entitles a defendant to an order for particulars of the plaintiff's demand "without the production of any affidavit." (b) And by reg. 63, the rule for a view may in all cases be drawn up by the officer of the Court, on the application of the party, "without affidavit or motion for that purpose." (c)

CHAP. XVII.  
SECT. II.  
AFFIDAVITS,  
§c.

In most cases an affidavit made by a *third person*, not a party to the cause either as a plaintiff or a defendant, may be received, as in the case of affidavits to hold to bail; (d) and a motion to change the venue may be by the defendant's attorney, though if the defendant be in the country, it has been considered that the defendant himself should make it. (e) An affidavit of a convicted felon may be taken off the file, if it be shown by affidavit affirmatively that his competency has not been restored. (f) We have seen that it is the duty of every attorney to take care that no affidavit be sworn by a party who from youth or mental imbecility does not thoroughly understand to what he is deposing; and the practice of permitting a young or inexperienced articulated clerk to swear to affidavits has been censured by high authority. It will always be advisable to ascertain and communicate to counsel the age of each deponent who has sworn to affidavits used by the opponent, and if they be very young or of bad character, it would be advisable to deliver to the counsel an affidavit cautiously and not libelously stating the fact, leaving it to his discretion to mention the facts to the Court, who might under circumstances, notwithstanding the positive statement in the affidavit of the individual, refer the matter to the master, or direct other further inquiry. (g)

2. By whom to be made.

Every affidavit made *after* a writ has been issued, and in a cause, must be properly intitled in the Court, as, "In the King's Bench," "In the Common Pleas," "In the Exchequer of Pleas." As regards the title of the Court, it is always advisable to state it correctly of that Court in which the cause is depending, or in which it is to be used, and then it will so far always be received, if sworn before an authorized judge or

3. Title of the Court. (h)

(a) Jervis's Rules, 98.

(b) Jervis's Rules, 54, n. (w), an affidavit was previously required in Exchequer.

(c) Jervis's Rules, 59, note (m), an affidavit was previously required in C. P.

(d) *Short v. Campbell*, 3 Dowl. 487; 1 Gale, 60; 2 Dowl. 785.

(e) *Biddell v. Smith*, 2 Dowl. 219.

(f) *Holmes v. Grant*, 1 Gale, 59.

(g) Perhaps it might be desirable, if there were a rule that every affidavit shall state the age of the deponent, as in some parts of the continent.

(h) *Ante*, vol. iii. 332, 333.

CHAP. XVII.  
SECT. II.  
AFFIDAVITS,  
&c.

officer; for the Reg. Gen. Hil. T. 2 W. 4, r. 4, directs, that an affidavit sworn before a judge of any of the Courts of King's Bench, Common Pleas, or Exchequer, shall be received in the Court to which such judge belongs, though not entitled of that Court, but not in any other Court, unless entitled of the Court in which it is to be used. But where an affidavit is sworn before a commissioner of the proper Court in which it is to be used, it need not be intituled in any Court.(i)

4. Title of the  
cause.(k)

In stating the *requisites* of an affidavit to held to bail, we have seen that any affidavit sworn *before* an action or criminal prosecution has been *commenced* ought not to be intituled as in a cause, and the same rule extends to an affidavit on which to found a motion to enter up judgment on a warrant of attorney given when no suit is pending;(l) but after a writ has been issued, then an affidavit, relating to the action, ought to

be intituled *fully* in the action, as: Between { A. B., plaintiff,  
and  
C. D., defendant,  
and as well the *Christian* as the *surnames* of *every* plaintiff and *every* defendant must be stated *in full*, and not abbreviated, or the affidavit will be insufficient.(m) And, therefore, an affidavit intituled "*Geo. Shrimpton v. Wm. Carter, the elder, sued as Wm. Carter,*" the action being by *George Shrimpton v. William Carter*, is insufficient, and was rejected.(n) The title of the affidavit in an action in *autre droit* must also *fully* state *the right or character* in which the plaintiff sues, or the defendant is sued;(o) and if it merely add to the names "*assignes, &c.*" without stating of whom, it will be insufficient;(o) and though the mere title "*executor, &c.*" without showing of whom, has been common and may suffice, there being a distinction in this respect between an executor and an assignee (because there are several descriptions of assignees), it is at least safer to state of whom the party is executor.(p) In support of a motion to set aside a bail bond, on the ground of a mistake in the defendant's surname, the affidavit must be intituled in the proper name of party, and not in the name by which he was arrested; and if the defendant were in his affidavit or proceedings to adopt the wrong name by which he was sued, it would afford evidence

(i) *Urquhart v. Dick*, 3 Dowl. 17.

(k) See in general *ante*, vol. iii. 333.

(l) *Davis v. Stanbury*, 3 Dowl. 440.

(m) *Anderson v. Baker*, 3 Dowl. 107; 9 Legal Obs. 108; *Anderson v. Ell*, 3 Dowl. 73; *Clothier v. Es*, 3 M. & Scott, 216; 2 Dowl. 731, and the objection is not waived by appearing to the rule and

producing affidavits in answer; *Anderson v. Ell*, 3 Dowl. 73, S. P.

(n) *Shrimpton v. Carter*, 3 Dowl. 648.

(o) *Phillip v. Hutchinson*, 3 Dowl. 20; *Clark v. Martin*, 3 Dowl. 222; *Tidd*, 492, citing *Steyner v. Cottrell*, 3 Taunt. 377; *Bullman v. Callow*, 1 Chitty's Rep. 728.

(p) *Clark v. Martin*, 3 Dowl. 222.

to the judge that he was known as well by one name as the other, and induce him to discharge the rule on that ground. (p) If it be intended to use the same affidavit in *two* causes, it seems, that since the abolition of stamps on proceedings in an action, such affidavit may be intituled at the top in both the actions, and then two affidavits will not be necessary. (q)

CHAP. XVII.  
SECT. II.  
AFFIDAVITS,  
&c.

An affidavit should also be intituled in the *usual way*, viz. first stating the plaintiff's Christian and surname, and then the defendant's, and, therefore, "C. D. ats. A. B.," is bad, (r) and a fortiori, a transposition of names, as the Christian name "Mary Ann" for "Ann Mary," will be fatal. (s) And an affidavit defective in the title cannot be amended after the rule has been drawn up. (t)

The ancient rule in King's Bench of Mich. T. 15 Car. 2, reg. 1, A.D. 1663, ordered, "that the true *place of abode, and true addition*, of every person who shall make affidavit in Court "here, shall be inserted in such affidavit." But there was not any such rule in Common Pleas, and it there sufficed to state his name and place of abode, omitting any statement of degree or mystery. (x) But Reg. Gen. Hil. T. 2 W. 4, r. 5, assimilating the practice of all the Courts, orders, that "the *addition* "of every person making an affidavit shall be inserted therein." The term *addition*, as here used, includes as well *place of abode* as *rank, degree, mystery, trade, or occupation*; (y) and the statement of these is now indispensable, and although it has in three cases subsequent to this general rule been held otherwise, (z) yet it seems the better opinion that even in an affidavit made by a *defendant* in a cause, and intituled in the cause, and describing the deponent as "the above named defendant," his addition of place and degree must be inserted, (a) but the rule is sufficiently complied with by a clerk who is the deponent, describing himself as "agent and collector of the said plaintiff," or as "late clerk, of &c.," although it do not describe his present abode. (b) The word "assessor" is not a

5. Addition of deponent. (u)

(p) *Finch v. Cocker*, 2 Dowl. 383; *Shaw v. Robinson*, 8 Dowl. & Ryl. 423, cited in *Nathan v. Cohen*, 3 Dowl. 371; and see 2 Crom. & M. 412; T. Chitty's *Forms*, 353; 3 Chitty's *Plead.* 901, (a)  
(q) *Pitt v. Evans*, and *Pitt v. Jervis*, 2 Dowl. 226.

(r) *Richard v. Isaac*, 1 Cr. M. & R. 136, 709; 2 Dowl. 710, S. C., cited in *Clark v. Martin*, 3 Dowl. 222.

(s) *Poole v. Pembrey*, 3 Tyr. 387; *Price v. James*, 2 Dowl. 435.

(t) *Phillips v. Hutchinson*, 3 Dowl. 22.

(u) See in general *ante*, vol. iii, 353, 354.

(x) *Tidd*, 179; *Anonymous*, 6 Taunt. 73; *Jervis's Rules*, 43; and per *Parke, J.*, in *Jackson v. Chard*, 2 Dowl. 469.

(y) *Semble*; and see 2 Dowl. 41, (c); as to *additions* in general, and consequences of mistake, see *Tidd*, 179, 493; 1 Chitt. *Crim. L.* 203 to 217.

(z) Per *Bayley, B.*, in *Poole v. Pembrey*, 1 Dowl. 693; per *Taunton, J.*, in *Green v. Forster*, 2 Dowl. 191; and per *Parke, J.*, in *Jackson v. Chard*, 2 Dowl. 469.

(a) *Lanson v. Case*, 3 Tyrw. R. 489; 2 Dowl. 40; 1 Cr. & M. 481, S. C.

(b) *Simpson v. Drummond*, 2 Dowl. 473; *Short v. Campbell*, 3 Dowl. 487; 1 Gale, 60.

CHAP. XVII.  
SECT. II.  
AFFIDAVITS,  
&c.

sufficient addition, but if introduced into an affidavit sworn also by other deponents, whose additions are correctly stated, their parts of the affidavit may be read. (c) As respects description of place, "merchant in the city of London," or of "Kennington in the county of Surrey," have been holden sufficient additions, (d) and "A. B. of Bath, in the county of Somerset, Esquire," is a sufficient description. (e)

6. The commencement.

The *commencement* or statement of the *deponent's swearing* must also be accurate, and where the affidavit run "maketh oath and said," (instead of *saith*,) the deviation from the usual form was considered fatal. (f) So an affidavit, "maketh and saith," omitting "*oath*," was rejected. (g)

7. The body or substance of the affidavit.

Facts must be stated as positively as truth will admit, and not mere inferences or opinions.

The *substantial requisites* of an affidavit must necessarily vary in each case. The deponent must in every case state *facts* which, without conjecture or intendment, show that he is absolutely entitled to the interference of the Court as prayed. (h) Indeed, a principle in pleading (viz. that all allegations shall be taken most strongly against the party pleading them, because it is to be presumed he has stated them as strongly and favourably as practicable for himself,) (i) might also be applied to allegations in an affidavit. Thus, if a defendant apply for double costs under the Middlesex County Court Act, he must *expressly* swear that he was liable to be summoned to that Court, for otherwise the superior Court will rather presume the contrary; (k) so, if he seek to set aside proceedings, on the ground of his not having been served with process, his affidavits must state that he is the very person intended to have been made defendant in the action, for otherwise the contrary will be supposed, and then the application would be unnecessary. (l)

An affidavit should state facts *as positively* as a deponent consistently *with truth*, and after full consideration, can venture to swear; and if an affidavit merely state that the deponent "*believes and understands*," &c. without stating the *grounds* of belief, no weight will be attached to it. (m) It is one of the most important and anxious duties of a practitioner, at the same

(c) *Nathan v. Cohen*, 1 Harr. 107; 3 Dowl. 370.

(d) *Wilton v. Chambers*, 1 Harr. 116.

(e) *Coffin v. Potter*, 2 Dowl. 785.

(f) *Howarth v. Hubbersty*, 1 Gale, 47; 3 Dowl. 455, S. C.

(g) *Oliver v. Price*, 3 Dowl. 261.

(h) See instances, *Fossett v. Godfrey*,

2 Dowl. 587; *Johnson v. Smallwood*, id. 588.

(i) Per Parke, B., in *Peerce v. Champneys*, 3 Dowl. 276.

(k) *Fossett v. Godfrey*, 2 Dowl. 587.

(l) *Johnson v. Smallwood*, 2 Dowl. 588.

(m) *Ex parte Tighe*, 2 Dowl. 148.



time that he may properly endeavour to obtain as strong an affidavit in favour of his client's interest as he can consistently with truth, to consider the possibility of the opponent indicting the deponent for perjury as respects any statement he may swear to, in cases when *two* persons who might swear to the contrary were present, and to caution the deponent to qualify his affidavit accordingly.

CHAP. XVII.  
SECT. II.  
AFFIDAVITS,  
&c.

When it is essential clearly to establish a fact, as for instance a person's knowledge of some illegality in which he had been concerned, the affidavit should not merely swear to facts from which such guilty knowledge and illegality might be inferred, but should at least state the *deponent's* belief of the person's guilt, unless the facts as sworn are such as cannot lead to any other conclusion. (n)

Sometimes *express* rules prescribe that certain particular matters shall be sworn to in precise terms; as in support of an application to set aside proceedings on a bail bond, or an attachment against the sheriff, (o) when, if an application be on behalf of the *original defendant*, a good defence on the *merits* must be stated, and if the application be on behalf of the sheriff, or of the officer, or of the bail, (p) it must be so stated and sworn that the application was so made at his instance and expense *only, and without collusion with the original defendant*. (q) An affidavit in support of a rule, and founded on an irregularity not apparent on the face of an annexed document, should distinctly point out the irregularity complained of, in order that the opponent may know what he is required to answer. (r)

In some cases express rules require particular points to be sworn.

Every affidavit should be in the *genuine natural language of the deponent*, and it is morally incorrect, and may be exceedingly prejudicial, if a practitioner should so frame the affidavit of an illiterate or inferior person, as to appear in language superior to his station in life. And where there are several deponents, each should swear in his own peculiar terms; and if several affidavits be precisely in the same words, it will naturally excite suspicion that the whole were dictated by the practitioner or his clerk, and are not the genuine statements of the deponents themselves. Unquestionably in practice great skill

The genuine language of each deponent, to be adhered to.

(n) *In re King*, 1 Adol. & El. 560; *R. v. Williamson*, 3 Bar. & Ald. 582.

(o) *Ante*, vol. iii.; *R. v. Sheriff of Middlesex*, 3 Dowl. 174.

(p) One of the bail may move on his own affidavit; denying collusion, although the other bail does not swear. *R. v.*

*Middlesex*, 3 Dowl. 186.

(q) *Reg. Mich. T.* 49 G. 3, K. B.; 2 Bar. & Ald. 240; *Call v. Thelwall*, 1 Gale, 16; 2 Dowl. 444, S. C.; *R. v. Sheriff of Middlesex*, 3 Dowl. 174.

(r) *Per Bayley, B. Aliven v. Furnival*, 2 Dowl. 50.

CHAP. XVII.  
SECT. II.  
AFFIDAVITS,  
&c.

may be evinced in preparing affidavits strictly according with truth; but the least improper perversion, even of language, to make a better case for a client than the facts will warrant, is morally, if not legally, an offence very little less than subornation of perjury.

Calumnious and irrelevant statements and expressions to be avoided.

In every affidavit unnecessary *scandalizing* or calumniating expressions, as well as all other *impertinent*, or *irrelevant*, or *libellous* matter, or a general attack upon character, especially upon hearsay information, should be cautiously omitted, not only because the introduction of it might subject the party to a cross motion to have the objectionable statement struck out, but also because the Court will sometimes, on account merely of the introduction of such scandalizing matter, refuse costs, though in other respects the application may succeed. (s) When it may be requisite or advisable to attack the character of an adverse deponent or party, it may be advisable to swear that the deponent is ready to state particulars, if the Court so require or permit, as thus, "And this deponent further saith, "that he is well acquainted with the character of C. D., of, " &c., who hath made an affidavit in this cause, on, &c. And "that he this deponent doth not believe the statements of the "said C. D. therein, or either of them, to be true; and on the "contrary, this deponent well knows and believes the same to "be utterly false; nor would he this deponent, on any other "occasion, believe any statement made by the said C. D., on "his oath or otherwise. And this deponent further saith, "that he is ready and willing to state, distinctly and separately, "sufficient grounds and reasons for his, this deponent's, thus "swearing, if this honourable Court will require, or permit or "suffer him so to do."

Affidavits to be concise and not unnecessarily lengthy.

An affidavit should not in any *other respect* be unnecessarily lengthy; and if it be, as if in answer to a motion to set aside a judgment on the usual affidavit of merits, the affidavit in answer, contrary to the established practice, go into a long detail of facts to show, (especially when only argumentatively,) that the defendant has not a defence on the merits, although the plaintiff will be entitled to the costs of the application; yet the Court will direct the master, in taxing the costs, to disallow the unnecessary parts of the affidavit. (t) So in other cases where similar directions to the master have been given. (u)

When affidavits should state particular objections.

In some cases, as in support of an application complaining of

(s) *Thompson v. Dicus*, 2 Dowl. 95,  
96; and see *Anonymous*, 2 Wilson, 20.  
(t) *Heane v. Batterly*, 3 Dowl. 213.

(u) *Pitt v. Coombs*, 1 Harr. 14, n. (a);  
*Lewis v. Woolrych*, 3 Dowl. 692, S. P.

some taxable items in a bill of costs, it is necessary to specify in the affidavit *each objectionable item* and the facts which render it so, either in the affidavit in support of the application, or in the rule nisi, in order that the opponent may distinctly know what are the objections he is called upon to answer; and if a rule nisi in this respect be good in part, and insufficient as to the residue, the applicant will not have costs. (x)

CHAP. XVII.  
SECT. II.  
AFFIDAVITS,  
&c.

When *several* other persons besides the deponent were present, when a material conversation or other fact took place, it may be advisable, although they do not join or make any affidavit on the subject, to state that fact and the names of such persons; and if they have been required to join in the affidavit, it may be expedient to state the terms of their refusal, and to swear according to the facts the deponent's belief why they have declined to concur, taking care, however, to avoid terms which might unnecessarily provoke them to swear the contrary, and when the facts will warrant, it may be advisable to add the deponent's belief, that if the persons would swear at all, they would corroborate his the deponent's statement.

When the presence of other persons should be sworn to.

When it is anticipated that a conversation or fact, which in one view, or on an *ex parte* statement, might be so distorted as to be unfavourable to the application, and that the opponent is capable of attempting so to misrepresent, then it may be advisable in the affidavit in support of the application, to notice such conversation or fact, however unfavourable, and then to give its full and favourable explanation; for otherwise the opponent swearing last, and no supplemental affidavits being admissible, might so misrepresent or garble the conversation or fact, or swear to such prejudicial inference, as to endanger the result of the application upon a collateral matter, though substantially the applicant might be entitled to the fullest relief.

Of swearing in anticipation and explanation of the deponent's probable statements.

In support of a motion on behalf of a *defendant*, to set aside any proceeding for *irregularity*, no affidavit of *merits* is requisite, if the ground of objection be clearly well founded; (y) but if the irregularity be doubtful, and in all cases when the facts will warrant, it is advisable that the affidavit state, "And this deponent further saith that he is advised, (z) and verily believes, " that he has a *good and sufficient defence to this action on the*

Of swearing to merits.

(x) *Allen v. Turnish*, 2 Dowl. 49.  
(y) *Williams v. Williams*, 2 C. & M.  
473; 2 Dowl. 350, S. C.

(z) This should only be stated when in

fact such advice has been given, and it would suffice to swear only to the deponent's belief.

CHAP. XVII.  
SECT. II.  
AFFIDAVITS,  
&c.

*merits*;" (not merely that he hath merits, or that he has a good defence.) (a) And upon such affidavit of merits, though the defendant might fail in his objection, he would be let in to try the cause on just terms. (a)

An affidavit of a defence on the merits must in general in terms add "to *this action*," and "on the *merits*," or it will not be received, or at least acted upon; (b) and where the affidavit, deviating from the usual language, stated that "the defendant had a good and *meritorious* defence to this action," the Court held it insufficient, but gave time to obtain a better affidavit; (c) and an affidavit that the defendant has merits to defend, is clearly insufficient, as rather importing that the defendant has to defend or answer an action on the merits against him. (d) If, however, the affidavit distinctly state *facts* which of themselves can lead to no other conclusion than that there is a defence on the *merits*, then it is not absolutely necessary, though always *safer*, to swear in terms "that the defendant hath a good and sufficient defence on the merits to this action;" (e) and, therefore, where the affidavit incorrectly was "that the defendant had a good defence to the action," (omitting on the merits,) but added the ground thus: "inasmuch as the principal has paid to the plaintiff sufficient money to exonerate the defendant from his covenant," such affidavit was holden sufficient, as disclosing in effect that there was a sufficient defence on the merits. (f) In general an affidavit of merits must be made by a defendant himself, or his attorney, or the clerk of such attorney *who swears he has conducted the defence from the earliest stages in the cause*, and who will swear positively that he is fully acquainted with the facts relating to the action. (g) But an agent in London to the defendant's attorney in the country, may sufficiently swear to his belief of merits from instructions received from the country attorney, as by an affidavit stating "that from the instructions this deponent has received from E. F. of, &c. attorney for the defendant, and for whom this deponent is agent in this cause, and which instructions this deponent believes to be correct and true, this deponent verily believes the said defendant hath a good defence to this action

(a) *Williams v. Williams*, 2 Cr. & M. 473; *Tate v. Bodfield*, 3 Dowl. 218; *Lane v. Isaacs*, *id.* 652; and see *In matter of King*, 1 Adol. & El. 560.

(b) *Johnson v. Nevison*, 2 Dowl. 260, 261; *Tate v. Bodfield*, 3 Dowl. 218; *Lane v. Isaacs*, *id.* 652; *Williams v. Williams*, 2 Cr. & M. 473.

(c) *Bower v. Kemp*, 1 Crom. & Jerv. 288; *Westerley v. Kent*, 1 Tyr. R. 261;

*Lane v. Isaacs*, 3 Dowl. 652.

(d) *Pringle v. Marsack*, 1 Dowl. & Ryl. 155; and see *Lane v. Isaacs*, 3 Dowl. 652.

(e) *Johnson v. Berrisford*, 2 Cr. & M. 222; and see *In matter of King*, 1 Adol. & Ell. 560; and *Attorney General v. Hull*, 2 Dowl. 111.

(f) *Johnson v. Nevison*, 2 Dowl. 260.

(g) *Morris v. Hunt*, 1 Chitty's Rep. 97.

on the merits." (h) The term *merits* in an affidavit of this nature is to be read in a technical sense, and is not to be understood to be confined to a *strictly moral* and conscientious defence, and therefore a sufficient defence on the merits might be safely sworn to, when the defence rests alone on a legal or technical objection, as the statute against frauds or usury, or the statute of limitations.

CHAP. XVII.  
SECT. II.  
AFFIDAVITS,  
&c.

---

If an affidavit purport to be *signed* by a deponent, it will constitute no objection that it is signed in a foreign character, and that there is no statement in the jurat to show that the deponent is a foreigner, and that the writing in question is his signature. (i)

8. Deponent's  
signature to  
affidavit.

We have seen that under 11 G. 4 and 1 W. 4, c. 70, s. 4, each of the fifteen judges, without regard to the particular Court to which he may be attached, is now competent to have administered before him every description of affidavit in actions over which the Courts have *common*, i. e. concurrent jurisdiction, and consequently all personal actions; (l) and the Reg. Gen. Hil. T. 2 W. 4, r. 4, orders that if an affidavit be sworn before a judge of the Court, in which an action is depending, it may then be received, though not intituled of that Court, but not in any other Court, unless intituled in such Court; and therefore it was held to be no objection to an affidavit to ground an attachment against a witness for contempt in a cause depending in the Court of Exchequer, and which affidavit was intituled "In the Exchequer," that it was sworn before a judge of the Court of Common Pleas. (m)

9. Before whom  
sworn. (k)

The Reg. Gen. Hil. T. 2 W. 4, rule 6, directs, that where an agent in town, or an attorney in the country, is the attorney on the record, an affidavit sworn before the attorney in the country shall not be received; and an affidavit sworn before an attorney's clerk shall not be received in cases where it would not be receivable if sworn before the attorney himself; but this rule shall not extend to affidavits to hold to bail. The object and use of this rule has been explained by Mr. Jervis in his valuable note in his collection of rules. (n) With respect to *commissioners*, it seems that during the assizes their power to

(h) *Schofield v. Huggins*, 3 Dowl. 427.  
(i) *Nathan v. Cohen*, 3 Dowl. 570;  
1 Harr. 170, S. C.

(l) *Ante*, vol. iii. 22, 23.  
(m) *Phillips v. Drake*, 2 Dowl. 45.  
(n) *Jervis's Rules*, 43.

CHAP. XVII.  
SECT. II.  
AFFIDAVITS,  
&c.

administer an oath in the town where the assizes are holden is suspended, and it must be made before one of the judges upon the circuit; but if the deponent be there present, the judge will permit the affidavit to be resworn before him. (o)

10. Of the  
jurat.

We have noticed certain requisites in the jurat of every affidavit. (p) If the date of an affidavit in support of a rule in the jurat be January, 1833, instead of 1834, it will be fatal, and not waived by the mere act of producing affidavits in answer, and previously arguing on the merits. (q) It has been held that an alteration in the jurat in the date of an affidavit, by writing one figure over another, does not constitute an *erasure* or *interlineation*, within the meaning of the rule of Court; (r) and where the names of the deponents were omitted in the jurat, through the inadvertence of the judge's clerk, the Court allowed it to be amended. (s) Although an illiterate person be sworn *in Court*, the fact of the affidavit having been read over to him and his understanding it must be stated in the jurat as well as when it is sworn before a commissioner; for although the Reg. Easter T. 31 G. 3, only extends in words to affidavits sworn before a *commissioner*, yet the former affidavit is equally within the mischief intended to be prevented by the rule, since it is notorious that the Court do not themselves administer the oath or examine the party as to his intelligence or otherwise. (t)

11. At what  
time an affida-  
vit must be  
sworn, pro-  
duced and filed.

The general rule of practice is not to allow an affidavit to be sworn and filed in support of a rule nisi, after such rule has been moved for and obtained; (u) indeed, by express rule of the King's Bench, all affidavits in support of a rule must be produced *in a complete state* at the time of making the motion, and filed or deposited with the proper officer, before any rule founded thereon can be drawn up; (x) and formerly, in the King's Bench, when one of the judges in the afternoon left the Court, and an affidavit was in fact sworn before him at chambers, after the rising of the full Court, the clerk of the rules would not draw up a rule nisi of that day; and it is certain that a party, having obtained a rule nisi, cannot, without with-

(o) *Bartlett v. Leighton*, 3 Car. & P. 408.

(p) *Ante*, vol. iii. 339; *Dos v. Roe*, 1 Chitty's R. 228; *Wood v. Stephens*, 3 J. B. Moore, 236; Tidd, 294, 295.

(q) *Barham v. Lee*, 4 M. & Scott, 327; 2 Dowl. 779.

(r) *Jacob v. Hingate*, 3 Dowl. 436; and *Atkinson v. Thomson*, 2 Chitty's R. 19,

8. P.; Tidd, 495; see Reg. Trin. Term, 1 G. 4, Exchequer, 8 Price, 501; *Wellings v. Marsh*, 11 id. 509; Reg. Mich. 37 G. 3, K. B. 7 T. R. 82.

(s) *Ex parte Smith*, 2 Dowl. 607.

(t) *Haynes v. Powell*, 3 Dowl. 599.

(u) *Ditchett v. Tollett*, 3 Price, 239.

(x) Reg. Hil. T. 36 G. 3, K. B.; *Williams v. Reeves*, 2 Chitty's R. 218.

drawing his motion and moving it again after an affidavit has been sworn or resworn, effectually make use of any affidavit sworn or not produced to the officer, until after the rule was first obtained. (y) When, however, counsel had inadvertently, on moving for a rule to set aside an award, stated a fact to the Court upon the erroneous supposition that it was sworn in the affidavit in his possession, but afterwards discovered that it was not so sworn, the Court on the *next day* permitted the counsel to file a fresh affidavit, provided it was sworn and filed the same night; (z) and sometimes, as in motions to stay proceedings on a bail bond, or for setting aside an attachment against the sheriff on payment of costs; if on showing cause it be objected that the affidavit on which the rule nisi was obtained, was informal, as on account of not swearing in a strictly formal manner to a defence on the merits, or that the application is at the instance of the bail, the Courts will enlarge the time for discussing the rule, and permit a supplementary affidavit to be produced and filed. (a)

In K. B. the stat. 29 Car. 2, c. 5, required *country* affidavits to be *filed* before they were read, and the rule in K. B., of Mich. T. 9 G. 2, required them to be *filed* in such *convenient time*, that copies might be duly made, and delivered to the party filing the same; but in modern practice country as well as town affidavits are not filed until immediately after the rule nisi has been moved for and granted. So in C. P. Reg. Trin. T. 2 W. & M. reg. 2, required all affidavits to be filed before they were read in Court; but this has long ceased to be observed in practice; and it is no longer usual to *read* the affidavits in or to the Court. (b) In the Exchequer, by Reg. Hil. T. 1 & 2 G. 4, all affidavits to be read on every *special* application to the Court were required to be filed one clear day before the application be made; (c) but that rule did not extend to a mere affidavit of service of notice of motion; (c) and in practice the clerks in the Court of Exchequer do not observe the rule, excepting as relates to affidavits to be used on showing cause against enlarged rules. (d)

(y) *Tilley v. Henley*, 1 Chitty's R. 186; *Shaw v. Mansfield*, 7 Price, 709.

(z) *Perrin v. Kymer*, 1 Har. & Wol. 20.

(a) Chitty's Summary Prac. 103; the Reg. Gen. Hil. T. 2 W. 4, r. 9, only prohibits a supplemental affidavit to supply a defect in an affidavit to hold to bail.

(b) In A. D. 1816, in K. B., the practice of any officer or counsel reading the affidavits verbatim to the Court had

ceased, excepting that Topping, K. C., still insisted, on weighty or important cases, in continuing the practice; and on the crown side, where parties are brought up for judgment, the affidavits for and against the prosecution are still usually read to the Court.

(c) 9 Price's Rep. 88; Price's Prac. 306.

(d) Chitty's Sum. Pract. 104.

CHAP. XVII.  
SECT. II.  
AFFIDAVITS,  
&c.

Although it is certainly not in a legal view essential to the crime of perjury that the affidavit on which it has been committed should have been *filed*, and it is obvious that the moral and legal guilt is complete the instant that a party has deliberately sworn to a non-existing fact, with intent that his affidavit shall thereafter be used; *(e)* yet in order to *secure the evidence* of the crime, and prevent the destruction or suppression of such evidence, it is essential that each Court and judge should, immediately an affidavit has been *used*, impound and detain it; and accordingly it is the practice of all the superior Courts to require *to be filed* every affidavit that has been used, (whether successfully or not, i. e. whether a rule nisi has or not been granted); and indeed formerly, when there was comparatively little business in the Courts, the affidavits were handed into the Court, and read by one of its officers, and then kept by him; and according to the present practice, if, upon application, an attorney neglect to file the affidavit, the Courts will by rule nisi compel him to do so; *(f)* and indeed counsel who have received the original affidavit with the brief to move, ought invariably, immediately after he has moved, to hand the affidavits with the brief carefully indorsed, with the terms of the rule as pronounced by the Court, to the officer, to be filed, and in no case to return them to his client. Perhaps the only exception is when the Court intimate to the counsel that the affidavits may be amended, and that then he may move again; which permission imports an exception as regards an immediate filing of the affidavit.

12. Documents  
to be annexed  
to and exhibited  
with affidavit.

When the application is in part founded on the terms of any written or printed *document*, the original, or a copy, or if very long, an extract from the important part, should be annexed or incorporated in the affidavit, and the rule nisi should be drawn up on reading such document, as well as the affidavit; (as thus "on reading the declaration in this cause, and the affidavit of A. B. and others, it is ordered, &c."); for otherwise the Court cannot, on the discussion of the rule, refer to the document; and if the affidavit should appear to be defective in its terms, there would be no adequate materials before the Court unless the document were so annexed or referred to. *(g)* But in a late case, in order to save expense, a rule nisi for a new inquiry of damages before the under-sheriff

*(e)* *Rex v. Crossly*, 7 T. R. 315. *(g)* *Howorth v. Hubbersty*, 3 Dowl.  
*(f)* *Ex parte Dicas*, 2 Dowl. 92; *Ex parte Elderton*, id. 568. 455, 456; 1 Gale, 47, S. C.



was granted on reading an *affidavit*, *verifying* the under-sheriff's notes, and not on reading such notes; and which having been objected to by counsel, Parke, B., said, "It was done to save expense; if the rule had been drawn up otherwise, office copies of the notes must have been taken." (*h*)

CHAP. XVII.  
SECT. II.  
AFFIDAVITS,  
&c.

We have in a previous page stated what documents should be annexed or referred to on moving to set aside a writ or a copy, or the mode or place of service. (*i*) In moving to set aside the copy of a writ of *capias* on the ground of irregularity, the writ having been indorsed "Old Jewry, London," and the copy only Old Jewry, omitting London, it was objected that the rule *nisi* should have been drawn up on reading *office copies* of the documents, and that it should have been sworn that they had been examined; but the Court held that an affidavit, merely stating "that the deponent had examined the copy of the *capias* delivered to the defendant with the original *capias* in the sheriff's office, and that the paper writing annexed was a true copy of the indorsement," was sufficient. (*k*) In an affidavit, on which to move to set aside a judge's order, it is not necessary to annex or state a full copy of the order; but it suffices to state its substance. (*l*)

Affidavits sworn and used on a prior occasion, in opposition to a rule then before the Court, and in which the allegations (*now become material*) might then have been immaterial, cannot be used without *re-swearing*, in opposition to a *subsequent* rule, on which they had so become material; although the same question might have been intended to be raised on the first rule, and was actually raised on the second. (*m*) But we have seen that a preliminary affidavit, if intituled in two separate causes, may be used in both; (*n*) and in general affidavits, previously used or filed between the same persons on a prior occasion, may be used in support of a fresh motion, provided they be expressly referred to in the rule *nisi*, "as upon reading the affidavit, &c.," but not otherwise. (*o*)

13. Affidavits previously used when they must be re-sworn or not.

As a general rule, parties ought to come prepared with proper affidavits in the *first* instance; and if a rule has been discharged or disposed of on account of the insufficiency of the

14. Consequences of affidavit not being sufficient in first instance.

(*h*) *Stephens v. Pell*, 2 Dowl. 629.

(*i*) *Ante*, vol. iii. 277 to 279.

(*k*) *Smith v. Pennell*, 2 Dowl. 654.

(*l*) *Shirley v. Jacobs*, 3 Moore & S. 67, note (*b*).

(*m*) *Quelby v. Boucher*, 3 Dowl. 107.

(*n*) *Pitt v. Evans*, and *Pitt v. Jarvis*, 2 Dowl. 226.

(*o*) *De Woolf v. —*, 2 Chitty's R. 14.

CHAP. XVII.  
SECT. II.  
AFFIDAVITS,  
&c.

affidavits, a party is not in general (unless the Court reserved leave) allowed to come again upon additional or amended affidavits. (p) But the above rule is not so strictly adhered to as to prevent a counsel who has, on arguing a practical rule, been taken by surprise, and inadvertently not stated a material point or decision in his favour, from afterwards praying the Court to allow the rule to be opened; and this the Court will sometimes permit. (q)

15. When or not an amendment in affidavit is permitted, or supplemental one received. (r)

Although a party after *moving* may, upon ascertaining that his affidavit is defective, *withdraw* his motion, and, after amending and *re-swearing* his affidavit, may renew his motion, *if in time*, for the particular purpose; yet an affidavit cannot in general be amended after a rule nisi has been obtained, so as to operate *nunc pro tunc*; but, after re-swearing, a fresh rule must be obtained. (s) The Court will not, however, when a rule nisi has been obtained in support of a *mere technical* objection, and which rule, on showing cause, has been discharged on account of a defect in the affidavit on which the rule nisi was granted, allow it to be renewed, or any new motion made on an amended affidavit, or even a fresh affidavit. (t) Though in cases of affidavits in support of motions to set aside proceedings on a bail bond, or an attachment against a sheriff, or otherwise, parties may be let in to try on the merits; if on showing cause, the opponent object to the affidavit, that it neither states a defence on the merits, nor that the application is on behalf of the bail or sheriff or his officer, the Court will sometimes allow time to file a supplemental affidavit. (u) So if an affidavit *in answer* to a rule nisi, on showing cause, be objected to as defective, the Court may enlarge the rule in order to afford an opportunity of amending such affidavit. (x) In case of bail also, if the affidavit of justification be defective, the judge may give time for justifying and amending the affidavit in the meantime. (y)

16. When or not objection waived.

If the affidavits in support of a rule are insufficient, as being

(p) *Preedy v. Macfarlane*, 1 Gale, 20; 3 Dowl. 458, S. C.; and see Reg. Hil. K. B., 3 Jac. 1, A. D. 1605, stated, post, 574.

(q) Reg. K. B. Hil. T. 3 Jac. 1; *Kibblewhite v. Jeffreys*, 1 Chitty's R. 142; *Tripp v. Bellamy*, 5 Price's R. 384; *Oakes v. Albin*, M'Clel. Rep. 582.

(r) See as to amending an affidavit in general, 2 Arch. K. B., 4th edit. 959.

(s) *Phillips v. Hutchinson*, 3 Dowl. 22; *Anderson v. Ell*, id. 73.

(t) *Finch v. Cocker*, 2 Crom. & Mees. 412.

(u) *Ante*, 547; *Bower v. Kemp*, 1 Crom. & Jer. 288; *Westerby v. Kent*, 1 Tyr. 261.

(x) *Anderson v. Ell*, 3 Dowl. 73.

(y) *Treasurer's Bail*, 2 Dowl. 670.

wrongly intituled, the opponent does not, by appearing to the rule and producing affidavits in answer, waive the objection; but may at any time before the rule has been disposed of state the objection to the same, and discharge the rule or not, according to the validity of his objection.(z)

CHAP. XVII.  
SECT. II.  
AFFIDAVITS,  
&c.

Whenever the applicant is anxious for despatch, as in cases of imprisonment and execution, it may be advisable as early as possible to deliver to the opponent's attorney copies of affidavits made, or even proposed to be made, which would afterwards remove all pretence for delay in discussing the merits of the application, and in cases of affidavits necessarily imputing discreditable misconduct to a professional person, that candour may save his exposure, and perhaps induce him to make remuneration without delay. But there seems no provision for enforcing the payment of the costs of such copy of affidavits even in case the applicant succeeds.

17. Of delivering copies of affidavits to opponent's attorney.

We have seen that the Reg. Hil. T. 1 & 2 Geo. 4, in the Exchequer, required that all affidavits in support of every *special* application should be *filed* one clear day before the application to the Court be made, so as to afford the opponent an opportunity of obtaining office copies, and showing cause in the first instance, but that this rule is not observed in practice,(a) and that when *notice of motion* is required to be given, the filing of any affidavit in support of the application shall also be mentioned at the foot of the notice, to enable the parties to obtain a copy therefrom, but it is stated that this regulation is not strictly observed in practice.(a)

18. Of opponents taking office copies.

In some cases a party, before showing cause, must of necessity take office copies of the affidavits filed in support of the rule, in order that he may answer the same with particularity and certainty when he has not obtained copies from the opponent; and anciently it was supposed that a party was not at liberty to show cause, unless he had taken and paid for *office copies*, and in a revenue cause in the Exchequer this was considered the indispensable practice;(b) but in a late case in the King's Bench, the Court, after referring to the officer, said that such practice had not been adhered to of late years;(c) and where the sheriff had obtained a rule for relief under the inter-

(z) *Clothier v. Es*, 5 M. & Scott, 216; 2 Dowl. 731.

(b) *In re Jeffery*, 1 Crom. & M. 71.

(a) 9 Price's Rep. 88; Price's Prac. 306, in note. See form, *post*, 571, note.(r).

(c) *Pitt v. Coombs*, 4 Nev. & Man. 535; 1 Harr. & Wol. 13.

CHAP. XVII.  
SECT. II.  
AFFIDAVITS,  
&c.

pleader act, it was held, that the claimant might appear to such rule without taking office copies of the affidavits on which the rule was obtained, because he appeared merely to substantiate his *own claim*, which might be wholly independent of that of the execution creditor. (d)

19. Affidavits  
in answer to a  
summons or  
rule nisi.

In preparing *an affidavit in answer* to one or more affidavits that are lengthy, or contain numerous allegations, the opponent's attorney will find it expedient to have a copy of the affidavits in support of the rule, made in a column on the right hand side of half pages of draft-paper, with small spaces between each paragraph, and then to request the person, who it is expected will effectually answer the affidavits in support of the rule, to write, in an opposite left hand blank column, his genuine distinct answers to each part of the opponent's statement, in as strong language as he conscientiously can use, stating time and place and qualifying circumstances, and whether any third person, and whom, was present, who will corroborate his qualification or contradiction. The opponent's attorney should then examine carefully *whether every distinct allegation has, in the proposed affidavit in opposition, been noticed, and completely answered*, according to the facts; and then, in company with the proposed deponent, should see that each allegation is placed in juxta position, or well arranged, and sufficiently connected in the narrative, at the same time carefully abstaining from any substantial alteration in the statement or the language of the opponent, excepting what might arise from a caution to him against swearing *too positively*, when he, perhaps, only has a faint recollection of the transaction, or might subject himself to a prosecution for perjury on the prosecution of a vindictive opponent.

Affidavits in answer should not be unnecessary lengthy, and the Court would direct the master not to allow to the party, though he succeed, the costs of unnecessary statements, (e) on which ground, if the defendant has sworn positively to merits, the plaintiff has no right in answer to go into a long statement of facts negating merits, for the Court will not, after the defendant's positive affidavit, decide upon the merits as disclosed by the affidavits, but, at least, let him in upon terms to try before a jury, the proper tribunal for deciding upon disputed facts. (e)

(d) *Mason v. Redshaw*, 2 Dowl. 595.

(e) *Hearne v. Battersby*, 3 Dowl. 213; *ante*, 542.

At all events, affidavits in opposition to a rule nisi should, as matter of *convenience*, be sworn and delivered with the brief to oppose the rule, sufficiently early on the day before that named in the rule for showing cause, so as to enable such counsel sufficiently to examine the affidavits on each side and authorities that may be applicable, and prepare observations, and these sufficiently early to enable such counsel as usual, in courtesy to send his clerk with such original affidavits to the counsel in support of the rule, with an intimation of the name of the counsel who will show cause, and a request to have the affidavits returned before the day of showing cause. Indeed, to prevent delay, the affidavit as well in support of as against the rule, or copies thereof, should be delivered to the counsel on each side as soon as practicable, for unless affidavits in opposition have been shown to counsel in support of the rule a reasonable time before such rule is brought on for discussion, the Court will direct the discussion to stand over.

CHAP. XVII.  
SECT. II.  
AFFIDAVITS,  
&c.

20. Time of  
swearing the  
same.

An affidavit on showing cause, although sworn after the day appointed in the rule nisi, may as a general rule be used; (f) and, in general, when a rule has been enlarged, as from Trinity to Michaelmas Term, affidavits filed a week before the latter term are in time. (g) But if the rule specify a particular time within which affidavits are to be filed, it must be complied with, and in general affidavits sworn afterwards cannot be read. Thus, in the latest reported case on the subject, where a rule was enlarged to a subsequent term, on the usual terms of filing the affidavits a week before the term, the Court refused to hear affidavits filed afterwards. (h) But there are instances of deviation from that strict rule under special circumstances, as inevitable accident; (i) in which case, however, there should be a special motion before the day of showing cause for leave to file the affidavit nunc pro tunc. (j)

The practice on the revenue side of the Court of Exchequer, requiring a defendant to file his affidavit against a rule one-day before the rule comes on for argument, is not strictly enforced, and it has been doubted whether such practice ever applied to a motion to enlarge a rule. (k)

After showing cause against a rule, counsel cannot come

(f) *Hicks v. Marreco*, 3 Tyr. 216; *Brame v. Hunt*, 2 Dowl. 391; *Hoars v. Hill*, 1 Chitty's Rep. 27, (a); *Tilley v. Henly*, id. 136; *Tidd*, 501.

(g) *Johnson v. Marriot*, 2 Dowl. 343, 346; 2 Cr. & M. 183, S. C.

(h) *Turner v. Unwin*, 1 Harr. & Woll.

186.

(i) Reg. Mich. T. K. B. 36 Geo. 3; *Hoar v. Hill*, 1 Chitty's Rep. 27; *Tilley v. Henly*, id. 136; *Harding v. Austen*, 8 J. B. Moore, 523; *Tidd*, 9th edit. 501.

(k) *Attorney General v. Jayes*, 2 Crompt. & J. 352.

CHAP. XVII. again on another day, even in the same term, with better affidavits. (i)  
 SECT. III.  
 OF SUMMONS  
 AND ORDERS.

21. Affidavit in answer, when, if defective merely in form, may be amended.

If affidavits *in opposition* to a rule nisi be defective in a mere technical matter, the Court may give leave to amend and reswear the affidavit, and will enlarge the rule for that purpose. (m)

SECT. III.—OF SUMMONSES AND JUDGE'S ORDER.

1. Of summary applications in general.....	554	monses, orders, and rules, &c.	563
2. When a summons proper .....	555	11. Hour of day of serving a judge's summons, &c. ....	564
3. Summons of what judge.....	556	12. When not necessary to produce original summons.....	565
4. Summons during vacations....	557	13. Of indorsing a consent .....	ib.
5. When summons to be supported by affidavit .....	ib.	14. Proceedings on opposing a summons and of the judge's hearing the summons, and his order thereon.....	ib.
6. Form and substance of a judge's summons .....	558	15. Form and terms of order, and when it should be <i>peremptory</i> , and not merely <i>conditional</i> , of drawing it up and serving the same.....	566
Usual form of summons ..	ib.	Form of a judge's order <i>ex parte</i> when the applicant only has attended .....	ib.
7. Summons how far a stay of proceedings .....	559	The like where both parties have attended .....	ib.
8. How many summonses are necessary .....	561	16. A judge's power to award costs.	567
In case of a prisoner one summons only necessary.	ib.	17. Order how far conclusive or binding until rescinded or set aside .....	568
One summons only necessary for delivery or taxing an attorney's bill ..	ib.	18. Judge's order, though imperative, may yet be abandoned.	ib.
One appointment to tax suffices .....	ib.	19. Of making judge's order a rule of Court .....	ib.
9. Service of summons and affidavit thereof .....	ib.	20. Of setting aside a judge's order.	569
Form of affidavit of service of two summonses, and of applicant's attendance and opponent's non-attendance .....	562		
10. Place of serving notices, sum-			

1. Summary, applications by summons and judge's order, or by petition and order, or by motion and rule nisi, and rule absolute.

The summary modes of taking advantage of *irregularities*, and of obtaining the decision of one or more of the learned judges in very numerous other cases, are either by *summons*, returnable before a judge at chambers, and obtaining his *order* thereon, (sometimes also by *petition*,) or by *motion* to the Court in banc, or in K. B. to the Practice Court, and obtaining a *rule nisi*, and afterwards causing the same to be made absolute. The proceedings by *summons before a single judge* have been frequently adverted to in previous pages, (n) and have been fully examined in other works; and in one in particular, where Mr. Bagley has very ably collected the law and proceedings relating

(i) *Kibblewhite v. Jeffreys*, 1 Chitty's Rep. 142; *Tripp v. Bellamy*, 5 Price, 384; *Oakes v. Albin*, McCl. Rep. 582; *Tidd*,

501; *ante*, 550, *post*, 574.

(m) *Anderson v. Ell*, 3 Dowl. 73.

(n) *Ante*, vol. iii. 19 to 33.

to the chamber practice of the judges.(p) We shall here only attempt to take a concise view of the subject, and of the most recent decisions not before collected.

CHAP. XVII.  
SECT. III.  
OF SUMMONS  
AND ORDERS.

In the first chapter of this volume we have already considered much of the jurisdiction and practice of a judge at chambers; and reference to that part of the work must be made for many points connected with this section.(r) In some cases, either by express enactment or rules of Court, the application *must* be by *summons*: thus Reg. Gen. Hil. T. 4 W. 4, r. 6, directs a summons shall be obtained for striking out a second count for the same cause of action;(s) and since the uniformity of process act, 2 W. 4, c. 39, and Reg. Gen. Mich. T. 3 W. 4, reg. 10, objections to *irregularities* in process, *arising in vacation*, should be taken by summons, unless the objection arise within eight days preceding the following term.(t) There are other cases where the application may either be to the Court in banc, or to the Practice Court of K. B., or to a single judge. It will be obvious, that in all cases when the object of a party might be attained by *summons* and a judge's order, it would be improper for either party, whether plaintiff or defendant, (at least in the first instance, and without previous application to a judge,) to occasion the expense incident to a motion to the Court;(u) and therefore, notwithstanding the plaintiff had given the defendant notice of motion, unless he would deliver to the plaintiff a copy of an agreement of demise at his expense, so as to enable him to declare, and the defendant had improperly neglected to comply, although the Court made absolute a rule nisi for the delivery of such copy, yet they refused to give the plaintiff immediately and absolutely the costs of the application, but directed that they should only be costs in the cause, (i. e. to be received by the party ultimately successful); for although the defendant had no right to impose terms on the plaintiff, and had the application been made before a judge at chambers, it would have been granted as a matter of course; yet if the

2. When or not application should be by summons.(q)

(p) See Bagley's Chamber Practice, *per tot.*

(q) See in general as to summonses and judge's orders, *ante*, vol. iii. 19 to 36; Tidd, 9th edit, 469, 509 to 511; 2 Arch. K. B., 1007 to 1013, 4th edit.; 2 Arch. C. P. [72], 316 to 319.

(r) *Ante*, vol. iii. 20 to 36.

(s) *Ante*, 458.

(t) *Ante*, vol. iii. 22.

(u) *Ante*, vol. iii. 19 to 36; and as to proceedings in general by *summons* and *judge's order*, see Tidd, *Prac.* 9th edit. 469, 509 to 511; 9 Arch. K. B., 4th edit., 1007 to 1013; 2 Arch. C. P. [72] 316 to 319; Price's *Prac.* 313 to 318, Bagley's *Chamb. Prac. per tot.*, and for a list of the numerous cases in which a judge can interfere, see *id.* index, title "Order."

CHAP. XVII.  
SECT. III.  
OF SUMMONS  
AND ORDERS.

Court, on the motion, had given costs absolutely, it would encourage parties to come to the Court, instead of the other less expensive remedy; (x) and in another case, where the application had been improperly made to the Court instead of a judge, the Court allowed the applicant only the same costs as if he had applied to a judge at chambers; (y) and in another case the rule was made absolute without any costs. (z)

Hence it is of essential importance to practitioners to be well informed when or not a judge at chambers has jurisdiction to interfere, and in cases of doubt first to apply to him. (a) An application for a copy of a document, to enable the plaintiff to declare, should always be to a judge at chambers; (b) so an application that an attorney's bill be taxed, and he pay over certain monies, was refused, because it should have been made at chambers; (c) and an application, that an attorney be changed, must also be made at chambers, and not to the Court. (d) It seems however from the above authorities, that when inadvertently a rule nisi has been granted in a case where the application should have been made at chambers, the Court will not discharge it, but decide upon the matter of the rule when before them, though they will thus distinguish as to the costs. (e)

3. Summons of and to be returnable before what judge.

We have seen that as regards chamber practice and a *summons*, the latter may, under 11 G. 4 and 1 W. 4, c. 70, s. 4, be obtained from and returnable before *either* of the fifteen judges, without regard to the Court to which he is attached or in which the action is depending; provided all the three Courts have *common* or *concurrent* jurisdiction over actions or matters of that description. (f) It is usual, however, (excepting during the circuits, when only one judge remains in London,) to apply to a judge of the particular Court in which the action is depending; because he will probably be most conversant with the particular practice of his own Court, which may still vary in some few particulars from the practice of the

(x) *Reid v. Coleman*, 4 Tyr. 274; 2 Crompt. & M. 456; 2 Dowl. 344, S. C.

(y) *Vaughan v. Trewent*, 2 Dowl. 299.

(z) *Wright v. Cross*, 2 Dowl. 651, note (a).

(a) See in general, *ante*, vol. iii., chap. i., *per tot.*, and Bagley's Chamb. Prac.; and see the list of summonses, 2 Arch. K. B., 4th edit., 1008 to 1011, and list of motions and rules, *id.* 999 to 1007.

(b) *Vaughan v. Trewent*, 2 Dowl. 299;

*Wright v. Cross*, *id.* 651, note (a); *Reid v. Coleman*, 2 Dowl. 354; 4 Tyr. 274; 2 Cr. & M. 456, S. C.

(c) *Bassett v. Giblett*, 2 Dowl. 650.

(d) *Rex v. Sheriff of Middlesex*, 2 Dowl. 147; when not necessary in case of partner succeeding one who has retired, *Farley v. Hobbs*, 1 Har. & Wol. 203.

(e) *Supra*, 555, 556.

(f) *Ante*, vol. iii. 22 to 24.



other Courts. And the 1 G. 4, c. 55, s. 5, gives power to a judge of either of the superior Courts on the circuit to make an order, although in a cause depending in a Court of which he is not a judge. The 4 & 5 W. 4, c. 62, s. 24, appears also to enable any judge of either of the Courts at Westminster to dispose of any matter depending in an action in the Common Pleas at Lancaster by summons and order, that may usually be determined upon by that proceeding. (g) If a summons or an order has been refused by one judge, it is considered extremely improper to attempt to obtain an order from *another* judge. (h)

CHAP. XVII.  
SECT. III.  
OF SUMMONS  
AND ORDERS.

Pending each of the *vacations*, when the Court in banc are not in any case now sitting, excepting on a trial at bar, and then only for that particular purpose, it has been considered that since the uniformity of process act, 2 W. 4, c. 30, s. 11, with a view of expediting proceedings, authorizes almost every description of proceeding during the vacation, a judge at chambers impliedly and of necessity has power to act and decide in many cases where before it was not the practice for him to interfere; (i) and certainly when any *irregularity* occurs in vacation, unless on the very eve, and at all events within eight days of any succeeding term, there must be an *immediate* application to a single judge to set the same aside as soon as the defendant has any intimation of the objection: (k) and although it has been doubted whether a judge can interfere in vacation absolutely to set aside a judgment or rule supposed to have been pronounced by the Court in banc, yet now in practice a single judge frequently does so interfere in cases where judgment has been signed by the plaintiff's attorney for want of a plea, or on other technical objections; and at all events a judge ought to be applied to immediately to *stay the proceedings* until the second day of the next term, so as to afford an opportunity for moving the Court on the first day, in case he declines to set aside the judgment. (l)

4. Summonses during vacations.

In general, in order to obtain a summons, the applicant prepares a *memorandum in writing*, stating the precise terms in which he wishes the summons to be framed; and in ordinary cases the judge's clerk immediately prepares and delivers a proper summons to the applicant without troubling the judge

5. Of application by summons, when to be supported by affidavit, and of obtaining an *ex-parte* stay of proceedings.

(g) *Terns v. Fushugh*, 3 Dowl. 278, a decision on the twenty-sixth section; and see *Potter v. Mass*, 3 Dowl. 432.

(h) *Wright v. Stevenson*, 5 Taunt. 850; 1 Chitty's R. 124.

(i) *Ante*, vol. iii. 21, 22.

(k) *Ellison v. Roberts*, 4 Tyr. 214; 2 Cramp. & M. 345, S. C.; *Cox v. Tullock*, 3 Tyr. 578, 591.

(l) *Rutty v. Arber*, 2 Dowl. 36.

CHAP. XVII.  
SECT. III.  
OF SUMMONS  
AND ORDERS.

upon the subject until the hearing, in case of opposition. But when the application is novel or urgent, and supported by an affidavit, it may be advisable to see the judge in the first instance, and produce the affidavit, and state the precise object of the application, especially when an immediate stay of proceedings is essential. In such a case a very concise but explicit affidavit should be sworn, stating the facts as strongly and positively as the truth will permit, and then the applicant's attorney should, after stating in writing the terms of the proposed summons, see the judge, and produce to him such affidavit, and pray that a stay of proceedings *may be embodied in the summons*, (l) because otherwise some adverse proceedings may ensue before the hour when the summons will be returnable. (m) Having obtained such summons, he should as speedily as practicable serve a copy on the opponent's attorney, offer to show the original, and leave with him a copy of the affidavit, with a written request that he may be favoured a reasonable time before the attendance on the summons, with a copy of any affidavit intended to be used in opposition. With respect, however, to the necessity for affidavits in support of or against a summons, it has been recently observed that it cannot be laid down as a general rule that a judge at chambers can act only upon affidavit; (n) and even a rule for a special jury, obtained in full Court, may by order of a judge be struck the next day, so as to secure to the plaintiff an opportunity of trying his cause, for otherwise the defendant might effectually delay the trial, and afterwards abandon such rule. (o) We have seen the general rules when or not the Court or a judge may act without affidavits. (o)

6. Form and  
substance of a  
judge's sum-  
mons. (p)

The usual form of summons is subscribed. (p) The same particularity is not observed in the title of the cause in a summons as in the title of affidavits, and only the surnames of the parties

(l) *See* *Williams v. Roberts*, 1 Gale, 56; 1 Cr. M. & R. 676.

(m) *See* *that at least during the vacations a single judge may, by the terms of his summons, direct an intermediate stay of proceedings, when justice requires,*

as much so as the Court in banc, for otherwise the utmost injustice might ensue from the act 2 W. 4, c. 39, s. 11, allowing so many proceedings in vacation.

(n) *Joseph v. Perry*, 3 Dowl. 699.

(o) *Ante*, 535, 536.

Usual form of  
summons.

(p) *See* a form of summons to strike out a count, *post*; and *see* Tidd's Forms, 172, 221.

D. } Let the plaintiff's [or "defendant's"] attorney or agent attend me at my  
ats. } chambers in Serjeants'-Inn to-morrow [or "on — next,"] at — of the  
B. } clock in the forenoon [or "afternoon,"] [in term time usually three o'clock in  
the afternoon, but in vacation at eleven o'clock in the morning,] to show cause why, &c.  
[here state the subject-matter or object of summons, as "why he should not deliver to the  
defendant's attorney or agent an account in writing with dates of the particulars of the

are usually stated; and when a summons is obtained by a defendant, his name is usually first stated. In summons for particulars of the plaintiff's demand, and to plead several matters, or for time to plead, the words "and *why* in the mean time proceedings should not be stayed," (*q*) are usually inserted, and yet when the *Court* grant a rule nisi with a stay of proceedings, the rule may be drawn up with an *immediate* stay of proceedings, as thus: "In the mean time proceedings to be stayed;" (*r*) and it would be as well to omit the word *why* in a summons, so that in its very terms it may import an *immediate* stay of proceedings, for otherwise the summons itself would not operate as such stay until the instant of its being *returnable*. (*s*)

In a summons or motion to set aside proceedings for *irregularity*, and indeed in every other application, a party should not require relief beyond what he may be advised he is entitled to, especially in cases where it is expected the opponent will show that if too much had not been asked, the application would not have been resisted, in which case it frequently occurs that merely on account of the applicant having *asked too much* he is ordered to pay the costs, because by asking too much he compels the opponent to appear and show cause. (*t*) But on the other hand a party applying for a summons in respect of any supposed irregularity is bound at the earliest opportunity to bring forward and state at once *all* then existing objections, and will not be allowed to make successive applications unless upon grounds *subsequently* arising. (*u*) As regards an application on account of a defect in a writ, or a copy, or the service thereof, it has already been shown how the summons or rule nisi should be drawn up. (*v*)

In general a summons does not operate as any stay of proceedings until the time when it is *returnable*, and not from its

7. Summons  
how far a stay  
of proceed-  
ings. (*w*)

---

plaintiff's demand, for which this action is brought," or "why the defendant should not have a month's time to plead," and *here specify any other terms desired to be imposed on the opponent.*] And in the mean time all proceedings in this action be stayed. Dated the — day of —, A.D. 1835.

[The Judge's or Baron's signature.]

---

(*q*) *Wells v. Secret*, 2 Dowl. 448.

(*r*) See form, Tidd's Forms, 180.

(*s*) *Post*, 559, 560.

(*t*) *Ante*, vol. iii. 237, 238, 275 to 279.

(*u*) *Greathead v. Bromley*, 7 T. R. 455;  
*Thornton v. Dumphy*, 1 Hen. Bl. 101;  
*Schumann v. Weatherhead*, 1 East, 537;

*Wright v. Stevenson*, 5 Taunt. 850; *Thorpe v. Beer*, 1 Chitty's R. 124; *Bagley's Ch. Pr.* 26, 27.

(*v*) *Ante*, vol. iii. 237, 238, 275 to 279.

(*w*) See in general *Bagley's Ch. Pr.* 20, 21.

CHAP. XVII.  
SECT. III.  
OF SUMMONS  
AND ORDERS.

date or the time of the service; so that, notwithstanding the service, the opponent is at liberty at any time before the summons is returnable to sign judgment, or take any other step that he might have done in case the summons had not been obtained. (x) But from and after the time when a first summons is returnable it operates as a stay of proceedings until a judge has disposed of it. (y) And as the Court in banc may, upon granting a rule nisi ex parte, order an immediate stay of proceedings, it would seem that a judge also, especially in vacation, has similar power; as if a defendant hear of an irregular execution against his goods, and that the sheriff, at the instance of the plaintiff, is immediately about to sell in the afternoon of the day on which a summons is obtained, it cannot be doubted that a judge, on positive affidavit that an immediate sale or other injurious act is threatened to take place the same day, may grant a summons with an immediate order staying a sale and all other proceedings. (x)

But a summons on a *collateral matter*, as to tax an attorney's bill, or to discharge the defendant out of custody, it has been considered is no stay of the proceedings in a pending action; (a) and Lord Abinger observed: "The order, to have the effect contended for, should have embodied in it a stay of proceedings;" (a) nor is a summons any stay of proceedings unless duly followed up by obtaining and *drawing up and serving the judge's order*; (b) and yet it is a common doctrine that a summons is a stay of proceedings from the time it is returnable and until it has been disposed of. (c) Provided therefore a *first* summons, relating to the proceedings *in an action*, and not to a *mere collateral matter*, be returnable before the time to plead or the performance of some other act has expired, or before a judgment by default has been signed, it virtually stays or prevents the opponent from *afterwards* taking any step; because if he

(x) See in general as to when a summons is a stay of proceedings, Tidd, 470, 510, 511, 566; *Case v. Lord Lyttleton*, 2 Black. 954; *Morris v. Hunt*, 2 Bar. & Ald. 355; 1 Chitty's R. 93, 97, S. C.; *Barnett v. Newton*, id. 689; *Rex v. Sheriff of Middlesex*, 5 Bar. & Ald. 746; *Glover v. Watmore*, 5 Bar. & Crea. 769; *Redford v. Edie*, 6 Taunt. 240; 1 Arch. K. B. 4 ed. 237; 2 id. 1008.

(y) *Wells v. Secret*, 2 Dowl. 447.

(z) *Semble*, and Tidd, 511.

(a) Tidd, 470; and though stated with doubt in 2 Arch. K. B. 1008, was confirmed in *Williams v. Roberts*, 1 Gale, R.

56; 1 Crom. M. & R. 676, S. C. However, as to an attorney's bill, 2 Geo. 2. c. 23, s. 23, enacts, "pending which reference and taxation no action shall be commenced or prosecuted touching the said demand," see Chitty's Col. Stat. 65, in notes, and see *Wells v. Secret*, 2 Dowl. 448, note (a); Tidd, 470.

(b) *Knowles v. Vallance*, 1 Gale, 16.

(c) *Morris v. Hunt*, 2 Bar. & Ald. 355; 1 Chitty's R. 93, S. C.; 5 Bar. & Ald. 746; *Glover v. Whatmore*, 5 Bar. & Crea. 769; *Redford v. Edie*, 6 Taunt. 240; *Jervis's Rules*, 29, note (i); Tidd, 470, 566.

had attended, as in due respect he ought to have done, at the return of the first summons, an order might have then been made, and it was his own fault that occasioned any extended delay. In a recent case it was held that as well a summons to plead several matters, as a summons for time to plead, returnable at eleven o'clock in the forenoon of the day after the time for pleading expired, was a stay of proceedings from and after that hour; so that a judgment signed at that hour when the judgment office opened, or afterwards, would be irregular. (d)

CHAP. XVII.  
SECT. III.  
OF SUMMONSES  
AND ORDERS.

Formerly there must in general have been *three* summonses, and an affidavit of attendance thereon, (usually half an hour on each day,) before a judge could make an order on default of attendance; (e) but that troublesome, vexatious, dilatory, and expensive practice was altered by Reg. Gen. Trin. T. 1 W. 4, reg. 9, which ordered, "That hereafter it shall not be necessary to issue more than *two* summonses for attendance before a judge upon the same matter, and the party taking out such summonses shall be entitled to an order on the return of the *second summons*, unless cause is shown to the contrary."

8. How many summonses are necessary, or when a summons must be attended, or an order will be made.

Only two summonses before an order now necessary.

In the case of a *prisoner* even *one* summons may suffice, it having been ordered by Reg. Gen. Hil. T. 2 W. 4, reg. 89, that "The order of a judge for the *discharge of a prisoner*, on "the ground of a plaintiff's neglect to declare or proceed to "trial or final judgment or execution in due time, may be "obtained at the return of *one summons served two days before* "it is returnable, such order in town causes being absolute, "and in country causes, unless cause shall be shown, within "four days, or within such further time as the judge shall "direct." (g)

In case of a prisoner *one* summons for his discharge suffices. (f)

In case of an *attorney's bill*, Reg. Gen. Hil. T. 2 W. 4, r. 91, directs that "An order to deliver or tax an attorney's bill may "be made at the return of *one summons*, the same having been "served two days before it is returnable;" and reg. 92 directs that "*One appointment* only shall be deemed necessary for "proceeding in the taxation of costs or of an attorney's bill." These rules have assimilated the practice of C. P. and Exchequer to that of K. B. (i)

*One* summons only necessary for delivery or taxing an attorney's bill. (h) And one appointment suffices.

The summons having been obtained, an accurate copy

9. Service of summons, and

(d) Per Parke, J., *Wells v. Secret*, 2 Dowl. 447.

(e) Tidd, 510, 511; Bagley, Ch. Pr. 22.

(f) Bagley, Ch. Pr. 21.

(g) See the former practice, Tidd, 368.

(h) Bagley, Ch. Pr. 21.

(i) Tidd, 335, 339, 680, 992; Jerris's Rules, 68, notes (o), (p); and see 4 T. R. 580.

CHAP. XVII.  
SECT. III.  
OF SUMMONS  
AND ORDERS.

affidavit of such  
service. (k)

thereof should as soon as possible on the same day be made, and carefully examined with the original, and both should be taken to the opponent's attorney, and the copy either delivered to him personally or left for him (open and not inclosed in a sealed cover (l)) at his residence or office with his *clerk* or *servant* before nine o'clock in the evening, (m) but not on a mere laundress or other third person, unless sworn to be a clerk or servant of the principal attorney or agent. With analogy to rules, it would seem that if by mistake the original summons, instead of a copy, should be left, that would be immaterial. (n) Immediately after serving the copy, the person who served the same should indorse on the original the exact hour and place of service, and on whom made; indeed this is a precaution to be observed in serving every document and proceeding, so as to enable the party to swear with certainty to the particulars of the service. The party who obtained the summons should punctually attend at the judge's chambers at the appointed hour, and wait at least half an hour; and if the opponent do not attend, then a second summons should be obtained in the same terms as the first, and a copy thereof should be served in like manner; and the party who obtained the same should attend at the appointed time; and if the opponent do not attend at the hour appointed in the second summons, then, after half an hour has expired, there should be an affidavit made of the two summonses having been obtained, and of the service of both, and of the two attendances, for full half an hour each at the judge's chambers, and that the opponent did not attend; and upon reading such affidavit (the form of which is subscribed (o)) the judge will make his order. (p)

(k) See in general, as to the service, &c. Bagley's Ch. Pr. 18, 20.

(l) *Arrowsmith v. Ingle*, 3 Taunt. 234.

(m) Bagley's Ch. Pr. 19; Reg. Gen. Hil. T. 2 W. 4, r. 50, speaks only of the service of Rules, Orders, and Notices, but

summonses are within the principle of the rule; and see *Freeman's Bail*, 2 Chitty's R. 88; Tidd, 261; *Arrowsmith v. Ingle*, 3 Taunt. 234; and see *Blackburn v. Post*, 2 Crom. & M. 244; 2 Dowl. 293.

(n) *Leaf v. Jones*, 3 Dowl. 315.

Form of affidavit of service of two summonses, and of deponent's attendance, but that opponent has not attended.

(o) In the K. B. [or "C. P." or "Each. of Pleas."]

Between { A. B., Plaintiff,  
and  
C. D., Defendant.

L. M., clerk to Mr. G. H. of —, gentleman, attorney for the above-named defendant in this cause [or "plaintiff,"] maketh oath and saith that he, this deponent, did, on the — day of — instant, at about the hour of — of the clock of the afternoon of the same day, personally serve Mr. E. F., who acts as the attorney [or "agent"] for the plaintiff in this cause, with a true copy of the first summons hereto annexed and marked X. [or if served on a clerk or servant, then say, "did on, &c.

(p) 6 T. R. 402; Tidd, 649; I. C. P. 233, 676; Bagley, Ch. Prac. 18, 23, 25,

262, where the variations in form of affidavit are stated.

If the party obtaining a summons intend to use *affidavits*, he should hand copies to the opponent's attorney at the time the first summons is served, or as soon as practicable; (g) and if either party intend to attend by counsel, he should give the earliest practicable *notice* of that intention to the opponent, in order to enable him also, if he think fit, to obtain the assistance of counsel; for if either of these be omitted, the learned judge in attendance may postpone the hearing to prevent inconvenience by surprise, and enable the opponent to obtain *affidavits* in answer, or the assistance of counsel. (r)

CHAP. XVII.  
SECT. III.  
OF SUMMONS  
AND ORDERS.

Copies of affidavits and notice of intention to attend by counsel to be given to opponent.

To remove all pretence of difficulty in giving or serving *notice* of any proceeding or intended proceeding, and to prevent the necessity for travelling a great distance for the purpose, there are express rules in the Courts of K. B. (s) and *Exchequer*, (t) requiring *every attorney* admitted in those Courts and residing in London, or within ten miles, to enter in a book kept by the clerk of the pleas, or his deputy, in alphabetical order, his name and place of abode, or *some other proper place* in London, Westminster, or the Borough of Southwark (or in the *Exchequer*, within one mile of the office of the clerk of the pleas), where he may be served with *notices, summonses, orders, and rules*, in causes depending in that Court; and it is ordered that all notices, summonses, orders and rules, which do not require personal service, shall be deemed sufficiently served on

10. Place of serving summonses, orders, and rules, and notices, &c. under particular circumstances.

serve a true copy of the first summons hereunto annexed, marked X., on Mr. E. F., who acts as attorney [or "agent"] for the plaintiff in this cause, by leaving the same at the house [or "office"] of the said E. F. in —, with his clerk [or "servant"] there,] and at the same time showed him the said original summons. And this deponent further saith, that he did at the same time leave with the said copy and with the said E. F. [or "the said clerk," or "servant,"] an examined copy of the affidavit made by the above defendant on his obtaining the said summons; and this deponent further saith, that on the — day of — instant, about the hour of —, he did personally serve the said E. F. with a true copy of the second summons in this cause, a copy whereof is hereunto annexed marked Z., [or state the service on a clerk or servant, as above,] and at the same time showed him the said original second summons. And this deponent further saith, that he did duly attend the said several summonses, at the times therein respectively mentioned, at the chambers of the Hon. Mr. Justice —, in Serjeants'-Inn Chancery-Lane, London, but that the plaintiff's [or "defendant's"] attorney or agent did not, nor did any other person on his behalf, attend the said summonses or either of them, at either of the said times, to the knowledge or belief of this deponent.

Sworn, &c.

L. M.

(g) Bagley, Ch. Pr. 26.

(r) Two shillings are paid for each summons and for each order. The fee to counsel for attendance is in general three guineas; but in taxing costs the master only allows two guineas. The judge's clerk receives when counsel attend, 7s. 6d. See a bill of costs relating to a summons,

post, "Of striking out Counts."

(s) In the K. B. Reg. Hil. T. 8 G. 3; *In re Sandys*, 1 Dowl. 368; *Ward v. Nethercote*, 7 Taunt. 145; *Sealey v. Robertson*, 2 Dowl. 568.

(t) Reg. Mich. T. 1. W. 4, r. 8, *Exchequer*.

CHAP. XVII.  
SECT. III.  
OF SUMMONS  
AND ORDERS.

such attorney, if a copy thereof be left at the place lastly entered in such book, with any person *resident* at or belonging to such place; and that if any such attorney shall neglect to make such entry, *then the fixing up of any notice*, or the copy of any summons, order or rule for such attorney in the said office, shall be effectual and sufficient. (t) And it has been held, that this rule extends to *pleadings*, as well as notices, summonses, &c.; (u) and that the rule is imperative on an attorney who resides out of London, Westminster, or Southwark, and above one mile from the office, to enter in the book not only his place of abode, but also therein to name some proper place within a mile from the public office where notices may be served for him. (v) If the attorney of either party has left his residence, and cannot be found, then endeavours must be made to discover where he is, and also to discover the residence of the party himself, or where he is, and the summons, order, rule, or other proceeding must be delivered to such party, or left at his residence, and all these endeavours must be sworn to particularly; and therefore it was lately decided, that the service of a rule by sticking it up in the office, will not be allowed upon an affidavit that the attorney's residence is unknown, unless it is also sworn that the party's residence is unknown. (w) Where a defendant has not caused his appearance to be entered, if his residence be unknown, then by leave of the Court not only may a copy of the declaration be stuck up in the office, but also a notice of inquiry may, by like leave, be stuck up there, and another copy left at his last place of residence. (x) And in almost all cases, (excepting attachments for contempt,) (y) the Court may dispense with personal service. (z) Consequently there can rarely be any excuse for the want of previous notice of any proceeding.

11. Time of day of serving a judge's summons, &c. &c.

The Reg. Gen. Hil. T. 2 W. 4, reg. 50, orders, "that service of rules and orders, and notices, if made *before nine at night*, shall be deemed good, but not if made after that hour;" which rule altered that of K. B. Mich. T. 41 Geo. 3, which allowed till ten o'clock at night, and renders the practice of that Court like that of C. P. and Exchequer, and nine o'clock

(t) Reg. Mich. T. 1 W. 4, r. 8, Exchequer; Jervis's Rules, 9, and decisions thereon; *Blackburne v. Peate*, 2 Cr. & M. 244; 2 Dowl. 293, S. C.

(u) *Blackburne v. Peate*, 2 Cr. & M. 244; 2 Dowl. 293, S. C.; and see Bagley's Ch. Pr. 19.

(v) *Supra*, note (t).

(w) *Wright v. Gardiner*, 3 Dowl. 657; and see *Mudie v. Newman*, 2 Dowl. 659.

(x) *Watson v. Delcroix*, 2 Crompt. & M. 425; 2 Dowl. 396, S. C.

(y) Not then, *Stuannell v. Tower*, 1 Cr. M. & Ros. 89; 2 Dowl. 673, S. C., overruling *Green v. Prosser*, 2 Dowl. 99.

(z) *Sealey v. Robertson*, 2 Dowl. 568.



is now the latest time in all the Courts. (a) And this rule extends to the service of a judge's summons. (b) And it would seem also to the delivery of pleadings, and probably every other proceeding in a cause, (c) though not to the service of a writ, or an arrest. (d)

CHAP. XVII.  
SECT. III.  
OF SUMMONS  
AND ORDERS.

Reg. Gen. Hil. T. 2 W. 4, r. 51, ordered, "that it shall not be necessary to the regular service of a *rule*, that the original *rule* should be shown, unless sight thereof be demanded, except in cases of attachment," which rule altered the previous practice of C. P., and rendered it similar to that in K. B. (e) It would seem that with analogy to that rule, it is not necessary, upon serving the copy of a summons, to produce the original summons, unless demanded, if even then. (f) It has been decided that a notice served on one of several defendants, who have suffered judgment by default, will be deemed equivalent to notice to each. (g)

12. When not necessary to produce the original summons.

If the opponent's attorney consent to the terms of the summons he may do so generally, or give a qualified consent; in either case, the terms should be expressed in writing, and indorsed on the original summons, and signed. The original summons, with the indorsed consent, should then immediately be taken to the judge's chambers, and his clerk will prepare a proper order as by consent. And such order must be forthwith drawn up and served; for otherwise the opponent, notwithstanding his indorsed consent, may treat the summons as abandoned. (h)

13. Of indorsing a consent.

Summonses waiting for hearing must be previously filed with the clerk of the judge who is in attendance, and they are usually called over successively, according to the numbers on the files, though summonses on which counsel attend are allowed to take precedence. (i)

14. Of attendance on the judge and his hearing the summons, and his order thereon.

Upon *attending the judge*, each practitioner or his counsel must be not only perfectly master of the facts and affidavits on each side, but even of the very line or exact part of each

(a) See *Jervis's Rules*, 55, note (s), and see *Rule of Exch. Tr. T. 1 W. 4, r. 9*, as to all proceedings.

(b) *Freeman's Bail*, 2 Chitt. 88; *Tidd*, 261; *Bagley's Ch. Pr.* 26; *ante*, 564.

(c) *Blackburn v. Peat*, 2 Crom. & M. 244; 2 Dowl. 293.

(d) *Ante*, vol. iii. 110, 111.

(e) *Tidd*, 500; *Wye v. Wright*,

*Barnes*, 403; *Jervis's Rules*, 55, note (a).

(f) *Ante*, 562; *post*, 584.

(g) *Figgins v. Ward and others*, 2 Cr. & M. 424.

(h) *Joddrell v. —*, 4 Taunt. 253;

*Eden v. Hoffman*, 2 Cr. & J. 140;

*Charges v. Farhall*, 4 Bar. & Cres. 865;

4 Dowl. & R. 422; *post*, 568.

(i) *Bagley, Ch. Pr.* 24.

CHAP. XVII.  
SECT. III.  
OF SUMMONSES  
AND ORDERS.

affidavit where any material allegation is to be found, so as to be able instantly to point out such part; and the same may even be marked with pencil in the margin. Attempts to urge lengthy arguments would be injudicious, because, in consequence of the very numerous applications usually pressing for the immediate decision of the judge, there is time only to hear very concise observations, and if lengthy investigation be essential, the judge should be solicited to hear the case on a distinct occasion separately appointed. On the hearing of all or most summonses it would be well if principals or their most intelligent clerk would always attend the judge when the object of the application is opposed; it is well known that a celebrated practitioner who always attended summonses himself, on that account was more frequently successful than his opponent, who absurdly treated a summons as a subordinate branch of practice not demanding his personal attention, and even to be left to the conduct of an inexperienced clerk. We have seen that all known existing objections must be stated to the judge at the same hearing. (k)

15. Form and terms of Order, and of drawing up and serving the same.

An *Order* should be duly intitled in the cause, and if an order of reference reverse the surname for the Christian name of one of the parties, it will be a nullity, though it might be amended. (l) The usual form is subscribed. (m)

If an order be made, it must be *drawn up* and *served forthwith*, or the opponent may treat it as abandoned, and proceed as if it had not been made; (n) and a judge's order to change the plaintiff's attorney must regularly be served before any further proceeding, or the latter will be void. (o)

Order to be peremptory, and not merely conditional.

It is advisable, in general, to request that the judge's order may be drawn up as peremptory in its terms on each side as

(k) *Ante*, 559, note (u); *Thorpe v. Beer*, 1 Chitty's Rep. 124.

(l) *Price v. James*, 2 Dowl. 435; *ante*, vol. ii. 89, 90.

Form of a judge's order ex parte when the applicant only has attended.

(m) The judge's clerk is entitled to two shillings for every order.

A. B. } Upon hearing the attorney or agent for the plaintiff, and on reading the  
agtl. } affidavits of — and —, I do order that [here state the subject-matter of  
C. D. } the order.] Dated this — day of —, 1835.  
[Signature of the judge.]

The like, where both parties have attended.

A. B. } Upon hearing the attorneys or agents on both sides, [or "and by coun-  
agtl. } sel,"] I do order that &c. [state subject-matter of the order.] Dated this  
C. D. } — day of — 1835.  
[Signature of the judge.]

(n) *Charge v. Farhall*, 4 Bar. & Cres. 865.

(o) *Rex v. Sheriff of Middlesex*, 2 Dowl. 147.

may be consistent with justice. (p) And as a *conditional* order for leave to the plaintiff to amend upon payment of costs, &c. cannot readily be enforced by attachment, it seems advisable, when the party has in fact so agreed, to draw up the order as made upon the *undertaking* of the party to pay the costs, (q) and in terms *ordering* the payment thereof, as, "Upon hearing the plaintiff's attorney and the defendant's attorney, and the plaintiff *having undertaken to pay the costs*, I order that the plaintiff be at liberty to amend the, &c. after payment of such costs, and I do further, with the plaintiff's consent, order *that the plaintiff do pay the defendant's costs and the costs of this application*, and the costs occasioned by any such amendment, and that further proceedings shall be stayed until such costs be paid;" (r) for if there has been an irregularity, and the order be only *conditional* as to costs, and the plaintiff amend and proceed without paying the costs, the defendant's only course would then be to obtain a summons to rescind the order, and to set aside the plaintiff's proceeding on account of the previous irregularity. (r) From the same cases also it appears that, although the judge, upon giving leave to the plaintiff to amend, do order the payment of costs, and that proceedings be stayed till they have been paid, and he amend and proceed without paying the costs, yet no attachment can be obtained.

The jurisdiction of a judge, we have seen, is limited in some respects, though very extensive; he cannot, therefore, make an order for quashing a demurrer, (s) or, without consent, an order for the payment of a debt by monthly instalments. (t) We have seen that if a judge's order be obtained from his clerk by misrepresentation, it may be treated as a nullity, though the safer course would be to apply to the same judge, if time will admit, and obtain his discharge of such order. (u)

We have seen that it is now settled that in most cases a judge at chambers has a *discretionary jurisdiction* over the costs of the application, and opposing the same, including those of affidavits, summonses, attendances, whether or not by coun-

16. Judge's  
power to award  
costs.

(p) See a form of a judge's peremptory order on a plaintiff to deliver up deeds on payment or tender of taxed costs, *Evans v. Millard*, 3 Dowl. 661.

(q) Such *undertaking* is essential in order to support a subsequent motion for an attachment for not paying on demand, *Harrison v. Wend*, 3 Dowl. 541; 1 Harr.

& Wol. 212, S. C.

(r) *Turner v. Gill*, 3 Dowl. 30; *Rees v. Fenn*, 2 Dowl. 182; *Bagley's Ch. Pr.* 28, 30.

(s) *Foster v. Burton*, 3 Tyrw. 388.

(t) *Kirby v. Ellier*, 2 Crom. & M. 315; *ante*, vol. iii. 32.

(u) *Wormann v. Pryce*, 3 Tyrw. 375.

CHAP. XVII.  
SECT. III.  
OF SUMMONS  
AND ORDERS.

sel, and of the fee to the judge's clerk.(x) In some cases, however, by express statute or rule, it is *imperative* on the judge to award costs, as in the instance of a summons to strike out a second count upon the same subject-matter.(y) In other cases, if nothing be said in the judge's order as to the costs, they will not in general be costs in the cause.(z) Consequently, a party who thinks that costs will be awarded to him should apply to the judge to allow them.

17. Order, how far conclusive until varied, rescinded, or set aside.

When upon a matter decided upon at chambers, a judge has entertained the question of costs, the Court will not afterwards hear a motion on the subject of such costs, they considering the judge perfectly competent entirely to dispose of and adjudicate upon that question.(a)

18. Judge's order, though imperative, may yet be abandoned.

An order, when imperative in its terms, and drawn up *and served*, is binding on all parties until it has been rescinded or set aside.(b) But a party may abandon a judge's order obtained by him, although it has been drawn up and served, when it is not imperative on him, but only gives him a *liberty* of which he may not afterwards think fit to avail himself;(c) and, therefore, where a plaintiff a few days before the assizes obtained a judge's order, giving him liberty to amend on the terms, that the defendant should have two days time to plead anew after such amendment, and the plaintiff afterwards delivered the issue without amending or rescinding the order, whereupon the defendant returned such issue as irregular, but the plaintiff proceeded to trial and obtained a verdict, his proceedings were holden regular.(c)

19. Of making a judge's order a rule of Court,(d) and enforcing the same.

In order to enforce a judge's order and obtain an attachment for disobedience, it must be made a rule of Court, and if the order be made in vacation, it cannot be made a rule of Court before the next term, nor then can it be made a rule as of the preceding term.(e) We have seen, however, that as respects

(x) *Ante*, vol. iii. 28 to 32.

(y) *Ante*, 458.

(z) *Mummery v. Campbell*, 10 Bing. 511; 2 Dowl. 798, S. C. N. B. That was the case of an order by the Court to discharge a defendant on ground of coverture.

(a) *Davy v. Brown*, 1 Bing. N. C. 460; 1 *Hodges*, 22, S. C.

(b) *Wilson v. Hunt*, 1 Chitty's Rep.

647; and *James v. Kirke*, id. 246.

(c) *Black v. Sangster*, 3 Dowl. 206, the Court, however, on terms referred the cause to arbitration, and an award was in plaintiff's favour for a reduced sum.

(d) See in general, *ante*, vol. iii. 33; 7 Taunt. 43.

(e) *The King v. Price and another*, 3 Dowl. 233; 2 Cr. & M. 12, S. C.

CHAP. XVII.  
SECT. III.  
OF SUMMONS  
AND ORDERS.

the disobedience of a judge's order to return a writ in vacation, subsequent compliance, before the order has been made a rule of Court, will not exempt the sheriff from proceedings in the next term by attachment for the contempt previously incurred. (f) The proceedings by motion, and rule for an attachment, will be considered in the next section.

Although a judge's order may in *some* cases be set aside, if the Court, on motion, should think that the judge had no jurisdiction, or that he exercised it erroneously, yet as the mistake was an incident of all human tribunals for which neither party is to blame, (h) (excepting perhaps in erroneously pressing a decision in his favour which he ought not to have required;) (i) it follows that when the Court set it aside no costs are payable. (k) When there is any supposed ground for questioning the judge's decision, the application to the Court must be made promptly, and it is too late to apply to rescind a judge's order, allowing to the plaintiff's attorney the costs of taxing the costs on the back of a writ, of which more than a sixth part was taken off, after the order had been made a rule of Court, and an attachment obtained upon it, the Court observing, that the defendant has allowed the other side to go on and incur expenses, and he, therefore, was then too late. (k)

20. Of setting  
aside a judge's  
order. (g)

(f) *Ante*, vol. iii. 246, 247; and see *Rex v. Sheriff of Middlesex*, 2 Dowl. 432.

(g) See in general, *ante*, vol. iii. 32 to 35; *Rex v. Wilkes*, 4 Burr. 2569; *James v. Kirk*, 1 Chitty's Rep. 246; *Wood v. Plant*, 1 Taunt. 47.

(h) *Ante*, vol. iii. 34, 35; *Hargrave v. Holder*, 3 Dowl. 176.

(i) On this ground some learned persons have contended with great weight, that on principle a party who has occasioned expense to his opponent, which it turns out was improper or unfounded in law, ought in all cases to be compelled to reimburse his opponent's expenses.

(k) *Thompson v. Carter*, 3 Dowl. 657.

CHAP. XVII. SECT. IV.—OF MOTIONS, RULES NISI, SHOWING CAUSE, RULES  
SECT. IV.  
OF MOTIONS  
AND RULES. ABSOLUTE OR DISCHARGED, COSTS, ATTACHMENT, &c.

1. Notice of motion when or not necessary.....	570	rule nisi .....	589
2. Brief to counsel with affidavits, &c. ....	571	27. <i>Seemle</i> , no necessity for obtaining office copy of the rule nisi, or of affidavits in support of rule, before showing cause ..	<i>ib.</i>
3. Motion to what Court .....	572	28. Of swearing affidavits in opposition, and showing the same to the counsel in support of the rule .....	<i>ib.</i>
4. Motion by whom to be moved .....	573	29. Brief to counsel to <i>move</i> that rule nisi be <i>absolute</i> .....	590
5. ——— time of moving .....	<i>ib.</i>	30. Brief to <i>oppose</i> rule .....	591
6. Second motion, when or not permitted .....	574	31. When or at what time a rule nisi should be made absolute ...	592
7. Conduct of counsel upon moving for a rule nisi .....	575	32. The conduct of counsel on each side in preparing to support or oppose a rule .....	<i>ib.</i>
8. When a rule is absolute in the first instance, or only nisi ...	576	33. Of discharging a rule .....	593
9. When costs allowed or refused when rule nisi absolute in first instance .....	577	34. Professional conduct of barristers in disposing of rules nisi.	594
10. Forms and requisites of rule nisi Forms of rules nisi in cases of irregularity .....	578	35. Arguments upon affidavits and documents in support of rules nisi .....	<i>ib.</i>
11. Statement in rule nisi of the time or day when the party is to show cause.....	579	36. Formal objections when to be taken .....	595
12. Rule nisi to be drawn up "on reading documents, &c." ....	<i>ib.</i>	37. How the Court or judge decides upon conflicting affidavits ..	596
13. In rule nisi for irregularity, the precise objection to be stated ..	581	38. Of making a rule nisi absolute, or discharging the same ...	<i>ib.</i>
14. All objections to be stated at one time, and not successively ..	581	39. Of the interlocutory costs of motions and rules.....	597
15. Rule nisi to state to whom payment to be made or deed, &c. delivered .....	<i>ib.</i>	40. Of the Court imposing terms. ...	601
16. As to rule nisi praying costs....	582	41. Terms of the rule absolute ...	<i>ib.</i>
17. When an immediate stay of proceedings to be prayed.....	<i>ib.</i>	42. Notice of and appointment for taxing interlocutory costs ...	602
18. Of amending a rule nisi, when or not allowed, or when a fresh rule must and may be permitted .....	583	43. The master's allocatur of costs..	<i>ib.</i>
19. Of service of copy of rule nisi; affidavit of such service ....	<i>ib.</i>	44. Of enforcing payment of interlocutory costs by attachment..	<i>ib.</i>
20. When service need not to be personal.....	584	45. Care essential in served copies .	603
21. When service must be personal .....	585	46. Personal service of rules and allocatur, and leaving copies of each .....	<i>ib.</i>
22. The time of serving rule nisi ...	<i>ib.</i>	47. Personal demand by a party entitled to receive payment ...	605
23. Of enlarging and reviving rules ..	586	48. Affidavit of service, and motion and rule for attachment when nisi only, or when absolute in first instance .....	606
24. Notices to be given by a party against whom a rule has been obtained, and of his intention not to resist the same, or to resist only in part.....	587	49. Execution of attachment, and who exempt or discharged ..	607
25. What party to show cause ....	588	50. Interlocutory costs, when recoverable by action.....	<i>ib.</i>
26. Of showing cause in first instance against a motion for a		51. Of setting off interlocutory costs ..	<i>ib.</i>

1. Notice of intended motion.  
(1)

We have considered the *expediency* and occasional necessity for a *notice*, as well of irregularity as of the intention to apply to the Court for relief. In the King's Bench, except in anticipation of motions for leave to file a criminal information against

(1) See *ante*.

a magistrate, or for a certiorari, a notice of motion is not in general necessary, although it seems *advisable* to serve the same, as probably more inclining the Court to allow costs. (m) In that Court it is not necessary even for the purpose of obtaining a stay of proceedings by the rule nisi, to serve any notice of motion as is required in C. P. and Exchequer. (n) In C. P. and Exchequer in general, unless two days' notice of motion be given, and affidavit of service thereof be filed, it is the practice not to draw up a rule nisi with an immediate stay of proceedings; (o) and Reg. Hil. T. 1 & 2 Geo. 4. (p) orders that when notice of motion is required to be given the filing "of any affidavits in support of the application shall also be mentioned at the foot of the notice to enable the parties to obtain a copy therefrom." But it is said that this direction is not strictly observed in practice. (q) It is advisable however to serve a notice in pursuance of the rule, and which may be in the subscribed form. (r)

Formerly in C. P. and Exchequer, but not in K. B. a notice of the intention to move for judgment as in case of a nonsuit was indispensable. (s) But now, by Reg. Gen. H. T. 2 W. 4. r. 68, "a rule nisi for judgment as in the case of a nonsuit may be obtained on motion without previous notice, but in such case it shall not operate as a stay of proceedings." In respect, therefore, of this last qualification, it may still be advisable in all the Courts to give notice at least of this motion.

A *brief* is to be prepared for counsel as instructions to move the Court for a rule. This should consist of *full copies* of the affidavits in support of the motion, including as well the title of

2. Brief to counsel, with copies of affidavits and documents, and with the original affidavits as sworn, and documents annexed.

(m) *Ante*, 527 to 533.

(n) *Stratton v. Regan*, 2 Dowl. 585, overruling *Fortescue v. Jones*, id. 524; 2 Arch. K. B. 4 ed. 994.

(o) *Ante*, 532, 3; *Rolfe v. Brown*, 1 Hodges, 27; *Smith v. Wheeler*, 1 Gale,

16; 3 Dowl. 431, S. C.; *Warn v. Bickford*, 9 Price, 14; Tidd, 491; Dax, Prac. 137; Price, Prac. 290, 301.

(p) 9 Price, 88.

(q) Price, Prac. 306.

(r) In the Exchequer of Pleas.

Between { A. B. Plaintiff,  
and  
C. D. Defendant.

Take notice that this Honourable Court will be moved on — next, or so soon after as counsel can be heard, for a rule to show cause why the writ of summons issued in this cause, and all proceedings thereon should not be set aside for irregularity with costs; and that in the mean time all further proceedings be stayed, and the grounds of irregularity are as follows [here state them explicitly, *ante*, 529, note (h).] Dated the — day of — A.D. 1835.

Yours, &c.

To Mr. E. F.

G. H.

Attorney [or "Agent"] for the plaintiff.

Attorney for the defendant.

In pursuance of Reg. Hil. 1 & 2 G. 4. you will further take notice that in support of the said application the affidavits of the said C. D., and of J. K. have been duly filed in the office of —, and where you may obtain office copies of such affidavits.

(s) *Chessell v. Parkin*, 2 Taunt. 48; Dax, Pr. 79; Tidd, 491, 765.

CHAP. XVII.  
SECT. IV.  
OF MOTIONS  
AND RULES.

the Court and cause, as the body of the affidavits to the end, including also the jurat, and even the signature and copies of all documents referred to; *verbatim* copies of each will be found preferable to mere abstracts, and in general this is to be observed, even as regards mis-spelling. Then may properly follow a suggestion of the terms in which the rule nisi should be drawn up, with copies of any statute or rule of Court applicable to the motion, and extracts from reported cases when the motion is attended with the least difficulty. If the facts are numerous, it may be advisable to assist counsel with an analysis of dates and material facts, arranged in natural order in a column under each other, and then may follow an exact copy of any opinion previously given in favour of the application, with observations upon the whole. This should be delivered with the *original affidavits* to the counsel as early as possible before the day when he is requested to move for the rule, and such original affidavits must at least be handed to the counsel before he moves the Court, so that he may hand the same into the Court immediately after he has moved. Whenever the brief with private observations, if handed in, might by any possibility be read by the opponent in the office, as has sometimes occurred, then it may be prudent to make a distinct motion paper with the terms of the rule nisi marked thereon, and to request that the same may be handed into Court with the original affidavits, and the original brief with observations to be retained by the counsel.

3. Motion to  
what Court.

In general, a *motion* in any action must be made to the Court in which it is depending; and we have seen that if there be *several* actions depending at the same time in two Courts, it is then necessary to apply to each, although the ground of motion be precisely the same; because one Court will not assume any controul over the proceedings of another superior Court of co-extensive jurisdiction, (t) as where actions were depending in different Courts, and it became necessary to apply to both for relief under the interpleader act. (u)

If a motion be made to set aside a warrant of attorney which authorized a judgment in a particular Court, or if a judgment has been *regularly* signed in such Court, the motion should be to *that* Court, though if the judgment had been irregularly signed without authority in another Court, the *latter* might then set aside the judgment, though it could not order the warrant of attorney to be cancelled. (x)

(t) *Ante*, vol. ii. 349, 350.

(u) *Allen v. Gilby*, 3 Dowl. 143.

(x) *Ante*, vol. ii. 336; *Scurfield v. Gowland*, 6 East, 241, a.



The 4 & 5 W. 4. c. 62, s. 26, authorizes *motions* in an action depending in the Common Pleas at Lancaster to be made to either of the Courts at Westminster. (y)

CHAP. XVII.  
SECT. IV.  
OF MOTIONS  
AND RULES.

With respect to *original motions* unconnected with and not made in the course of any pending action, we have seen that some are peculiar to each Court, and can only be made therein. (z)

In general, motions to be actually stated to the Court are to be made by a *counsel*, and in no case by a person acting as an *attorney* for another; and although in *civil* cases a party, when plaintiff or defendant, may *himself* move or address the Court without the intervention of an attorney or counsel, it is otherwise in all cases of a *criminal* nature, when no one but counsel can be heard; and a motion against an attorney, requiring him to answer matters contained in an affidavit, (a) or for an attachment against an attorney for alleged misconduct, must be made by a *barrister*, who, before he moves the Court, is supposed to have read and considered the affidavits, and to be of opinion that the application is proper, or at least not improper. (b) In one case, however, where, on the application of a private individual against an attorney, it appeared that the latter had been guilty of gross misconduct, and that the applicant required the *immediate* protection of the Court, the Court of its own accord directed that the affidavits should be answered. (c)

4. Motion by  
whom to be  
moved.

With respect to the *time* of moving, the former rules and decisions on the subject will be found collected in the works referred to. (d) Motions of a *criminal* nature, as motions for a criminal information, or requiring an attorney to answer matters charged against him in affidavits, ought not to be moved *within the last four days* of term, because it is improper to keep a criminal charge against any person once promulgated in open Court suspended during vacation; (e) and it has recently been decided that a rule to show cause why an attorney should not answer the matters in an affidavit imputing misconduct cannot be moved on the last day of term. (f) But when, from the

5. Time of  
moving.

(y) *Terus v. Fitzhugh*, 3 Dowl. 278; *Potter v. Mass*, 3 Dowl. 432.

(z) *Ante*, part iv., per tot.

(a) *Ex parte Pitt*, 2 Dowl. 439.

(b) *Ex parte Fenn*, 2 Dowl. 527.

(c) *Ex parte Pitt*, 2 Dowl. 439.

(d) As to days of moving and hearing

rules Tidd, 9th ed. 497, 504; 2 Arch. K. B. 4th ed. 992 to 1007; Chitty's Summary Prac. 105 to 107, as to the last day of term.

(e) *Ex parte* ———, 2 Dowl. 227.

(f) *Re Turner*, 3 Dowl. 557.

CHAP. XVII.  
SECT. IV.  
OF MOTIONS  
AND RULES.

misconduct of one of the parties to an award, the submission cannot be made a rule of Court, so as to enable the opposite party to make it a rule of Court before the last day but one of the term after the award, the Court will on that day grant him a rule nisi, dated of that term, but to show cause in the next; (g) and the Court will not, on a motion made on the last day of a term for security for costs, on the ground that the plaintiff is abroad, permit it to be drawn up with a stay of proceedings; (h) and from the same and other authorities a rule nisi with a stay of proceedings will not in general be granted on the last day of term, though in cases where justice requires a speedy decision, the Court will sometimes grant a rule on the last day of term, and direct cause to be shown in a week or so at chambers. (i)

By Reg. Gen. Hil. T. 2 W. 4, r. 96, it was ordered "that *side-bar rules* may be obtained on the last as well as on other days in term," and which rule assimilated the practice of the King's Bench to that of the Common Pleas. (k)

6. *Second motion on same ground, when or not permitted.*

Further, as regards *time*, if a motion has been once made in respect of a *technical objection* to proceedings, and such motion has failed on account of a defect in the affidavit in its support, the Court will not in general permit a second motion on the same objection, although supported by an amended affidavit. (l) There is an ancient rule of Hil. T. 3 Jac. 1, A. D. 1605, (m) "That if any cause be once moved in Court in the presence of counsel of both parties, and the Court shall thereupon make an order, no person shall afterwards cause the same to be moved contrary to such rule or order, under pain of an attachment; and the counsel, knowingly making such motion, shall not be heard here in any cause during the same term."

If an application, founded on a *technical objection*, has been discussed and discharged by the Court, though partly on account of the insufficiency of the affidavits, the party cannot in general apply again, though upon additional affidavits, because parties ought to come prepared with proper affidavits in the first instance. (n) A motion to set aside a bail-bond, on the ground of misnomer in the surname, will not be allowed to be

(g) *Re Perring*, 3 Dowl. 98.

(h) *Gronow v. Pointer*, 3 Dowl. 571.

(i) *Ante*, vol. iii. 27; *Rowell v. Brendon*, 3 Dowl. 324.

(k) Tidd, 9th ed. 498; *Jervis's Rules*, 69, note (i).

(l) *Finch v. Cocker*, 2 Dowl. 383.

(m) Tidd, 531; 2 Arch. K. B. 4th ed. 999; and see *Kibblewhite v. Jeffreys*, 1 Chitty's R. 142.

(n) *Preedy v. Macfarlane*, 3 Dowl. 460; 1 Gale, 20, S. C.

renewed, (o) nor any motion founded merely on a technical objection. (o)

CHAP. XVII.  
SECT. IV.  
OF MOTIONS  
AND RULES.

But there are cases in which a party may make a second application to the Court on the same subject; and this, although he has not paid the costs of a former rule nisi, which had been discharged; (p) and where justice may require, and especially when a prior motion and discharged rule were founded on a new act or rule, and the party, or his counsel, or attorney, may have been misled, and failed for want of proper materials, (as an affidavit, when necessary,) the Court will sometimes reserve to the applicant, on refusing or discharging a rule, leave to him to move again on proper materials, but usually imposing proper terms; (p) as where the defendant had moved for a new trial before the under-sheriff, without founding his rule as required on an affidavit verifying the accuracy and identity of the under-sheriff's notes; in which case, although the Court discharged the prior rule, they gave the party leave to move again, on producing the proper materials. (q)

On moving the Court for a rule nisi in a new or difficult case, it is in general advisable to state the grounds and reasons against as well as for the application, and to endeavour to obtain the opinion of the Court or single judge in favour of the application, notwithstanding he is in full possession of all the difficulties and objections, because if he grant a rule nisi, notwithstanding the suggested difficulty, he will be better prepared and more disposed when cause is shown correctly to appreciate the arguments on each side, and consequently a favourable result will be more probable; and if the opinion of the judge should be strongly unfavourable in the first instance on moving for a rule nisi, it may not be expedient to incur the risk of drawing up the rule when reluctantly granted, and afterwards having the rule discharged, perhaps with costs, and still more because counsel, by uniformly adopting such explicit and honourable course, may justly acquire a general character for candour, of the utmost importance, not only to himself but his clients, when by concealment of an objection for the mere temporary advantage of obtaining a rule nisi, he would not only prejudice that character, but also when the judge hears the objection raised for the first time by the op-

7. Conduct of  
counsel on mov-  
ing for a rule  
nisi.

(c) *Finch v. Cocker*, 2 Dowl. 383; 3 Dowl. 333, S. C.  
and see *Warner v. Wood*, 3 Dowl. 262. (q) *Johnson v. Wells*, 2 Crom. & M.  
(p) *Wilton v. Chambers*, 1 Harr. 116; 428.

CHAP. XVII.  
SECT. IV.  
OF MOTIONS  
AND RULES.

ponent, when showing cause, he perhaps might then give it more weight than if he had heard it together, with its appropriate answer in the first instance. (r)

8. When a rule is absolute in the first instance or only nisi. (s)

It is important for counsel, who have not had much experience, well to inform themselves upon the varying and somewhat complex practice relating to the question when or not a motion or rule is to be absolute in the first instance. (s) In general the officers of each Court are peculiarly well informed upon this branch of practice, and exceedingly obliging in the communication of their knowledge.

By the long established practice of the Courts, and by some express rules, many motions and rules granted thereon are absolute in the first instance, i. e. *instantly*, whilst others are only *nisi*, i. e. not to become absolute, *unless* on a certain day named in the rule cause be shown to the contrary by the opponent, (s) and the latter are differently framed. *Some* become absolute on the very day named, unless sufficient cause to the contrary be shown on that very day; and if the counsel do not on such exact day, show cause or arrange with the opponent's counsel to bring the rule on for discussion on a subsequent day, the rule nisi will become absolute on that *very* day, and he cannot be heard to the contrary even on the next morning. (t) But more generally rules nisi require cause to be shown on a named day, in which case the opponent has the whole of that day, and therefore the rule cannot be made absolute until on or after the next day, and then or on some day afterwards counsel must move that it be absolute, or it would never be so. The opponent's counsel has, however, a *strict right* (though rarely exercised, and never without previous notice of the intention to do so,) to show cause on the *very day* named in the rule nisi, provided he has in reasonable time before shown his affidavits in answer to the counsel who is to support the rule. In general, the counsel who is to show cause against a rule nisi takes care to apprise the counsel in support of the rule that he is instructed to do so, and hands to him any affida-

When a rule may be moved absolute, or cause be shown.

(r) Perhaps exceptions might be allowed, if perchance it should *again* occur that a single judge will not hear any lengthy statement from counsel, on moving for a rule nisi, in which case it has been known that the mere suggestion of a difficulty, though clearly answerable, would induce the judge to refuse a rule nisi. There was a time when if motions were made before a certain single judge, rules nisi were frequently refused, but which

the full Court in Banc afterwards granted. Hence it was then necessary to avoid any motion to that judge for any rule nisi, but application was made to the full Court.

(s) Tidd, 480, 485; 2 Chitty's Arch. K. B. 4th ed. 992 to 1008, where see the rules of each description enumerated, and see *post*.

(t) *Bagnall v. Shipham*, 1 Crompt. & J. 377; *Jervis's Rules*, 70, a.

vits intended to be used on showing cause ; (*t*) after which it is usual to evince great courtesy between the respective counsel, each studying, as far as professional duty will permit, not to bring on the rule for discussion until it suits the convenience of each counsel, and still more that of the Court. But when a rule moved for in one term is drawn up to show cause in the next term, or is enlarged till the next term, it is then put into the *peremptory paper* in which all such rules are apportioned usually a certain number for each of the first five or six days in such next term, and regularly cause *must be shown on the very day* ; and if inadvertently either side neglect by counsel then to appear and support or resist the rule, and in consequence it be disposed of, the Court will not, in favour of a mere technical objection, afterwards permit it to be opened and discussed, (*u*) though sometimes exceptions are allowed. (*x*)

The Reg. Gen. Hil. T. 2 W. 4, r. 102, directs that an order upon the lord of a manor to allow the usual limited inspection of the Court Rolls, on the application of a copyhold tenant, may be *absolute in the first instance*, upon an affidavit that the copyhold tenant has applied for and been refused inspection. But it has been decided that that rule only applies when an application has been made *in a cause depending*, and not to an *ex parte* application in other cases. (*y*) A rule for judgment against the casual ejector must be nisi, if not moved for until the second term after the service of the declaration in ejectment. (*z*) A rule for an attachment for nonpayment of costs, pursuant to the master's allocatur on a taxation between *attorney and client*, is only nisi in the first instance ; but if the application be for an attachment for nonpayment of costs between *party and party*, then it may be absolute in the first instance. (*a*)

The Reg. Gen. Trin. T. 17 G. 3, in the King's Bench, as to attachments, prescribes when or not the rule shall be nisi or absolute in first instance. (*b*)

It has been the practice in C. P. (*c*) and the Exchequer, (*d*) and it seems also of K. B. (*e*) not to compel a party who moves

9. When costs allowed or refused, and when rule nisi is refused in first instance.

(*t*) *Ante*, 551, 552. It may be advisable for the attorney resisting a rule nisi to cause this to be carefully done on the day before that on which the rule can be moved absolute, for it frequently occurs that great difficulties arise in communications between the counsel themselves.

(*u*) *Warner v. Wood and another*, 3 Dowl. 262.

(*x*) *Semble*, see the same case.

(*y*) *Ex parte Best*, 3 Dowl. 38.

(*z*) *Doe v. Roe*, 1 Gale, 15.

(*a*) *Green v. Light*, 3 Dowl. 578, see *post*.

(*b*) *Post*, "Of Motions for Attachments."

(*c*) *Waldron v. Norris*, 2 Bla. R. 769 ; Tidd, 503.

(*d*) *Fitch v. Green*, 2 Dowl. 439.

(*e*) *Anonymous*, 2 Clitty's Rep. 241, where Bayley, J. expressed his regret that such was the practice.

CHAP. XVII.  
SECT. IV.  
OF MOTIONS  
AND RULES.

for a rule nisi which is refused, to pay costs to his opponent, who shows cause by counsel in the first instance, in consequence of a previous notice of motion; and hence it is not usual for practitioners in general to incur the expense of instructing counsel to oppose an application until after a rule nisi has been served.

10. Forms and  
requisites of  
rules nisi.

A rule nisi, and the copy thereof served, should be properly intituled or described in the margin in the cause with the *full Christian and surnames of all the plaintiffs and all the defendants*, and even the appearance of the opponent by counsel will not cure the omission. (e) The *names of the parties* should also be very accurately stated; and where a rule absolute had been drawn up, stating the names of the defendant (as Calver for Calvert) incorrectly, an attachment having been obtained, the Court set the latter aside with costs merely on account of such small error in a letter, and although the defendant had promised to pay the debt; (f) and it would seem that if in the title the Christian name be transposed, as "Mary Ann" instead of "Ann Mary," the irregularity would be fatal. (g) The usual forms of a rule nisi for setting aside proceedings for irregularity are subscribed, and may be readily applied to any case that may arise. (h)

(e) *Wood v. Crutchfield*, 3 Tyr. 235.

(f) *Smith v. Calvert*, 2 Dowl. 276; *Wood v. Crutchfield*, 3 Tyr. 235; and see *Poole v. Pembrey*, 3 Tyr. 387, that the transposition in the title of an affidavit annexed to a plea in abatement of the

names forming the Christian name of one of the defendants, as "Mary Ann," for "Ann Mary," is fatal, so that the Court on motion set aside the plea."

(g) *Poole v. Pembrey*, 3 Tyr. 387.

Usual form of  
rule nisi for  
setting aside  
proceedings for  
irregularity in  
K. B. or Ex-  
chequer.

(h) In the King's Bench [or "Exchequer of Pleas."]

A. B. } The — day of —, 1835.  
agst. } Upon reading the affidavit of G. H., it is ordered that the plaintiff, [or  
C. D. } "defendant,"] upon notice of this rule to be given to him or his attorney,  
shall, upon —, show cause why the [here state the proceeding to be set aside,] in this  
cause, and all further proceedings should not be set aside for irregularity, with costs  
to be taxed by the master; and that in the meantime all further proceedings be  
stayed. On the motion of Mr. —.

By the Court.

In the Common Pleas.

The like in C.  
P.

A. B. } The — day of —, A. D. —.  
agst. } Upon reading the affidavit of G. H., it is ordered that the plaintiff, [or  
C. D. } "defendant,"] upon notice of this rule to be given to him or his attorney,  
shall show cause to this Court, on — next, why the [name of the proceeding to be set  
aside] in this cause should not be set aside for irregularity; and why the plaintiff [or  
"defendant"] should not pay to the defendant [or "plaintiff," or "his attorney,"] his  
costs of and occasioned by this application to the Court, to be taxed by one of the pro-  
thonotaries of this Court; and in the meantime, and until this Court shall otherwise  
order, let all further proceedings in this cause be stayed.

On the motion of Serjt. — for the defendant, [or "plaintiff,"]

By the Court.

With respect to the statement in a rule nisi of the *day or time* when the opponent is to show cause, it varies according to the supposed time that will be *reasonably required* to obtain affidavits in answer to the rule, which must obviously depend on many circumstances, and principally the distance of the *opponent's residence* from town. In the *King's Bench* a rule nisi in a *town cause* usually requires the other party to show cause on the *fourth day*, exclusive of the day of obtaining the rule; but if the defendant reside or be in the *country*, not far off, then the *sixth day*, though if very distant, then the *tenth day*. (i) In the Common Pleas, and in all the Courts, towards the end of the term, in a *town cause*, the rule is frequently drawn up to show cause in *two days* inclusive, but if the affidavits be long, or the matter arose in the country, the rule is commonly drawn up to show cause in about a week. (k)

CHAP. XVII.  
SECT. IV.  
OF MOTIONS  
AND RULES.

11. Statement in rule nisi of the *time or day* when the party is to show cause.

In drawing up rules nisi, if the application is in part founded on what appears in the *proceedings* or *pleadings* in the cause, or matters of record before the Court, the rule should state, that "upon reading the affidavit of — and of —, (*concisely describing the documents*) the opponent is required to show "cause, &c.;" and in that case, but not otherwise, the Court may proceed on the *documents* without the affidavit, if defective. (l) And in the Court of K. B. (though it is otherwise in C. P.,) (m) a rule nisi to set aside an award must expressly state and describe all documents intended to be referred to on argument; and the rule must be drawn up "on reading the "affidavit of Y. Z., and a copy of the award of G. H., Esq." and not "on reading the *paper writing* hereunto annexed," although it be afterwards sworn that such writing was a copy of the award. (n) And the Court of K. B. refused to amend a rule defective in this respect, but permitted a fresh rule to be moved for. (n) So in the Exchequer a rule nisi for setting aside mesne process in proceedings to outlawry should be drawn up "on reading the original writ." (o) But in support of an application to the Court to set aside a judge's order, it suffices if the affidavit state the substance of the order, without setting it out verbatim or annexing a copy. (p)

12. Rule nisi to be drawn up "on reading documents and affidavits, &c."

Great care must be observed in drawing up a rule (especially

13. The precise ground of objection to be precisely stated.

(i) *Anonymous*, 2 Chitt. R. 372; Tidd, 499; 2 Arch. K. B. 4 ed. 994.

(k) Tidd, 499.

(l) *Hosworth v. Hubersty*, 3 Dowl. 455; 1 Gale, 47; *Cliff's v. Prosser*, 2 Dowl. 21, 22.

(m) *Sherry v. Oakes*, 1 Harr. & Woll.

119; 3 Dowl. 349, S. C.; rule nisi amended in Exchequer, *Lewis v. Davison*, 3 Dowl. 272.

(n) *Sherry v. Oakes*, 1 Harr. & Woll. 119; 3 Dowl. 349, S. C.

(o) *Lewis v. Davison*, 3 Dowl. 272.

(p) *Sharley v. Jacobs*, 3 Dowl. 101.

CHAP. XVII.  
SECT. IV.  
OF MOTIONS  
AND RULES.

in rules nisi to set aside any part of the proceedings for *irregularity*,) to state *the exact proceeding* objected to, or object to be prayed; (q) thus where the rule nisi was "to show cause why the *service* of a writ should not be set aside for irregularity," and it appeared on showing cause that there was no irregularity in the *time* or *manner* of *service* of the copy of the writ, but that the real objection was that the *copy served*, as well as the writ itself, were defective in not stating the date of the writ, the rule was discharged with costs, Bayley, B. observing, that had the motion been to set aside "the writ and service," or "the writ or service," the Court might have discharged the rule as to the service, and made it absolute as to the writ; but as no part of the rule was correct in its terms, it could not be sustained. (r) So where incorrectly a motion was made merely to set aside an *execution* on a warrant of attorney, the Court held that could not be, because the judgment and warrant of attorney were admitted to be good, and there was no separate objection to the execution itself. (s) And it seems advisable to state in the affidavit or rule nisi all the objections which it is proposed to rely upon. (t) It may frequently be advisable, when the affidavits in answer or the decision of the Court cannot certainly be anticipated, to draw up a rule nisi in the *alternative*, as to show cause "why a verdict for the plaintiff should not be set aside and a nonsuit entered, or why the verdict should not be reduced and entered for nominal damages only." In such a case, if the plaintiff think that he cannot sustain the verdict *in toto*, he should give notice accordingly, for if he show cause generally, and the Court should order the verdict to be reduced as prayed, he will not be entitled to his costs of showing cause against the rule. (u) Every rule nisi, or the affidavit on which it is founded, when the *regularity* of the opponent's proceedings are objected to, must distinctly specify such objections, in order that the opponent may prepare to show cause. (x) And if a rule nisi be drawn up to set aside interlocutory judgment for *irregularity*, it cannot afterwards be made absolute or supported on a different ground, as that the judgment was signed against *good faith*, but the Court under the circumstance discharged the rule without costs. (y)

(q) *Ante*, vol. iii. 277, 278.

(r) *Hasker v. Jarmaine*, 3 Tyr. 381; 1 Dowl. 654, S. C.; Tidd, 9th ed. 161.

(s) Per Bayley, B. in 1 Dowl. 655, *supra*, i. e. no particular objection to the writ of execution itself being stated, an objection to the warrant of attorney or the judgment should have been stated,

and the motion should have been to set them, or one of them, aside.

(t) *Supra*, 577, 580, and vol. iii. 277, 278, 279.

(u) *M'Andrew v. Adam*, 1 Bing. N. C. 270; 3 Dowl. 120, S. C.; *post*, 587, 588.

(x) *Aliven v. Furnival*, 2 Dowl. 49.

(y) *Smith v. Clarke*, 2 Dowl. 218.



*Some rules nisi must embody a statement of all the objections intended to be relied upon when arguing in support of the rule.* Thus, as regards *annuities*, Reg. Trin. T. 42 Geo. 3, of King's Bench, expressly orders, that "where a rule to show cause is obtained for the purpose of setting aside an *annuity* the *several objections* thereto intended to be insisted upon by the counsel, at the time of making the rule absolute, *must be stated in the rule nisi*;"(x) and the same *practice* prevails in the other Courts.(x)

So, by *express rule* of King's Bench, "where a rule to show cause is obtained to set aside an *award*, the several objections thereto intended to be insisted upon at the time of making such rule absolute must be stated in the rule to show cause;"(a) and the like practice prevails in the Court of Exchequer,(b) though in the Common Pleas the rules as drawn up do not state that they are made on reading the awards or other documentary evidence annexed.(c) And as well in King's Bench as in Exchequer the rule seems to extend as well to an *arbitrator's certificate* in lieu of an award as to a formal award, but each Court will, in case of a mistake, permit an amendment of the terms of the rule nisi.(d) It is therefore incumbent on the applicant's attorney as well as his counsel in these particular cases, to take great care that all the proposed objections be explicitly stated in the rule nisi before it is served. It seems also essential in all affidavits, motions, and rules nisi, for supposed irregularity, to bring forward and state to the Court and the opponent *all* the then existing objections, for, at least as respects a *summons*, we have seen that several *successive* applications will not be permitted, unless where a new ground of objection has arisen since the previous application.(e) On referring a rule to the master, if it be expected that his personal examination of a party, instead of receiving affidavits, will probably elicit the truth, the Court should be requested that it be part of the rule of reference to the master, that he be at liberty to receive *viva voce* testimony, without which he could only proceed on affidavits; but if the rule has not been so drawn up, the Court will not, after the master has made his report, alter the rule or refer it back to him.(f)

CHAP. XVII.  
SECT. IV.  
OF MOTIONS  
AND RULES.

14. All objections or grounds to be stated at once, and not successively.

(x) See Rule, 2 East, 519; Tidd, 527.  
(a) Reg. E. T. 2 Geo. 4, K. B.; 4 Bar. & Ald. 539; 2 Chitty's R. 376; and see Tidd, 845, for the decisions on this rule.

(b) As to Exchequer, Tidd, 844, 845; Smith v. Briscoe, 11 Price, 57; Watkins v. Phillips, 1 M'Clel. & Y. 394.

(c) Whatley v. Morland, 2 Dowl. 249; Watkins v. Phillips, 1 M'Clel. & Y. 394;

as to amendments of rules, 2 Arch. K. B. 4th edit. 959, 995.

(d) Per Patteson, J., in *Sherry v. Oakes*, 1 Harr. & Wol. 120.

(e) *Ante*, 559, note (u); *Smith v. Clarke*, 2 Dowl. 278; 2 Arch. K. B. 4th edit. 994, 998.

(f) *Noy v. Reynolds*, 1 Harr. & Wol. 14; 4 Nev. & Man. 483.

CHAP. XVII.  
SCOT. IV.  
 OF MOTIONS  
 AND RULES.

15. Rule nisi to state to whom money to be paid, or deed, &c. delivered.

A rule nisi relating to the payment of money should in general require payment to the party entitled to the same, if in this country, or his agent named in the rule, or to his attorney in London, or in the country; so as afterwards, when the rule has been made absolute, to avoid difficulty in an authorized person making the proper demand without incurring the expense of a formal power of attorney. (f)

16. As to rule nisi praying costs.

When the party applying to the Court to set aside proceedings for *irregularity* or for any other purpose, is confident of success, he should by the express terms of his rule nisi *pray costs*; because the general rule is not to make a rule absolute with costs, unless they were prayed by the rule nisi; but if the result be doubtful, or if costs are a subordinate consideration, then it may be desirable, at least in rules nisi to set aside proceedings for *irregularity*, not to pray costs; (g) for if costs be prayed, and the rule be afterwards discharged, the party moving will then, by the *express rule* in King's Bench, Mich. T. 37 Geo. 3, have to pay costs as a matter of course. (g) On the other hand, if a rule be drawn up in the alternative, and the applicant fail on the substantial question, he will not be entitled to the costs of the rule, although he succeed upon one of the grounds, and his opponent will then have costs, if he duly gave notice that he only intended to resist the untenable part of the rule; (h) and certainly as a general rule, and as regards costs, it is better to *ask no more* by a rule than it is confidently expected the Court will decide the applicant is entitled to. (h) But the subject of *costs* will presently be more fully considered. (i)

17. Of a rule nisi directing an immediate stay of proceedings.

In the Exchequer, even under the first section of the interpleader act, 1 & 2 W. 4, c. 58, the Court will not, in granting a rule nisi, order an *immediate* stay of proceedings, unless notice of motion has been given; (k) but towards the end of a term the Court will sometimes, when justice requires, on that account direct the rule to be drawn up to show cause at chambers; (k) and we have seen that the Court of Common Pleas also refuse a stay of proceedings, unless notice of the applica-

(f) *Dennett v. Pass*, 3 Dowl. 632; and *post*.

(g) See express rule in K. B. Mich. T. 37 Geo. 3, *post*, "Costs;" *Cook v. Allen*, 3 Tyrw. 380; *Ryall v. Emerson*, 2 Crom. & M. 468; *The King v. Sheriff of Middlesex*, 2 Dowl. 5, 6, where see the rule as stated by Bayley, B., in *Tilley v. Henry*,

1 Chitty's Rep. 136.

(h) *M'Andrew v. Adam*, 1 Harr. & Wol. 270; 3 Dowl. 120, S. C.; see further as to costs in this case, *post*, 597.

(i) *Post*, 597 to 608.

(k) Per Parke, B., in *Smith v. Wheeler*, 1 Gale, 15, 16; 3 Dowl. 431; *Jervis's Rules*, 55, note (a).

tion has been given; (*l*) but that in King's Bench the settled practice is without any notice of motion to grant a rule nisi with an immediate stay of proceedings. (*m*) In this case the rule nisi should not be drawn up requiring the opponent to *show cause* why all proceedings should not be stayed, but conclude peremptorily with an instant order of the Court that the proceedings be stayed, as thus, "In the mean time all proceedings are to be stayed." (*n*)

CHAP. XVII.  
SECT. IV.  
OF MOTIONS  
AND RULES.

We have seen that in the King's Bench, if a rule nisi in support of a *technical* objection be defective, the Court will not permit an amendment, but when justice requires the Court will enlarge the rule, and give time to move for a fresh rule; (*o*) and in the Exchequer a rule nisi for setting aside proceedings in outlawry may be enlarged, amended, and again served. (*p*) It is laid down, however, as the general practice, that if a rule or order of the Court be drawn up wrong by mistake in the office, the Court, upon application, will order it to be corrected; (*q*) and recently, where the Christian and surname were transposed by mistake in an order of reference, the Court allowed an amendment. (*r*)

18. Amendments of rules nisi, when allowed, or when a fresh rule must or may be obtained.

The rule nisi having been obtained, a very *accurate copy* thereof, and of all annexations, if any, must be made and *served* on the party against whom the rule has been obtained, and if the copy served be not intituled, or be inaccurately so, as not exactly in the full Christian and surnames of all the plaintiffs and defendants in the cause, then even the appearance of the party served by counsel will not, it has been considered, aid the omission. (*t*) It is expressly ordered by Reg. Gen. Hil. T. 2 W. 4, reg. 51, "that it shall not be necessary to the regular service of a rule that the original rule should be shown, unless sight thereof be demanded, except in cases of attachment," which rule simulates the practice of Common Pleas to that of

19. Of service of a copy of the rule nisi and affidavit of such service. (*s*)

(*l*) *Rolfe v. Brown*, 1 Hodges's Rep. 27; 2 Dowl. 435.  
ante, 531, 570, 571.

(*m*) Ante, 571.

(*n*) See forms, ante, 578.

(*o*) Ante, 574, 575; *Sherry v. Oakes*, 1 Harr. & Woll. 119; 3 Dowl. 349, S. C.; as to amendments of a rule of reference to arbitration, *Evans v. Senior*, 5 Taunt. 662; *Grimstone v. Bell*, 4 Taunt. 254; *Dartnall v. Howard*, 2 Chitty's Rep. 29; *Rawtree v. King*, 5 Moore, 167; *Rex v. Bingham*, 1 Crom. & J. 245; *Price v. James*,

(*p*) *Lewis v. Davison*, 3 Dowl. 272.

(*q*) Tidd, 9th edit. 506; *Lopes v. De Tastet*, 8 Taunt. 712.

(*r*) *Price v. James*, 2 Dowl. 435.

(*s*) See in general as to service of rules, ante, Tidd, 500; 2 Arch. K. B. 4th edit. 995.

(*t*) *Wood v. Critchfield*, 1 Crom. & M. 72; 3 Tyrw. R. 235; 1 Dowl. 587; *Smith v. Culvert*, 2 Dowl. 276; *Clothier v. Ess*, 3 M. & Scott, 216; 2 Dowl. 731, S. C.

CHAP. XVII.  
SECT. IV.  
OF MOTIONS  
AND RULES.

**King's Bench.** (u) It is, however, always advisable to produce and tender the original to the party for inspection, and to *deliver* to him the copy at the same time; a mistaken delivery of the original rule instead of the copy has, however, been deemed sufficient service. (x) We have seen that by express rules in King's Bench and Exchequer an attorney residing out of London, and within ten miles, must appoint a place of service within a mile, where he may be served with rules, &c. (y) And the cases when a rule may be served by sticking it up in the office have also been stated. (z)

20. When service of rule nisi need not be personal.

In general a rule nisi may be served either *personally* on the party called upon to show cause any where, or on his *wife* or *servant* at his residence; and unless inspection of the original be demanded, it need not be produced, except in cases of attachment; (a) and service of a rule nisi on one of several joint defendants, who had previously suffered judgment by default, and thereby admitted joint liability, suffices; (b) and the Court of King's Bench granted a rule nisi to compute principal and interest on a bill of exchange, to be served on the porter of the Junior United Service Club, on an affidavit that the bill had been accepted payable there, and that deponent believed defendant was a member of such club, &c. (c) But when the service is on a *third* person, the connection as wife or servant of the party must be shown; and an affidavit of service on a laundress or person at the house or chambers of the party, without swearing that he or she was then the *servant* or *inmate* of such party, will not suffice. (d) And service on the landlady of a defendant, not being his servant or his inmate, is insufficient; (e) and the service of a rule nisi to compute, by putting it under the door of the defendant's chambers, is not sufficient, although the laundress stated that the defendant would probably have the rule in the course of the day, the Court saying, "Putting the rule under the door is not of itself sufficient. It does not appear here that the deponent might not have gone to the chambers another time and found them open." (f) Al-

(u) Jervis's Rules, 55, (a); and see *Holmes v. Senior*, 7 Bing. 162.

(z) *Leaf v. Jones*, 3 Dowl. 315.

(y) *Ante*, 563, 564.

(z) *Ante*, 564.

(a) Tidd, 9th ed. 500; *Hall v. Franklin*, 2 Price's Rep. 4; and see Reg. Gen. Hil. T. 4 W. 4, reg. 51, *ante*, 583.

(b) *Figgins v. Ward*, 2 Cr. & M. 424.

(c) *Ridgway v. Baynton*, 2 Dowl. 183.

(d) *Alanson v. Walker*, 3 Dowl. 258;

*Stratton v. Hawkes*, 3 Dowl. 25; *Warren*

*v. Smith*, 2 Dowl. 216; *Smith v. Spurr*,

2 Dowl. 231; *Kent v. Jones*, 3 Dowl.

210.

(e) *Gardner v. Green*, 3 Dowl. 343.

(f) *Strutton v. Hawkes*, 3 Dowl. 25.

CHAP. XVII.  
SECT. IV.  
OF MOTIONS  
AND RULES.

though the defendant himself may have gone away, yet if his family remain living at his house, the leaving a rule nisi there for him with his wife, servant or inmate, is a sufficient service, without any previous leave of the Court. (g) And where a party is already in contempt, it is not necessary that a rule calling upon him to answer it should be personally served. (h)

It has, however, long been considered an established rule that, *to bring a party into contempt*, a copy of the rule must be *personally* served upon him, even though he be an attorney, and also that the original rule, being the very act of the Court, be at the same time shown to him; (i) and in cases of *attachment*, Reg. Gen. Hil. T. 2 W. 4, reg. 51, we have just seen impliedly requires production of the original rule, although not demanded; (k) and many years ago the Court of King's Bench refused to grant a rule to dispense with personal service of the master's allocatur for costs, with a view to an attachment on an affidavit that the defendant kept out of the way to avoid being served; (l) and although there has been a recent decision to the contrary, (m) yet in one of the latest reported cases on the subject the Court held that that decision was erroneous, and that personal service could not be dispensed with. (n) And to ground a motion for a contempt in disobeying a rule of Court, it is not only necessary to produce and show to the party the original rule, but also to deliver him an exact copy of such rule, (o) although the delivery to the party of the *original rule* by mistake, instead of a copy, was holden sufficient service. (p)

21. When the service must be personal.

If the attorney or party has left his residence, and it is not known where he is gone, then upon an affidavit, showing sufficient exertion to discover where he is gone, but not otherwise, the leaving a copy of the rule nisi at the last place of abode, and sticking up another copy in the office, may suffice, except in cases of attachment. (q)

(g) *Payett v. Hill*, 2 Dowl. 688.

(h) *Levy v. Duncombe*, 1 Gale, 60.

(i) *Tidd*, 500; *R. v. Smithico*, 3 T. R. 351; *Reid v. Deer*, 7 Dowl. & Ry. 612; *Parker v. Burgess*, 3 Nev. & Man. 36; *Woollison v. Hodgson*, 3 Dowl. 178; *Stanwell v. Towers*, 1 Cr. M. & Rosc. 88, overruling *Green v. Prosser*, 2 Dowl. 99; and *Allier v. Newon*, id. 582.

(k) *Ante*, 583; *Holmes v. Senior*, 7 Bing. 162.

(l) *Anonymous*, 1 Chitty's Rep. 503;

*In the matter of* —, *Gent.* 1 Dowl. & Ry. 529.

(m) *Green v. Prosser*, 2 Dowl. 99; and see *Weston v. Faulkner*, 2 Price's Rep. 2; *R. v. Fowey*, 5 Dowl. & Ry. 614.

(n) *Woollison v. Hodgson*, 3 Dowl. 178; 1 Cr. M. & R. 89, expressly overruling *Green v. Prosser*, 2 Dowl. 99.

(o) *Parkin v. Burgess*, 3 Nev. & Man. 36.

(p) *Leaf v. Jones*, 3 Dowl. 315.

(q) *Mudie v. Newman*, 2 Dowl. 639.

CHAP. XVII.  
SECT. IV.  
OF MOTIONS  
AND RULES.

22. The time  
of serving the  
rule nisi.

As soon as practicable after the Court have granted a rule nisi, it should be drawn up by the proper officer, who will oblige by expedition when necessary, as when a sale under an execution is apprehended; and a copy should be made and carefully examined, and served upon the opponent's attorney, and all other persons who may be about to proceed, especially when the rule by its terms is to operate as a stay of proceedings; and in all cases if the service be delayed so long as not to leave sufficient time to obtain office copies of the affidavits, and prepare others in answer, and to instruct counsel to show cause before the appointed day, the Court will as of course enlarge the rule however urgent the object of the application may be. And a service at a great distance from London of a rule nisi on the very day when the party was thereby required to show cause, is much too late, and the rule must be enlarged, and the enlarged rule served again. (r) Indeed, if the rule be not served in a reasonable time for these purposes, the party who obtained the same would not, on his affidavit, which must show the time and place of service, be allowed to move the rule absolute, but must himself apply to enlarge the rule, and as soon as possible must serve such enlarged rule, and not attempt to move to make the same absolute until a reasonable time has elapsed after such service of the enlarged rule. The service of a rule nisi even to compute (which is considered much of course), at York, on the very day cause was by the terms of such rule to be shown, was holden insufficient to move absolute upon, although ten days had elapsed since the actual service on that day. (s) And no rule can be served on a Sunday, (t) nor between 10th August and 24th October, (u) nor after nine o'clock at night in either of the Courts. (x)

23. Of enlarging and re-  
viving rules. (y)

By the long established practice of the King's Bench, a rule might be *enlarged* by the counsel for the opponent applying to the Court for that purpose, sometimes on a mere suggestion of time being required, and without affidavit or notice of the application, and even in the absence of the applicant's counsel. But in the Common Pleas notice of the intention to apply to enlarge the rule was always required. (z) Now Reg. Gen. Hil. T. 2 W. 4, reg. 97, orders that "*a rule may be enlarged*

(r) *Farrell v. Dale*, 2 Dowl. 15.

(s) *Id.*

(t) *M. Itcham v. Smith*, 8 T. R. 86.

(u) *Ante*, vol. iii. 100.

(z) Reg. Gen. Hil. T. 2 W. 4, r. 50, see the rule, *ante*, vol. iii. 100; *Jervis's Rules*, 55, note.

(y) See in general, *ante*, vol. iii. 99.

(z) *Tidd*, 484, 498, 502, 505, *semble*, for the reasons stated in the context, the former practice of the Common Pleas was in some respects more convenient than the present.

*if the Court think fit without notice,"*(a) so that now the practice in all the Courts is similar to the former practice in the King's Bench. It has, however, been objected that this enables a party opposing a rule, even without any affidavit of just cause, to enlarge it in the absence of the party who obtained the rule, and without affording him an opportunity of resisting such enlargement, and which frequently may be attended with inconvenience, if not injury; for the counsel instructed to make the rule absolute sometimes does so, not being aware of the enlargement, or he uselessly prepares to do so; and in rules nisi for relief, prejudicial delay sometimes ensues, and it is therefore contended that the former practice in the Common Pleas was preferable. It was not the practice formerly to *serve enlarged rules*, because both parties being by their counsel before the Court when the enlargement took place were sufficiently apprized thereof; (b) but now as the enlargement may take place in the absence of the opponent, it would seem that he ought to have a copy of the enlargement forthwith served upon him.

If a rule be drawn up to show cause in one term, it ought regularly to be disposed of in that term, or the party who obtained the rule should take care to move the Court *to enlarge* the rule until the next term, and so on from term to term. (c) But if he omit to do so, although he cannot otherwise move to make it absolute in the following term, yet he may in general then move upon the former affidavit and materials to *revive* his rule and call on the opponent to show cause in that term. (d)

A rule may be *revived* if it has not been enlarged or made absolute in due time; (e) and although it is too late on the last day but one of a term to move to make absolute a rule nisi which had been drawn up to show cause in the previous term, yet on such last day but one of the second term a rule may be obtained to show cause on the first day of the third term, provided such rule be served before nine o'clock on such last day but one of the second term. (f)

If a party has been served with, or had intimation of a motion or a rule, which he resolves *not even in part* to resist, he should, to prevent an increase of costs by any further pro-

24. Notices to be given by a party against whom a rule

(a) See Jervis's Rules, 69, note (a).

(b) Tidd, 500, cites 1 Smith's R. 199.

(c) See in general as to enlarging and reviving a rule, *ante*, part v. vol. iii. 93.

(d) Smith Collier, 3 Dowl. 100; 9 Legal

Obs. 236; *ante*, vol. iii. 99.

(e) *Id. ibid.*; Tidd, 502.

(f) Smith v. Collier, 3 Dowl. 100; 9 Legal Ob. 236.

CHAP. XVII.  
SECT. IV.  
OF MOTIONS  
AND RULES.

has been obtained of his intention not to resist the same, or to resist only in part.

ceedings, serve a *written notice* on the attorney who has obtained the rule, that he consents to the application, and will pay any costs that may be payable on receiving a bill; and he should also do the act required, and tender the probable amount of costs; after which, if the attorney who obtained the rule should take no notice of the application, and instruct counsel to make the rule absolute, the party to oppose the rule should make an affidavit of the offer, and instruct counsel merely to resist the payment of costs, and to pray costs of showing cause. (g) But the party guilty of the irregularity must take care not to propose any unreasonable terms; for if he do, the opponent may proceed to make his rule absolute with costs. (h) As where a defendant, having been arrested on a defective affidavit, obtained a rule nisi for cancelling the bail bond, whereupon the plaintiff's attorney, properly to save expense, offered to consent to a judge's order to the same effect as in the rule, except as to the costs of the rule, which he insisted should be costs *in the cause*, which being rejected, the rule was moved absolute, and the plaintiff's counsel urged that after such offer the defendant ought not to have the costs of moving absolute; but the Court said, "If you had offered to pay the costs of the rule nisi, *that would have been so*; but as that was not the case, the rule must be absolute with costs." (h) If a rule nisi prays too much, or in the alternative, and the party to show cause assents to the rule being in part absolute, but resists the residue, then he should serve a distinct written notice accordingly, in which case, if the party persist in endeavouring to make the whole rule absolute, but fail as to that part properly resisted by the opponent, then he may have to pay the costs sustained by that party in showing cause to such part, or at least so much of the costs would be costs in the cause. (i) If a party show cause against an entire rule, and the rule nisi be made in part absolute, then, although the party showing cause do so with effect as to a part, yet unless he has given notice as above, he will not be allowed any costs. (k)

25. What party to show cause.

A party upon whom a rule does not expressly call to show cause is not, because he has been served with a copy of such

(g) *Ante*, 584, 580; *Clarke v. Crockford*, 3 Dowl. 693.

(h) *Clarke v. Crockford*, 3 Dowl. 693; *ante*, 584.

(i) *Per Tindal, C. J., in M'Andrew v.*

*Adams*, 1 Bing. N. C. 270; 3 Dowl. 122; and see *Clarke v. Crockford*, 3 Dowl. 693.

(k) *Id. ibid.*; but see *Rough v. Thompson*, cited in 3 Dowl. 122.



rule, obliged to appear and show cause; and if he do, the Court will not give him his costs of appearing; (l) for he ought to rest satisfied that the Court will not make a rule absolute against him unless he has been expressly made a party in the rule nisi.(l)

CHAP. XVII.  
SECT. IV.  
OF MOTIONS  
AND RULES.

Unless in cases where a defendant has given notice of motion, in order to obtain a stay of proceedings, or in cases where a stay of proceedings would be seriously injurious to a plaintiff, it seems not to be expedient for him to show cause by counsel in the first instance; because the costs of showing cause in the first instance are not in general allowed, although a rule be refused.(m)

26. Of showing cause against a motion in first instance, or against a rule nisi.

Before showing cause, it is said that the opponent must obtain an *office* copy of the rule nisi,(n) and also of the affidavits filed in support of the rule, and that otherwise counsel cannot be heard;(n) but as the opponent must have been served with a copy of the rule nisi, the ground on which it is supposed he must obtain an office copy of such rule seems to have been always questionable; and, probably, as we have seen that the practice of requiring *office copies of the affidavits* in support of a rule has of late not been adhered to,(o) so also the necessity for obtaining an office copy of the *rule* may now be questionable. One useful object in requiring official copies might be to secure accuracy of the documents to be produced on the discussion; but probably the real motive was the payment of fees to the officers who made the copies.

27. Of obtaining office copy of the rule nisi, and of the affidavits in support of rule before showing cause.

We have in a prior page(p) considered the requisites of and time of swearing affidavits in opposition to a motion or rule nisi.(p) These having been obtained are not, excepting in the case of affidavits after a rule has been enlarged until a following term, in general filed in the office until the rule has been argued and disposed of; but the counsel who is to show cause keeps them until a reasonable time before the rule is

28. Of swearing affidavits in opposition, and showing the same to the counsel in support of the rule.

(l) *Johnson v. Marriott*, 2 Crom. & M. 183; 2 Dowl. 343, S. C. See the same principle in *Hosworth v. Habbersty*, 3 Dowl. 437.

(m) *Ante*, 557; 2 Chitty's R. 241; *Fitch v. Green*, 2 Dowl. 439; *Grove v. Parker*, *id.* 628; *Begbie v. Grenville*, 3 Dowl. 504, *sed quare* the principle of the practice of refusing costs in such a case.

(n) Tidd, 9th edit. 501.

(o) *Ante*, 551, 555; *Foy v. Pitt*, K. B. Hil. T. 1835, 9 Legal Obs. 269; where the Court, after consulting the clerk of the rules, thought that as according to the modern practice it had not in all cases been held necessary to take such copies, it could not be required in that instance.

(p) *Ante*, 553.

CHAP. XVII.  
SECT. IV.  
OF MOTIONS  
AND RULES.

argued, when he usually delivers such affidavits to the counsel in support of the rule. If the affidavits are lengthy, it is proper in courtesy that the counsel showing cause should authorize the former to have a *copy promptly* made for his private use, taking care to have back the original before the time of argument.

29. Brief to  
counsel to move  
that rule nisi be  
absolute.

Considerable care, attention, and skill, may be essential in preparing the briefs for or against a rule nisi when the affidavits are lengthy, or the points to be discussed are new or intricate.

In *support* of the rule the *original* brief with its annexations should always be delivered to the counsel, whose own notes thereon may refresh his memory; and such brief will, if framed as before recommended, contain exact copies, and not mere abstracts of the affidavits and documents filed, and reference to authorities in support of the rule. Next should be delivered to the same counsel a brief, or instructions to move to make the rule absolute, with a left-hand margin throughout for such counsel's annotations. To this should be so annexed as to be readily detached, the original rule nisi and the original affidavit of service of a copy thereof; so that should any question arise as to the terms of the original rule or of the affidavit of service, the counsel may be able instantly to hand the same to the Court or one of its officers to be read. The private brief absolute will then contain, *first*, a copy of the rule nisi; *secondly*, a *copy* (not a mere abstract) of the affidavit of service; *thirdly*, very accurate and carefully examined copies of all the affidavits and documents in support of the rule nisi; for it frequently has occurred that great confusion arises from want of due care in such copies; *fourthly*, a copy of any authorities or observations referred to in the original brief; *fifthly*, a statement of any observations made by the judge or judges on granting the rule nisi; *sixthly*, a statement of any subsequent circumstances, as any enlargement of the rule nisi, &c. and at whose instance, and a copy of any enlarged rule; and, *seventhly*, if the opponent has, as sometimes laudably occurs, delivered to the applicant's attorney copies of his affidavits to be used on showing cause, then the same copies of such affidavits should be given with short observations in the margin on any particular parts; *eighthly*, there may be more particular observations on each affidavit, and extracts from or reference to any statute, rule of Court, or decision for or against the rule being made absolute; and *ninthly*, observations as to the

*costs* to be prayed for or resisted by either party; and *tenthly*, a concise chronological analysis of dates and important events in column will frequently materially assist the counsel.

CHAP. XVII.  
SECT. IV.  
OF MOTIONS  
AND RULES.

But it is to be regretted that too often there is not sufficient facility afforded by practitioners in furnishing, or permitting to be taken, copies of the affidavits in opposition. In general the counsel who has to oppose a rule should hand over his affidavits, and not object to the counsel in support of the rule having a copy thereof promptly made, so as to enable him with more facility to comment on such affidavits; and it is prudent for every attorney who has to support a rule, in the morning of the day before the rule, according to its terms, might be discussed, i. e. on the morning of the day named in the rule, to attend the Court, and ascertain from his counsel whether he has obtained any affidavits that he may have copied, and immediately have them copied; and such copy with the original should be delivered to his counsel as early as possible the *same evening*, together also with the above suggested observations on the terms of such affidavits. Without having such copies, it will occur in the multiplicity and hurry of business, especially towards the end of a term, that a counsel having to support a rule, and having had a very cursory perusal of the affidavits in answer, which he has been obliged to return, will have great difficulty in recollecting dates and precise circumstances, which if he have copies before him he can obviously state readily and with confidence of accuracy.

The *brief* or instructions to *oppose* a rule nisi should, for greater security and in avoidance of all possible objections, have annexed, in a manner readily to be detached, an office copy of the rule nisi, and also office copies of the affidavits in support of the rule; though we have seen that these are not perhaps strictly necessary. (q) The *original* affidavits in opposition should accompany the brief. The *private brief* should first contain a copy of the rule nisi; secondly, full and very exact copies of all affidavits and documents filed in support of the rule; *thirdly*, a copy of any enlarged rule; *fourthly*, a copy of all affidavits in opposition; *fifthly*, observations on the affidavits; *sixthly*, a chronological compact analysis of the dates and most material points sworn to be the same as in the brief to support the rule; and *seventhly*, references to the statutes, rules, and decisions applicable to the particular case:

30. Brief to oppose Rule.

(q) *Ante*, 589.

CHAP. XVII.  
SECT. IV.  
OF MOTIONS  
AND RULES.

31. When or at what time a rule nisi should be moved absolute.

We have in a prior page stated some cases when a rule is only nisi, or when it becomes absolute of itself, unless cause be shown, and when a rule continues open until counsel has moved to make it absolute or discharge it. (*q*)

The distinction in the Exchequer is between some rules (then *improperly* called nisi) (*r*) which became absolute on a certain day, *unless* cause be shown on that day, (as is the form of a rule in the Exchequer for costs of the day,) and a rule strictly *nisi*, and in form requiring cause to be shown on a certain day, in which case the *day after* that mentioned in the rule is the day for showing cause. (*s*) In the former case, at least in the case of a rule nisi for costs of the day for not proceeding to trial pursuant to notice, if counsel, though previously instructed, do not show cause on the very day, or arrange with the counsel who obtained the rule, not to bring on the rule for discussion until both agree upon the time of disposing of it, he will be too late on the next day, and if the rule has in due course become absolute, the Court will not open it or allow him to show cause. (*s*)

32. The conduct of counsel on each side in preparing to support or oppose a rule.

Before the rule is discussed each counsel should make himself *master of every part of the affidavits*, and make his own analysis of dates and principal events, and be ready instantly to point out to a line where any particular allegation affirmative or negative will be found. He must also take a comparative view of each affidavit, contrasting the negative allegations with those in the affirmative, so as to attain a certain view of each, and by private annotations be fully prepared at any instant, without loss of time, to show to the Court the exact result, and concisely to comment on the same as well as upon any peculiar mode of swearing.

Formerly it was the practice to hand the affidavits on each side to an officer of the Court, who read the same distinctly to the Court; but that course has for many years been disused, and it is expected by the Court of counsel that they be prepared not only to state in detail and in his own arrangement every part of the affidavits, but instantly when called upon and without regard to any logical order to separate and state how any particular part of one affidavit has been answered in another. The Courts usually evince great kindness towards the bar, especially beginners, and avoid embarrassing them,

(*q*) *Ante*, 576.  
(*r*) Price, *Prac.* 293.

(*s*) *Scott v. Marshall*, 2 Tyr. 176, and note, 2 Crompt. & Jerv. 60.

and suffer them to pursue their own course of argument; but after a barrister is supposed to have acquired some self-possession and tact, it will sometimes occur that each of the judges will almost simultaneously put to such counsel numerous isolated questions, and which in general he must instantly answer, or he might excite a presumption that he knows he cannot answer the same. If, however, a counsel knowing that he can answer such question satisfactorily, but still finds that the so doing would embarrass or lead him away from a better line of argument, he may then respectfully crave the indulgence of the Court to hear him according to his own arrangement.

In general, however, it is better to give a prompt answer to the questions of each judge, however calculated to embarrass; for if a counsel do not instantly answer such inquiry from the Court, it is either supposed that he has not sufficiently read or attended to the terms of the affidavits, or that in fact he knows the result is against him; and not only an unfavourable supposition is excited, but even before he can explain, his more attentive or acute adversary gains an advantage which, if he had been more on the alert, would not have been the result; and not unfrequently his client and the auditors draw unfavourable conclusions against the talent of the counsel, however learned and able he may be, merely because he has been deficient in tact.

In the Exchequer it is necessary to give the opposite party notice of an application intended to be made to discharge a rule nisi, for an order of the Court, and which is a rule peculiar to this Court, and in this respect differs materially from the ordinary rule to show cause. (†) In general when a rule nisi has been obtained, the proper mode for the opponent's disposing of it, is by his showing cause in due course; but if on or after the time appointed by the rule to show cause has elapsed, the counsel who moved the rule nisi state to the counsel who is to show cause that he is not yet instructed to support such rule, then the party thus instructed may move to discharge the rule, and in general with costs. In case of rules nisi, for judgment in case of a nonsuit, it is usual for the counsel on each side not to attempt to bring on the rule for discussion until two or three days have elapsed after the day appointed in the rule nisi for showing cause, and it is injudicious immediately to press to make the same absolute; because it very frequently

33. Of discharging a rule nisi.

(†) *Raby v. Clarendshaw*, 11 Price, 152.

CHAP. XVII. occurs that some counsel has been instructed to oppose the  
 Sect. IV. rule, and in that case the Court will open the rule and much  
 Of MOTIONS trouble will be occasioned in getting back the brief, and bring-  
 AND RULES. ing on the rule for proper discussion.

34. Professional conduct of barristers towards each other in disposing of rules nisi.

Considering that barristers have to advocate very opposite interests and necessarily congregate, and are constantly placed in collision, it is scarcely necessary to observe that it is of the utmost consequence that they should evince uniform courtesy, if not kindness and forbearance, towards each other, and as much candour and even liberality in assisting each other as professional duty will permit, especially in communicating intended points of argument and authorities proposed to be cited, and happily, in general barristers set a high example in this respect. There are, however, *two uncourteous practices* sometimes observable, (though in general confined to junior barristers,) viz. the one, that of *withholding from a counsel supporting a rule the affidavits in answer so long, that it is scarcely practicable for him to read them in time for the discussion*; and the *second*, that of a counsel who finds upon the affidavits it is most probable the rule will be determined against him, *purposely leaving the Court about the time when his opponent would in the ordinary course of business reasonably expect to bring the rule on for discussion, and thus from day to day delaying the proceedings, to the no small injury of the client and prejudice of the opponent counsel.* The counsel, prejudiced by such ungenerous conduct, being anxious to avoid troubling the Court with his particular grievance, and to keep from public view any matter derogatory from the general character of the profession, submits to the grievance; but it behoves the rest of the bar and the practitioners of the Court to mark their disapprobation of such conduct.

35. Arguments upon affidavits and documents in support of rule nisi.

We have seen that as regards *facts* for or against a rule nisi, they must in general be laid before the Court by affidavit pro and con, or verified documents, but that there are few exceptions. (u) In general, when a rule nisi is brought on for discussion, the counsel for the party *opposing* it begins and states the terms of the rule nisi, and then very concisely the points which he supposes are intended to be relied upon by the party who obtained it, and then he assumes that the application

(u) *Ante*, 535, 536, as to the general necessity for affidavits, and the requisites thereof.

is completely answered; but if he do not entertain a strong opinion on that point, it is then advisable at once to begin with the affidavits, for it will be found as a general rule as impolitic as it is discreditable for counsel to pledge even his opinion to a result, as it is immoral and improper to do so, except in accordance with a genuine opinion. When a counsel entertains a strong opinion in favour of his case, then there is no reason why his client should not have the probable advantage of a zealous assertion of that opinion; but if such opinion do not exist, or be not well founded, the counsel would, by affecting it, forfeit the general estimation and credit of the Court. In the latter case, however, no counsel has a right to surrender the case of his client and admit that it is untenable, especially as it is well known that very frequently counsel, or one of several counsel, will succeed in argument quite contrary to the private opinion of all. In stating the affidavits pro and con, perfect knowledge of each as well as of the modes of swearing is indispensable, and the more compact the statement, and the more acute the comparison of the affidavits the better; and the counsel in many cases closes his observations with very concise remarks on the law applicable to the case.

The counsel in *support of the rule* then observes upon the affidavits on each side, taking care to call the attention of the Court to each most material part of the affidavits, and which the counsel opposed to him may have omitted to state faithfully, and if a very important allegation in support of the rule remains entirely unanswered, or only evasively so, he will particularly rely on that fact, and if the contra swearing is loose, that also will be remarked upon. When *further enquiry by additional affidavits* not in general admissible in Court, then both or one of the counsel may find it expedient to pray that the rule be referred to the master or prothonotary, and will thereupon particularly request the Court to direct that such officer shall or may examine the parties or witnesses either by affidavit or *visa voce*. (x)

We have seen that either counsel is at liberty, even after arguing the merits, to take an objection to the form or the substance of an affidavit on either side, (y) or of the terms of rule nisi, or of the copy thereof served, as that it is not correctly intituled in the cause; (z) but when the objection is decisive against a rule, and the discussion upon the merits would

36. Formal objections, when to be taken.

(x) *Noy v. Reynolds*, 1 Harr. & Woll. 14; *Dicas v. Warne*, 2 Dowl. 812; *ante*, vol. iii. 36, 37.

(y) *Barham v. Lee*, 4 Moore & Scott, 327; 2 Dowl. 779, S. C.

(z) *Wood v. Critchfield*, 3 Tyr. 235.

CHAP. XVII. occupy much time of the Court, it is more usual and preferable to take all technical objections in the first instance.

SECT. IV.  
OF MOTIONS  
AND RULES.

37. How the Court or judge decide upon conflicting affidavits.

Unfortunately, by the use of written *affidavits*, the advantage to be derived from a *viva voce* examination of a deponent before the Court, and from a view of his *countenance*, and of the *manner* of giving his testimony, are wholly lost, and even the age, education, and moral character of the deponent, are sometimes concealed from the Court, and the advantage of a *rigid cross examination*, calculated to elicit truth, is wholly taken away. (a) Sometimes, therefore, when the Court find the statements in the affidavits irreconcilable, they will either refer the matter to the master to receive further information, and sometimes even oral evidence; (b) and in cases of great difficulty will direct *an issue* to be tried by a jury. But in general, when the party swearing last very *positively and distinctly denies the matter stated in the affidavit in support of the rule*, the Courts have no alternative but to discharge the rule, especially in cases where the applicant has another remedy either at law or in equity.

38. Of the Court making a rule nisi absolute, and on what terms; or discharging the same, and on what terms.

If the Court or a majority of the judges should, upon the affidavits and documents before them, decide *in favour* of the application or rule nisi, it is then said to be *made absolute*; but it by no means follows that it must or will be so in the very terms of or to the full extent of the prayer in the rule nisi, for the Courts have in general an unlimited discretion in this respect; they can direct that the rule shall be absolute in part, and discharged as to the residue; or absolute conditionally upon the party moving performing some act, or absolute (as in the case of a rule to discharge a prisoner out of custody) on the terms of that party agreeing not to bring any action of *trespass* for false imprisonment, but that he shall be at liberty to bring an action *on the case* for *maliciously holding him to bail* without reasonable cause. (c) If the rule direct that the party to be discharged out of custody shall undertake not to bring

(a) See *post* as to witnesses, and evidence as to the supposed examination of a witness in open Court, before a judge and jury, subject to an immediate cross-examination.

(b) *Ante*, 595, note (x).

(c) *Gray v. Shepherd*, 3 Dowl. 442. The distinction is *material*, for when in consequence of the irregularity the defendant might bring an action of *trespass*

for the *immediate wrongful imprisonment* under the writ, he would be necessarily entitled to some damages and costs, but when by the terms of the rule absolute he is only to be at liberty to bring an *action on the case*, he would not recover, unless he prove that the arrest was malicious, or without reasonable cause, and which action frequently fails.



any action, such undertaking must be prepared, signed and delivered at his expense. If a rule to discharge a party out of custody be made absolute on account of irregularity in an arrest, and the judge offer to give the applicant costs if he will undertake not to bring any action (a condition frequently proposed,)(*d*) but which terms being refused, the order for the discharge is unconditional, and nothing is said about the costs of the motion or rule, then the party may, in an action of trespass for the false imprisonment, recover the costs of such previous proceeding.(*e*)

CHAP. XVII.  
SECT. IV.  
OF MOTIONS  
AND RULES.

The *costs* relative to summons, motions and rules (usually termed *interlocutory*) are in general entirely in the discretion of the *judge* as regards a summons and order ;(*g*) and of the Court as to the latter, excepting in a few particular cases, where a statute or rule is imperative ; as the Reg. Gen. Hil. Term, 4 W. 4, reg. 6, which always gives the costs on a successful summons to strike out a second count for the same cause of action. It will be found, however, that such discretion is constantly exercised with the utmost regard to strict justice, and according to the fairness in the conduct of the parties. Thus, as regards motions and rules nisi to set aside proceedings for irregularity, however it may be regretted that a practitioner will ever take a trifling objection in respect of a defect which cannot in reality have prejudiced his client, yet as it is essential that uniformity in regular practice should be observed, the Courts therefore will in general give the party who has explicitly pointed out and established his objection, the costs of his motion and of the rule to set aside the proceeding ; because, if such costs were refused, probably great and prejudicial laxity in practical proceedings would supervene.(*h*) But if the party applying, instead of candidly stating his objection, and affording an opportunity to his opponent of promptly, without increase of expense, rectifying his error, *refuse* to inform him, or to accept costs up to the time when tendered, and persist in increasing the costs, then the Courts will allow him the costs only of his first proceeding, and will even make *him pay* to his opponent the *subsequent* costs.(*i*) In short, it will in general be found that the judges, in the exercise of this discretionary jurisdiction, so de-

39. Of the  
*interlocutory*  
costs of motions  
and rules. (*f*)

(*d*) *Marshall v. Davison*, 2 Tyr. 315.

(*e*) *Pritchett v. Bovey*, 3 Tyr. 949.

(*f*) See in general Tidd, 503, 504 ;  
2 Arch. K. B. 4th ed. 888, 998.

(*g*) *Ante*, vol. iii. 29 to 32, 80, 81, and the Court in banc will not interfere with a single judge's jurisdiction or decision as to

costs, *Davy v. Brown*, 1 Bing. N. C. 460 ;  
1 Hodges, 22.

(*h*) Costs in general allowed when irregularity established, and why, per Damper, in notes, 1 Chitty's Rep. 399.

(*i*) *Ante*, 529, 530, 571, as to notice of irregularity and notice of motion.

CHAP. XVII.  
SECT. IV.  
OF MOTIONS  
AND RULES.

side as regards these interlocutory costs, as to convince practitioners that practically it is their better interest on all occasions at least to evince candour in taking technical objections. It has naturally occurred in a long course of practice, that although the jurisdiction over interlocutory costs is principally discretionary, yet a succession of decisions have established some few *general* principles and rules, most of which have been collected by Mr. Tidd ; (j) and it will here only be necessary to notice a few *other* rules or qualifications and *subsequent* decisions.

As respects rules nisi for *irregularity* it seems that unless costs be *expressly prayed*, i. e. the rule be drawn up *expressly requiring* the opponent to pay costs, it will not be made absolute *with costs*, because the Court can give no more than he asked ; (k) and in that case, if there was any reasonable ground for the rule, the Courts will, it is said, in general, in case they discharge it, do so *without costs*, (l) especially if it be discharged in consequence of some technical objection to the affidavit or rule nisi ; or they will sometimes order the costs to abide the event of the suit. Where there have been for some time reported decisions upon a matter of regularity, as, for instance, the requisites of an affidavit to hold to bail, and, in accordance with such decisions, a rule be made absolute for setting aside a bail-bond upon a similar defect in the affidavit, it will in general be *with costs*, because the practitioner had no excuse for his ignorance or inattention. (m) And where nothing is said about costs in the rule or by the Court on making it absolute, they are considered as costs in the cause, i. e. the party ultimately succeeding will then have his costs relating to such motion and rule, provided the rule be made *before* judgment ; (n) though if a rule be made *after* judgment, then no costs will be recoverable, unless expressly provided for by the rule. (o) When a counsel therefore moves for a rule nisi, and doubts his success, it is considered most prudent not to pray costs by the terms of the rule ; but when the *irregularity is clear*, costs

(j) Tidd, 9th ed. 503, 504 ; and see 2 Arch. K. B. 888, 998.

(k) Cook v. Allen, 3 Tyr. 380 ; Ryalls v. Emerson, 2 Crom. & M. 468 ; and per Bayley, B. in The King v. Sheriff of Middlesex, 2 Dowl. 5, "If the rule had prayed for costs, it would have been absolute with costs :—we cannot give you more than you ask ;—you asked all that was prudent. If the costs had been asked for, they would have been in the rule. I consider it as the clear

"and settled practice of the Court that we cannot give more than has been asked for. Where a party merely asks to set aside proceedings for irregularity, no costs are given." But see 3 Arch. K. B. 4 ed. 998.

(l) 1 Chitty's R. 399, note to Tomlin v. Preston, Tidd, 504 ; see also Drum v. Bowman, 3 Dowl. 161.

(m) Mollineux v. Dorman, 3 Dowl. 662.

(n) Tidd, 504.

(o) Id.

should be prayed, or they will not be obtained. (p) If a rule nisi be moved *with costs*, i. e. drawn up requiring the opponent to *pay costs*, and the rule be made absolute in the very terms of the rule nisi, either without cause shown, or without sufficient cause, or some peculiar circumstances of vexatious proceedings on the part of the applicant, established by affidavit, the rule will be absolute *with costs*, which must then be *immediately* paid by the party in the cause guilty of the irregularity. On the other hand, if a rule nisi for *irregularity* be drawn up *with costs*, and on cause being shown the applicant fail in his objection, or his affidavit in support of the rule nisi be informal, then it will in general be *discharged with costs*, and the party who moved will immediately have to pay to the opponent the costs he incurred in showing cause. (q) Indeed by the Reg. Mich. T. 37 Geo. 3, in K. B., it is expressly "*ordered that in all cases where a rule is obtained to show cause why proceedings should not be set aside for irregularity with costs, it is to be understood to be discharged with costs, and the latter rule must be drawn up accordingly.*"

Sometimes the rule absolute expressly directs that costs shall be paid to the applicant, and sometimes *by him*, although he succeed; in other cases the costs are directed to be costs in the cause, in which case they are not taxed or paid till the conclusion of the action; (r) sometimes also, when nothing is said about costs in the rule nisi, or on discharging the same, the costs of the application and of resisting the same are consequently costs in the cause. (s)

But as regards summonses, motions, and rules, upon subjects *subsequent* to the judgment, (t) or *collateral* to the action, the costs thereof cannot become costs in the cause, and therefore the party succeeding upon such a collateral proceeding should take care to apply for costs, and obtain them by the rule absolute, or the rule discharging the same; (u) as where a defendant was discharged out of custody on the ground of coverture, or arrest by a wrong name, the costs of the application not being costs in the cause, the defendant must endeavour to recover the same at the time the motion is disposed of. (u)

Where a rule nisi prays for several things, to some of which the party is entitled, and to others not, but cause is shown *against all*, no costs are in general given on either side, although

(p) *The King v. Sheriff of Middlesex*, 2 Dowl. 5, and ante, 598, (k).

(q) Per Lord Lyndhurst in *Blomfield v. Blake*, 2 Dowl. 275, and 1 Chitty's R. 399; *Tilley v. Henly*, 1 Chitty's R. 136, 137.

(r) *Read v. Coleman*, 2 Dowl. 354; *Rowe v. Rhodes*, 4 Tyr. 221.

(s) *Kidd v. Mason*, 3 Dowl. 98.

(t) *Tidd*, 504; ante, 598.

(u) *Mummery v. Campbell*, 2 Dowl. 798; 10 Bing. 511.

CHAP. XVII. if notice had been given that cause would be shown only against the untenable part of the rule, the party showing cause successfully would then have had costs. (x)

SECT. IV.  
OF MOTIONS  
AND RULES.

If both parties be wrong, as one in asking too much, and the other by tendering too little, then in general costs will not be given to either, but each must bear his own costs. (y) And if a rule proper in its terms and prayer, and not in *respect of a mere irregularity*, fail on account of a *technical objection* taken to the affidavit on which such rule was founded, the Court will discharge it without costs. (z) But if the rule be obtained in respect of a mere technical irregularity, as a defect in a writ of summons, and it appear that the affidavit in support of the application be defective, the rule nisi will be discharged with costs. (a) And if a rule nisi for contempt of Court be obtained on frivolous grounds, the Court will discharge it with costs. (b) So if a rule has been moved for either from a want of proper care in obtaining correct information, or from having received incorrect information, that is the misfortune of the applicant, but the opponent is not on that account to be brought before the Court by that which is only an experiment, and he ought to have his costs. (c) Where a *prisoner struggling for liberty* has obtained a rule nisi, which, on showing cause, is discharged, the Courts will not always subject him to costs. (d)

So where a doubtful and material point of practice is raised by a rule nisi, although the Court may discharge the rule, yet they will not in general subject the party moving it to costs; nor on the other hand make it absolute with costs. (e) And on setting aside a judge's order regularly obtained, the practice is not to make the party who obtained the order pay costs for endeavouring to sustain it; (f) and the same practice prevails as regards a motion and rule for the master to review his taxation; (g) for in both those cases the proceeding was sanctioned by proper authority, though ultimately not sustained.

If the Court or a judge expressly adjudicate upon the question of the costs of a summons, motion, or rule, the subject cannot again be discussed in an action or subsequent proceeding. (h) But we have just seen that where a party is by order

(x) *Alison v. Furnival*, 2 Dowl. 49; Tidd, 504; *M'Andrew v. Adam*, 1 Harr. & Wol. 270; 3 Dowl. 120, S. C.

(y) Per Ld. Lyndhurst, C.B. in *Whalley v. Barnett*, 2 Dowl. 33, 34.

(z) *Hosworth v. Hubbersty*, 1 Gale, 47; 3 Dowl. 455, 456.

(a) *Smith v. Crimp*, 1 Dowl. 519; *Macher v. Billing*, 4 Tyr. 812; ante, vol. iii. 78, note (x).

(b) *Wheeks v. Whiteley*, 3 Dowl. 536.

(c) Per Williams, J. in *Doe dem. Lam-*

*bert v. Roe*, 3 Dowl. 558.

(d) Per Taunton, J. in *Morley v. Hall*, 2 Dowl. 497.

(e) *Dawson v. Bowman*, 3 Dowl. 161.

(f) *Wigley v. Tomlins*, 3 Dowl. 9; *Nurse v. Geeting*, id. 158; *Hargrave v. Holden*, id. 176; *Lewis v. Dairymple*, id. 434; ante, vol. iii. 34, n. (g), 35, note (r).

(g) *Ward v. Bell*, 2 Dowl. 76; ante, vol. iii.

(h) *Loton v. Devereaux*, 3 Bar & Adol. 343; ante, vol. iii. 80, 81.

or rule discharged out of custody, but nothing said therein about costs, then in an action of trespass for false imprisonment the costs of the rule may be recovered as special damages. (g)

CHAP. XVII.  
SECT. IV.  
OF MOTIONS  
AND RULES.

Although a judgment by default has been signed strictly regularly, but merely because the special pleas had not been signed by counsel, a judge in vacation will set the judgment aside and direct that the costs shall be costs in the cause, because the plaintiff's attorney previously knew that the pleas had been settled by counsel and were pleaded by leave of the Court, and yet signed judgment without any previous notice of the objection to the pleas, or his intention to do so; the learned judge animadverted upon the signing judgment under such circumstances as reprehensible sharp practice, not entitling the attorney to immediate costs. (h)

We have before partially considered the jurisdiction of the Court in deciding upon a rule to impose terms. (i) In general if an application be made to either of the Courts to discharge a defendant out of custody on the ground of illegality or irregularity in the arrest, the Court, if they grant the application, will only do so on the terms of bringing no action, (k) or no action of *trespass* for false imprisonment, but leaving the defendant to bring an *action on the case* for a malicious arrest; but the Court has no right to impose the terms of bringing no action, if the proceedings were altogether void. (l)

40. Of the  
Court imposing  
terms.

When a rule is absolute for the payment of money, it is in general advisable that it should direct payment to the principal party, or to his attorney in the country, or to his attorney or agent in London, so that either may make a demand sufficient to sustain an attachment (m) and avoid the expense and difficulties sometimes incident to a demand by a person having a formal power of attorney.

41. Terms of  
the rule absolute.

In cases of difficulty or particularity sometimes the chief justice, or chief baron, or other judge of the Court, will himself oblige the counsel by framing the terms of the rule absolute. In all cases it is advisable for the counsel on each side, whilst the verbal decision of the Court is fresh in recollection, and whilst the Court is sitting, on the same day to agree upon the precise terms of the rule, and subscribe their names as in-

(g) *Pritchett v. Bossey*, 3 Tyr. 949; ante, vol. iii. 80, 81.

(h) ———, assignees, &c. v. ———, Exchequer, cor. Gurney, B. July, 1835.

(i) *Ante*, part v., vol. iii. p. 280.

(k) Per Alderson, B. in *Reddell v. Pake-man*, 3 Dowl. 721; 1 Gale, 104, S. C.

(l) Per Alderson, B. in *Reddell v. Pake-man*, 3 Dowl. 721.

(m) *Dennell v. Pass*, 3 Dowl. 632.

CHAP. XVII.  
SECT. IV.  
OF MOTIONS  
AND RULES.

structions to the officer of the Court; and in cases of doubt in the exact terms of the decision, the matter may be shortly mentioned to the Court on the same day. And as a further precaution, it is recommended to practitioners, before they serve any rule of importance, to ascertain from their counsel whether the rule has been properly framed.

42. Notice of  
and appoint-  
ment for taxing  
interlocutory  
costs.

In general by Reg. Gen. Trin. T. 1 W. 4, reg. 12, "before *taxation of costs one day's notice* is to be given to the opposite party."<sup>(n)</sup> But by Reg. Gen. Hil. T. 4 W. 4, reg. 17, "notice of taxing costs shall not be necessary in any case where *the defendant has not appeared* in person, or by his attorney or guardian, notwithstanding the above rule."<sup>(o)</sup> And this rule being considered directory only, the omission to give the notice does not ipso facto render a judgment and execution void.<sup>(p)</sup> And by Reg. Gen. Hil. T. 2 W. 4, r. 92, "one appointment only shall be deemed necessary for proceeding in *the taxation of costs, or of an attorney's bill.*"<sup>(q)</sup> It seems that at least in the Exchequer no fee is payable to the master for his taxation.<sup>(r)</sup>

43. The master's  
allocatur of  
costs.

The master or prothonotary having taxed the costs and fixed the amount, he dates and signs what is termed his *allocatur*, stating the amount in one aggregate sum, as thus: "I allow £——. Le Blanc. — August, 1835." Such allocatur belongs to the party in whose favour it has been made, though the opponent may perhaps be entitled to keep a copy; and upon motion to the Court a rule nisi may be obtained and made absolute for compelling the delivery of such allocatur to the proper party.<sup>(s)</sup>

If either party be dissatisfied with the amount, he must make *affidavit* of the master having made his allocatur,<sup>(t)</sup> and in such affidavit state the *particular items* which are incorrect, and in what respect, and then pray a rule for reducing or otherwise altering the amount of the costs.<sup>(u)</sup>

44. Of enforcing  
payment of in-  
terlocutory  
costs by attach-  
ment.<sup>(x)</sup>

The usual mode of enforcing payment of interlocutory costs is by *attachment*, though sometimes they may be recovered by action. In order to proceed by attachment the order must afterwards be made a rule of Court, and the rule must be *absolute and imperative* for the payment of costs, for if either be only

(n) Jervis's Rules, 31, note (y).

(o) Jervis's Rules, 98; *Clark v. Jones*, 3 Dowl. 277.

(p) *Perry v. Turner*, 2 Tyr. 128; 2 Crom. & J. 89, S. C.

(q) Jervis's Rules, 68, note (p).

(r) Per Parke, B., *Eudes v. Everatt*, 3

Dowl. 690.

(s) *Doe v. Robinson*, 2 Dowl. 503.

(t) *Cleaver v. Hargrave*, 2 Dowl. 689.

(u) *Clarke v. Jones*, 3 Dowl. 277.

(x) See the practice as to enforcing an award by attachment, *ante*, vol. ii. part iii. 122 to 124.

conditional no attachment lies, although the party has availed himself of so much of the rule as was in his favour, but refused to perform the other part.(x) The judge's order made a rule of Court must also contain an express order to pay.(y) In order to proceed by attachment *all* judge's orders in any way connected with the adjudication of costs, and the master's allocatur, must first be made rules of Court, because it is only the non-observance of the unqualified direction of *the Court in banc* that constitutes the *contempt* to be punished by attachment.(z) Therefore, where the demand of payment of costs was made before the master's allocatur had been made a rule of Court, the motion for an attachment for nonpayment was refused,(z) and if inadvertently, without making certain essential judge's orders rules of Court, an attachment be obtained, it will be set aside; but after making such judge's orders rules of Court, and producing to the party *personally* such rules and the original allocatur, and leaving copies of each document, and again demanding payment, an attachment may then, upon an affidavit of such last service, be regularly obtained.(a)

As respects any *rules of Court*, upon which the allocatur is founded, great accuracy is essential, and the *copies thereof* must be faithfully correct; and, therefore, where in an action against Calvert the copy of the rule served omitted the *t*, an attachment obtained for non-observance was set aside as irregular, with costs, although the party had promised to pay.(b)

45. Care to be observed in served copies of rules.

A *personal service* of the original rule and allocatur, and a *personal demand* made by a party entitled to receive of the party bound to pay or deliver, is always essential to perfect the contempt of Court, and, as we have seen, cannot be dispensed with,(c) and this as well in proceedings against an attorney as in other cases.(d) And all these formalities should *concur at the same time*, and not some at one time, and others subsequently.(e) But if the party to be served knock down the person who has nearly completed the service and explained his purpose,(f) or close the door of a house upon him, and then

46. Of personal service of rules and allocatur, and leaving copies of each.

(x) *Ress v. Fenn*, 2 Dowl. 182; *Turner v. Gill*, 3 Dowl. 30; *Ex parte Townley*, *id.* 39; see as to conditional judge's order, ante, 566, 567.

(y) *Ryalls v. Emerson*, *id.* 357; 2 Cr. & M. 467.

(z) *Chilton v. Ellis*, 2 Crom. & M. 459; 2 Dowl. 338, S. C.; *Ryalls v. Emerson*, 2 Crom. & M. 467; *Woollison v. Hodgson*, 3 Dowl. 178.

(a) *Ryalls v. Emerson*, 2 Crom. & M. 464.

(b) *Rex v. Calvert*, 2 Crom. & M. 189.

(c) *Ante*, 584, 585; *Dicas v. Warne*, 1 Hodges, 91.

(d) *Albin v. Toomer*, 3 Dowl. 563.

(e) *Ex parte Lowe*, 4 Bar. & Ald. 412; *Rogers v. Twisdale*, 3 Dowl. 572.

(f) *Wenham v. Downes*, 3 Dowl. 573.

CHAP. XVII.  
SECT. IV.  
OF MOTIONS  
AND RULES.

the documents are placed under the door, (g) or if a complete service be prevented by fraud, (h) or where the documents have certainly come to the hands and knowledge of the proper party, (i) either of these circumstances may dispense with the usual formula.

In general the *original* rule and *original* allocatur must be shown to the party required to pay, (k) at the *very same time* (l) as the legal and authorized demand of payment or performance of other directed act, and such *original* rule and allocatur should be so produced and shown, that the party thereby called upon to pay *may be able to read it*; but it need not be placed in his hand or parted with; (m) and where the party endeavouring to serve the defendant went to his house and knocked at his door, and the defendant thereupon came to it, and the deponent then showed him the original rule and allocatur indorsed, and demanded the amount of costs claimed on the allocatur, and the defendant then shut the door in the deponent's face, declaring that he would not be served, and the deponent then pushed a copy of the rule and allocatur under the door and came away, these facts were holden sufficient to authorize the Court in granting an attachment; (n) and when the party sought to be served, by his violence, as by knocking the party down, prevented the personal service or demand, he thereby dispensed with the same, and an attachment may be issued. (o) And when it is clear that the copy of a rule and allocatur have actually come to the possession of the defendant an attorney, the Court will grant a rule nisi for an attachment, although *strict personal* service had not been effected. (p) An exact copy of all requisite rules, *enlargements*, &c. must also be personally produced to and left with the party at the time of the demand of payment, and the mere leaving a copy with the servant of the party, after showing the original rules to him, will not suffice. (q) But where a party against whom a rule nisi for an attachment had been obtained appeared, and objected that such rule nisi had not been *personally* served, the Court notwithstanding made the rule absolute, because in this case the contempt for which the attachment was prayed,

(g) *Rex v. Koops*, 3 Dowl. 566.

(h) *Doe d. Frith v. Roe*, 3 Dowl. 569, *sed quære*.

(i) *Phillips v. Hutchinson*, 3 Dowl. 585, a rule nisi granted.

(k) *Parker v. Burgess*, 3 Nev. & Man. 36.

(l) See 603, note (c).

(m) *Calvert v. Redfearn*, 2 Dowl. 505.

(n) *Rex v. Koops*, 3 Dowl. 566.

(o) *Wenham v. Downes*, 3 Dowl. 537.

(p) *Phillips v. Hutchinson*, 3 Dowl. 585.

(q) *Parker v. Burgess*, 3 Nev. & Man. 36.



was in not obeying a *previous* rule which had been personally served, which distinguished this case from the general rule. (r)

CHAP. XVII.  
SECT. IV.  
OF MOTIONS  
AND RULES.

There must be a *personal demand* of the costs made even of an attorney before an attachment, though now in the Exchequer no subpœna for the costs is necessary. (s) The demand should be personally in the *presence* and *hearing* of the party who is to pay, and, therefore, service by leaving the allocatur with the daughter of the party, he being then in the house, will not suffice, and Per Lord Lyndhurst, C.B., "It is much better in cases of this kind, where the liberty of the subject is so deeply concerned, to adhere to the strict rule that personal service should be required." (t) The demand must also be made *by at least one of the persons named in the rule to whom* payment is to be made, or a document delivered, and not by a person acting on his behalf, but not expressly named in the rule. (t) If by the terms of the rule the payment is to be made *to the plaintiff, or his attorney, or agent*, a demand by the attorney's clerk will not suffice. (u) But in such a case a demand made by the attorney in the country, if properly concerned, will suffice; (x) and in order to obtain an attachment for nonpayment of costs, pursuant to the master's allocatur, it must expressly appear by the *affidavit* on which the motion is founded, that the persons who demanded the payment were the identical persons named in the allocatur to whom the payment should have been made. (y)

47. *Personal demand* by a party entitled to receive payment.

If the demand of payment be made by an agent of a person named in the rule, then, unless such agent be particularly identified by the terms of the rule, he must have a regular power of attorney under seal, authorizing him to receive, and the original power must be produced, and a copy left, and besides the original rules and allocatur the execution of the power of attorney must be verified, and the due service of all these, and a demand by the agent, at the time sworn to. (z)

A fortiori it is necessary that the demand should be made personally by one of the parties *to receive upon the party*

(r) *Lavy v. Duncombe*, 1 Gale, 60; 3 Dowl. 447, S. C.

(s) *Doe v. Barker*, 3 Dowl. 217.

(t) *Stannell v. Tower*, 1 Crom. M. & R. 88; and *Parker v. Burgess*, 3 Nev. & Man. 36; *Woollison v. Hodson*, 3 Dowl. 178, overruling *Green v. Prosser*, 2 Dowl. 99; and *Allier v. Newton*, *id.* 582; and see *Dicas v. Warne*, 1 Hodges, 91.

(u) *Ex parte Fortescue*, 2 Dowl. 448; *France v. Wright*, 3 Dowl. 325; *Harley v. Burlow*, 1 Chitty's Rep. 229, cited and approved in *Dennell v. Pass*, 3 Dowl. 632, 633.

(x) *Dennell v. Pass*, 3 Dowl. 632.

(y) *France v. Wright*, 3 Dowl. 325.

(z) *King v. Packwood*, 2 Dowl. 570; *ante*, part iii. vol. ii. p. 123.

CHAP. XVII.  
SECT. IV.  
OF MOTIONS  
AND RULES.

*himself*, who has been ordered to pay or deliver; and, therefore, where a judge's order directed that on payment or tender of the debt and costs to the plaintiffs, their attorney, or agent, *the plaintiffs should deliver up to the defendant* certain deeds; and an attachment was moved for on an affidavit that the money was tendered to *the plaintiff's attorney's agent*, and the deeds demanded, but they had not been delivered: it was held, that the *affidavit* was insufficient, and that notice should have been given to the plaintiffs that the money had been tendered to the agent, and then *a demand made personally upon them*. (a) It is advisable that a demand and performance of the terms of a rule be made recently before the application for an attachment for the non-performance; if, however, the contempt was incurred on the 2d of February, by nonpayment of costs then demanded, it is not too late to move on the 22d of April following. (b)

48. Affidavit of service and motion and rule for attachment when nisi only, or when absolute in first instance.

The only effect of the *personal service* of the original rules and copies, and demand of the money or performance of any other act, is to *perfect or complete* the contempt; but still, before an attachment for such contempt can be obtained, the party desirous to obtain the same must make *affidavit* of the regular service of the rules and copies, and demand, and before moving the Court for an attachment, and which motion should be made within a reasonable time after the contempt was incurred; though if it were incurred by nonpayment of costs in February, the motion may be made in the following April. (c) Even then, by the practice of all the three superior Courts, the party can, on application for an attachment for non-payment of costs, pursuant to the master's allocatur *between attorney and client*, only obtain a *rule nisi* in the first instance, though it is otherwise when between party and party; (d) and a rule for an attachment for nonpayment of costs between attorney and client is only nisi; though when the motion is for nonpayment of costs between party and party it is absolute in the first instance. (e) But by Reg. Trin. T. 17 Geo. 3, in King's Bench, it was ordered, "That attachments shall be absolute in the first instance only in the three following cases, viz. *first*, for nonpayment of costs on the master's allocatur; *se-*

(a) *Evans and wife v. Millard*, 3 Dowl. 661.

(b) *Rex v. Rogers*, 3 Dowl. 605.

(c) *Id.*

(d) *Spragg v. Willis*, 2 Dowl. 551; *Green v. Sight*, 3 Dowl. 578; ante, 576, 7.

(e) *Boomer v. Mellon*, 2 Dowl. 553; *Green v. Sight*, 3 Dowl. 578; ante, 577.

"*condly*, against a sheriff for not obeying a peremptory rule to return a writ, or to bring in the body; and, *thirdly*, for contempt of the Court in the execution of the process of the Court:" (*f*) and a party cannot have a rule absolute in the first instance for an attachment for not paying costs pursuant to a rule of Court where those costs form part of a rule, for disobedience of which a rule nisi only for an attachment can be granted. (*g*)

CHAP. XVII.  
SECT. IV.  
OF MOTIONS  
AND RULES.

Bankruptcy and *certificate* are sometimes a discharge from liability to be attached merely for nonpayment of costs, but in other cases not so: (*h*) and a person arrested or imprisoned under an attachment for contempt in non-payment of money pursuant to a rule of Court, is not entitled to be discharged upon tendering the amount to the officer. (*i*)

49. Execution of attachment, and who exempt or discharged.

It is a general rule, that *interlocutory costs* are not recoverable by action, at least when the order or rule under which the same were payable was pronounced in *invitum*, and not under circumstances from which an *agreement* to pay such costs could be inferred. (*k*) But if an order or rule for payment of costs be by *consent*, an action may then be sustained, (*l*) or the amount of the costs may be proved as a debt under a fiat in bankruptcy. (*m*)

50. Interlocutory costs when or not recoverable by action.

By Reg. Gen. Hil. T. 2 W. 4, reg. 93, it was ordered "that no set-off of damages or costs between parties shall be allowed to the prejudice of the attorney's lien for costs in the particular suit against which the set-off is sought; *provided*, nevertheless, that *interlocutory costs in the same suit* awarded to the adverse party may be deducted." This assimilated the practice of Common Pleas and Exchequer to that of King's Bench. (*n*) So that under such a proviso a party to an action has an absolute right to set off or deduct

51. Setting off interlocutory costs, when.

(*f*) *Godbey v. Dewes*, 2 Dowl. 747; 3 M. & Scott, 556. On a return of a rescue a motion for an attachment is absolute in first instance.

(*g*) *Ex parte Townley*, 3 Dowl. 39. But see *Ex parte Grant*, *id.* 320.

(*h*) *Jacobs v. Phillips*, 1 Crom. M. & Ros. 195; 2 Dowl. 716; but see *Ex parte Grant*, *id.* 320.

(*i*) *Pitt v. Coombes*, 3 Nev. & Man. 212.

(*k*) *Emerson v. Lashley*, 2 Hen. Bla. 248; *Jacobs v. Phillips*, 1 Cr. M. & R. 195; *Wentworth v. Bullen*, 9 Bar. & Cres. 850.

(*l*) Per Parke, B. in *Wentworth v. Bullen*, 9 Bar. & Cres. 850; *Porter v. Cooper*, 1 Cr. M. & Ros. 387.

(*m*) *Ryley v. Byrne*, 2 B. & Adol. 779.

(*n*) Tidd 339, 680, 992.

CHAP. XVII.  
SECT. IV.  
OF MOTIONS  
AND RULES.

---

the amount of *interlocutory* costs adjudged in his favour in any stage of the *same action* against similar costs that may have been adjudged against him in that action, (o) although in other cases of cross actions the lien of the attorney must be first satisfied. But still the attorney's lien on the costs of the action are subject to a set-off of interlocutory costs in the same action. (p)

---

(o) *Ellis v. Bates*, 2 Cr. & M. 143;  
*George v. Elston and others*, 1 Bing. N. C.  
513. But costs in equity cannot be set off

against those of a rule at law, *Wenham v. Fowle*, 2 Dowl. 444.  
(p) *Eades v. Eoratt*, 3 Dowl. 687.

---

## CHAPTER XVIII.

THE PRINCIPAL PROCEEDINGS BY A DEFENDANT BETWEEN  
DECLARATION AND PLEA.

I. Of taking the declaration when filed out of the office .....	610	XVII. Do. staying proceedings on ground of claim or action being frivolous, or for too small a sum.....	633
II. Of obtaining particulars of plaintiff's demand .....	611	XVIII. Do. staying proceedings until security for costs, plaintiff being abroad .....	ib.
III. Of demandingoyer, &c.....	618	XIX. Do. staying proceedings until security for costs, plaintiff being insolvent.....	635
IV. Of inspection of public and private documents, &c.....	619	XX. Do. staying proceedings in ejectment or penal action till plaintiff's residence be stated or security for costs.....	636
V. Of Proceedings under interpleader act .....	620	XXI. Do. until payment of costs of a prior action .....	ib.
VI. Of bills of interpleader in equity .....	627	XXII. Do. for staying proceedings under other particular statutes .....	637
VII. Of injunction bills to stay proceedings at law .....	ib.	XXIII. Staying proceedings in other cases not before enumerated .....	ib.
VIII. Of bills for discovery, &c....	ib.	XXIV. When without consent the Court or a judge has no power to stay proceedings on unusual terms, &c. ....	ib.
IX. Motions and rules at law for staying proceedings on ground of plaintiff's ignorance of the proceedings, or incapacity, &c. ....	628	XV. Of summons and motion to strike out superfluous or scandalous matter, or second counts .....	638
X. Do. staying proceedings on penal statute not authorized ...	629	XXVI. Of reducing the length of pleadings by agreement, and rule thereon .....	642
XI. Do. staying proceedings, want of authority to attorney to act..	ib.	XXVII. Of motions to consolidate, and of consolidation rules...	643
XII. Do. staying proceedings on ground that no debt is due..	640	XXVIII. Of proceedings by defendant to change venue .....	646
XIII. Do. staying proceedings when several concurrent actions pending for same cause....	631		
XIV. Do. staying proceedings in a second action, after former recovery or defeat .....	632		
XV. Do. when or not proceedings at law stayed to render available a defence or relief in equity .....	ib.		
XVI. Do. staying proceedings when contrary to agreement or good faith .....	633		

HAVING in the last chapter examined the subjects of *Irregularities* and *Nullities*, and endeavoured to explain the modes of objecting to them, and of sustaining other applications by *Affidavits*, *Summons* and *Orders*, *Motions* and *Rules Nisi*, afterwards made *Absolute*, enforced by *Attachments*; we will now consider the principal *Occasional Proceedings* between declaration and plea, chiefly on the part of a defendant, and which are usually adopted *before he resolves* whether he will *submit* to the action by compromise or suffering judgment by default, or giving a *cognovit* or warrant of attorney, or whether he will *defend* the action by *pleading* or *demurring*, and either *argue an issue of law* before the Court or *try an issue in fact*

## CHAP. XVIII.

I. TAKING  
DECLARATION  
OUT OF OFFICE.

Of the adoption of one of the several *occasional proceedings* between declaration and plea.

## CHAP. XVIII.

I. TAKING  
DECLARATION  
OUT OF OFFICE.

Consideration whether the application shall be by summons or by motion.

Expediency of praying an intermediate stay of proceedings pending any application.

I. Of taking the declaration when filed out of the office.

before a jury. The principal of these occasional proceedings will be found enumerated in the above analytical table, and the *most recent rules and decisions* applicable to each will be stated under the subdivisions.

After having resolved to adopt one or more of these intermediate proceedings, the *next question* relates to the *mode of application*; i. e. whether it shall be by *summons* returnable before a *judge* at chambers and to be decided upon by his *order*, or whether it shall be by *petition*, or by *affidavit* and *motion* to the *Court in banc* for a rule nisi, afterwards to be made absolute, and whether to the Practice Court or to the Court in banc. The general application of these have been considered in the previous chapter; but their practical application to occasional proceedings may be farther examined in this.

For fear that the proceeding should not succeed, and that when decided, the defendant's time for pleading or rejoining, &c. should have elapsed, whereby he might lose the opportunity of trying the merits, it is in general essential for the defendant to endeavour to have his summons or rule nisi relating to any subject drawn up *with a stay of proceedings at all events until the particular application* has been disposed of, and, if possible, until the expiration of as many days, *or as much time* after that event as the party applying had at the time of his application. The cases when or not a stay of proceedings can be obtained have already been fully considered. (a)

I. TAKING DECLARATION OUT OF OFFICE.—Supposing that after the plaintiff has declared there has not been any irregularity in his proceedings that can still be objected to, or that the defendant resolves not to take advantage thereof, then if the declaration has been *filed*, and notice thereof given, the *first proceeding* on the part of a defendant seems to be his taking the declaration so filed out of the office. This act, and the payment for the same, is indispensable before the defendant can plead; (b) and if the defendant plead without having done so, the plaintiff may treat the plea as a nullity and sign judgment by default, as for want of a plea, without even demanding a plea. (c) On the other hand it must be kept in view, that by taking the declaration out of the office when filed, the defendant waives all objections to the affidavit and process, (d)

(a) *Ante*, 551 to 553, 557, 558, 582.

(b) *White v. Dent*, 1 Bos. & Pul. 341;  
*Keeling v. Newton*, 1 Wils. 173; *Bond v.*  
*Smart*, 1 Chitty's R. 735.

(c) *Bond v. Smart*, 1 Chitty's R. 476.  
566.

(d) *Caswall v. Martin*, 2 Stra. 1072.

and to any variance between the notice of declaration and the declaration itself; (e) and also to the declaration having been filed conditionally instead of absolutely. However the defendant's attorney is usually allowed at the office where it has been filed, to see the exterior of the declaration, and consequently the indorsements. (f) And we have seen that neither that act, nor his having ascertained from the officer its contents, waives the right to object to the irregularity. (g)

CHAP. XVIII.

I. TAKING  
DECLARATION  
OUT OF OFFICE.

II. OF PARTICULARS OF DEMAND.—Whether a declaration has been delivered or filed, the most usual proceeding on the part of the defendant, is to endeavour to ascertain with *more certainty* the exact extent of the aggregate claim, as also the items with dates of the plaintiff's demand, and for that purpose the defendant may, using the technical terms, "*take out a summons for the particulars of the plaintiff's demand*;" or he may "*crave oyer of any deed*" declared upon, and of which *proferet* has necessarily been made in the declaration; or he may apply for and obtain in certain cases "*inspection*" of a public or private document.

II. Of obtaining particulars of plaintiff's demand. (h)

A defendant may now in all the Courts take out a summons for and obtain *particulars* of the plaintiff's demand *immediately after he has been served with process or arrested, and before appearance*, and this without any affidavit of his ignorance of the nature of the plaintiff's demand, although in the Exchequer such affidavit was formerly indispensable; indeed it seems reasonable, when the writ is so general, as is now always the case under the uniformity of process act, 2 W. 4, c. 39, that the defendant should, at the earliest stage, have the means of ascertaining the exact claim, so as to satisfy the same without incurring further costs, if he find he have no defence, or plead to and defend the claim when disputed. (i) There is, however, a modern rule in K. B., that no order be made in any action depending in that Court to compel the delivery of particulars of the plaintiff's demand, unless the defendant, in the event of pleading, *do by such order undertake to plead issuably*, or the plaintiff's attorney, by

At what time particulars may be applied for,

So, when pleas were filed, it was held that taking a plea out of the office and keeping it, waived an objection that it was pleaded in name of a fresh attorney, without a previous order to change. *Margerum v. Makilwaine*, 2 New Rep. 508; *ante*, 520.

(e) *Robins v. Richards*, 1 Dowl. 378.

(f) *Gilbert v. Kirkland*, 1 Dowl. 153, and *Robins v. Richards*, *id.* 379; *ante*,

440.

(g) *Id. ibid.*; *ante*, 440.

(h) See in general Tidd, 9th ed. 596 to 601; 2 Arch. K. B. 4th ed. 875 to 882; 2 Arch. C. P. [47, 48, 69, 99,] 224.

(i) Reg. Gen. Hil. T. 2 W. 4, c. 47; Jervis's Rules, 54, note (w); Dax, Prac. 59; *Derry v. Lloyd*, 1 Chitty's R. 724; Reg. Trin. T. 2 G. 4, C. P.; 6 Moore, 211.

CHAP. XVIII.  
II. PARTICULARS OF  
DEMAND.

special indorsement, consent to waive the same; (*k*) and it is usual in K. B., upon granting an order, to require from the defendant some admission, as the signature to a note, &c. (*l*) It would seem, therefore, inexpedient, at least in K. B., for a defendant to apply for particulars, unless it be certain that he will be advised to plead issuably, and not in abatement, nor object to be subjected to any reasonable terms. Although the application for particulars should properly be made before pleading, yet a defendant may, under circumstances, apply for and obtain them even after issue joined: (*m*)

Origin of practice of ordering particulars.

The practice of requiring such particulars is comparatively of modern date, and probably attributable to the adoption of *general indebitatus* and quantum meruit counts, also comparatively of modern date, and not to be found in the ancient entries, as we find that declarations for even most ordinary services and works were formerly special. (*n*) It is observable that common counts, as for goods sold, or for work and materials found, may and frequently do embrace numerous transactions that took place at different times and upon different contracts, wholly independent of each other, and of which the form of the declaration affords the defendant in effect no information. It has therefore, since the introduction of those counts, and principally to prevent inconvenience and surprise from them, been the practice, at the instance of a defendant upon a summons, for one of the learned judges, as a matter of course, to order the plaintiff to deliver to the defendant *particulars* of his claim.

Reg. Gen. Trin. T. 1 W. 4, particulars when to accompany declaration, and be annexed to the record.

However, before the Reg. Gen. Trin. T. 1 W. 4, the plaintiff was not required in any case to deliver any particulars until the defendant had obtained *an order* for that purpose. But that rule ordered, "that *with every declaration, if delivered*, or with the *notice* of declaration, if filed, containing "counts in *indebitatus assumpsit*, or *debt on simple contract*, "the plaintiff shall deliver *full particulars* of his demand under "those counts, where such particulars can be comprised within "three folios; and where the same cannot be comprised within "three folios, he shall deliver such *a statement* of the nature of "his claim, and the amount of the sum or balance which he "claims to be due, as may be comprised within that number of

(*k*) Reg. Hil. T. 59 Geo. 3, K. B.; Tidd, 597.

(*l*) Tidd, 597.

(*m*) Impey, K. B. 239.

(*n*) *Osborne v. Rogers*, 1 Saund. 264.

Lord Holt observed, that he was a bold man who first adopted such common counts, 2 Stra. 933; 1 Saund. 269 a, note 2.



"folios. (o) And to secure the delivery of particulars in all such cases, it is further ordered, that if any declaration or notice shall be delivered without such particulars or such statement as aforesaid, and a judge shall afterwards order a delivery of particulars, the plaintiff shall not be allowed any costs in respect of any summons, for the purpose of obtaining such order, or of the particulars he may afterwards deliver. . . . And that a copy of the particulars of the demand, and also particulars (if any) of the defendant's set-off, shall be annexed by the plaintiff's attorney to every record at the time it is entered with the judge's marshal." This rule is calculated to induce a plaintiff strictly to comply with its directions, because by delivering the particulars with the declaration or notice, the expense or fee of preparing such particulars would be costs in the cause, to be paid to the plaintiff, if he succeed; but if in violation of the rule no particulars be delivered, and the defendant afterwards obtain a summons and order for particulars, then the plaintiff will not be paid at any time the expenses of preparing the same. And as respects the direction that a copy of the particulars be annexed to the record of nisi prius, the omission would constitute an irregularity, and the judge might refuse to try the cause, or at least to receive evidence in support of the indebitatus counts; whereas it has been held, that when the particulars have been so appended to the record, they are thereby so far authenticated, that the delivery of them need not be proved on the trial, and thus the plaintiff saves some risk in evidence. (p)

It will be observed, however, that this rule only applies when a declaration contains an indebitatus count in *assumpsit* or *debt*, and there are many other claims in which it may be still necessary or advisable, by summons and order, to obtain full particulars. A judge may certainly order particulars in every description of action when justice requires, as in an action of *assumpsit* against a vendor for not making out a sufficient title to the property sold, a particular of the *objections to the title* may be ordered. (q) And in ejectment for a forfeiture, a particular of the *covenants broken and of the breaches*, may also be ordered; (r) and as the object of obtaining them is not merely to ascertain the extent of the claim and pay it, but also to plead

CHAP. XVIII.  
II. PARTICULARS OF DEMAND.

Consequence of not delivering them that plaintiff shall not be allowed any costs of a subsequent summons and order for a delivery of particulars.

Copy of particulars of demand or of set-off to be annexed to the record.

When an order for particulars may be obtained

(o) *Semble*, that the first part of this rule would render a noncompliance with its directions an irregularity and ground for setting aside the delivery of the declaration or notice thereof, without the

prescribed particulars.

(p) *Macarty v. Smith*, 8 Bing. 145; 1 M. & Scott, 227; 1 Dowl. 233, S. C.

(q) 3 Bos. & P. 46; 1 Campb. 293.

(r) 6 T. R. 597; 7 T. R. 332.

CHAP. XVIII.  
II. PARTICULARS OF  
DEMAND.

with precision to each part of the claim, and to be *prepared with proper evidence* on the trial, to meet every part of the plaintiff's case, it would seem just to compel the plaintiff, in all cases, to specify each item of his claim, whatever may be the form of declaration. However, in a late case of an action of covenant against an author for *not improving* according to express covenant, to the best of his skill, five works, consisting of several thousand pages, and for publishing three other works containing several thousand pages pretended to be piracies and imitations of parts of the first-named works, a learned judge refused an order for particulars, naming the pages or parts of each work on which the plaintiff intended to rely, though it was urged that it would otherwise be impracticable for the defendant or his attorney, or counsel on the trial, to be prepared for a just defence, because the plaintiff might suddenly, on the trial, select one of the many thousand pages as a breach of the covenant. (s)

Where a particular of demand, stating dates and items fully, exceeded three folios, and the plaintiff gave notice to the defendant accordingly under the above Reg. Gen. Trin. T. 1 W. 4, the Court ordered a full particular to be delivered to the *defendant on payment of costs* and taking short notice of trial, if necessary, though he had had full particulars before the action was brought. (t) And in another case, where particulars of demand had been delivered under a judge's order, and another differing bill of particulars was afterwards annexed to the record by the plaintiff's attorney, as in pursuance of Reg. Gen. Trin. T. 1 W. 4, and as a copy of the particulars of demand, but in fact containing items not originally stated in the particulars delivered to the defendant; and the plaintiff's evidence at the trial was confined to the items exclusively set forth in the particular annexed to the record, and therefore the defendant's counsel not being prepared to prove the delivery of the particulars to the defendant's attorney under the judge's order, did not then apply for a nonsuit, the Court afterwards granted a new trial without costs, but refused to enter a nonsuit. (u)

Requisites of  
particulars of  
plaintiff's de-  
mand. (x)

It is advisable for the plaintiff's attorney, at the time he instructs counsel or a pleader to prepare the declaration, also to draw the *particulars* of the plaintiff's demand; and although

(s) *Brooke v. Chitty*, C. P. January, A. D. 1835, coram Bosanquet, J. The learned judge stated that the defendant must be supposed to know whether and in what respects he had omitted any improvements, or had been guilty of piracy, and therefore thought the general breach sufficient.

(t) *James, Gent. v. Child*, 2 Tyr. 308; 2 Crompt. & J. 252, S. C.

(u) *Morgan v. Harris*, 2 Tyr. 385; 2 Crompt. & J. 461, S. C.

(x) See Tidd, 9th ed. 596 to 601; 2 Arch. K. B. 4th ed. 675 to 682; 2 Arch. C. P. 226.

the latter is a mere practical form, and could not, if defective, in any case be *demurred* to, yet great care is essential in *accurately stating the nature of the claim as it will certainly be proved in evidence*, and sometimes even greater care is required in framing particulars than in drawing a declaration; and it may be still advisable to describe the claim in varying statements similar to several counts, when they were permitted. Thus, where the particulars stated that the plaintiff's demand was for goods sold and delivered *to the defendant*, (instead of for money received to his use,) the *plaintiff* was not allowed to give evidence of goods sold *by the defendant as agent for the plaintiff*, and that he was debtor to the plaintiff for the proceeds, and yet it could not be doubted the defendant well knew for what claim the plaintiff was proceeding. (y) And though the Court gave leave to amend the particulars, and granted a new trial on payment of costs, yet the latter were disastrous. (y) And in a very late case, where the declaration was for *goods sold* and on an account stated, without a count for money received to the plaintiff's use, and the particulars delivered with the notice of declaration, were, "*to a beast sold and delivered,*" and the evidence was that the defendant told a third person that he owed the plaintiff 13*l.* 10*s.*, without saying on what account, it was held that the plaintiff could not recover on the count for goods sold, because the evidence did not establish a debt for *goods sold*, nor on the account stated, because such admission to a *third person* of a debt for a *single* item was not applicable to an account stated, and there was not any count for money had and received. (z) But although the particulars of demand vary from the evidence which the plaintiff adduces in some respects, yet if the defendant appeared at the trial and defended, and was *not really misled*, the variance will be no ground of nonsuit. (a)

CHAP. XVIII.  
II. PARTICULARS OF  
DEMAND.

If the defendant find the particulars defective, as too indistinct, he may on summons obtain an order for *better particulars*, stating dates, &c. on his praying for the same. And in an action on an attorney's bill, the defendant would only have to pay the cost of fair copying such particulars, it being the duty of an attorney to keep a detailed account of the business transacted for his client. (b)

(y) *Holland v. Hopkins*, 2 Bos. & Pul. 243; 3 Esp. 168, 8. C.

(z) *Breckon v. Smith*, 1 Adol. & El. 488. *Scoble*, that case turned upon there being no applicable count in the declaration. See *Spencer v. Bates*, 1 Gale, 108.

(a) *Spencer v. Bates*, 1 Gale, 108; *Green v. Clark*, 3 Dowl. 18; 2 Taunt. 224; 1 Camp. 69; 3 Maule & Sel. 380.

(b) *Jones v. Roberts*, 4 Tyr. 310, but not put on that ground.

## CHAP. XVIII.

## II. PARTICULARS OF DEMAND.

Forms of particulars of plaintiff's demand.

The *form of particulars*, whether to *accompany* the declaration or notice thereof, in pursuance of the above Reg. Gen. Trin. T. 1 W. 4, r. 6, or to be *delivered* in pursuance of a *judge's order*, must necessarily vary according to the facts of each case; the forms in the note may assist. (c) The claim

(c) In the King's Bench [or "Common Pleas," or "Exchequer of Pleas."]

Between { A. B. Plaintiff,  
and  
C. D. Defendant.

The full particulars of the plaintiff's demand under the counts in indebitatus assumpsit in the declaration in this cause are as follows, viz. for

Butcher's meat sold and delivered by the plaintiff to the defendant [or for]

Clothes sold and delivered, and tailor's materials found and provided by plaintiff or defendant [or for]

Making dresses and other articles of dress for the wife of the defendant and others at his request.

And the *items* of such demand are as follows:

	s.	d.
A. D. 1835, Jan. 1, beef 9½ lb. at 8d. . . . .	7	4
3, leg of mutton, 11 lb. at 7½ . . . . .	8	1½
&c. &c.		

[Here copy the whole bill when the same with the above words will not exceed three folios, (or three times seventy-two words, which constitute a law folio,) and which may be copied in two columns.]

Dated this — day of — A. D. 1835.

To Mr. J. K. Defendant's Attorney,  
[or "to the defendant."]

Yours, &c.  
G. H.  
10, Clifford's Inn.  
Plaintiff's Attorney.

In the King's Bench [or "Common Pleas," or "Exchequer of Pleas."]

Between { A. B. Plaintiff,  
and  
C. D. Defendant.

This action is brought to recover £40, being [the balance] due to the plaintiff upon the following items of account.

	£	s.
1835, June 24. To half year's rent to this day of house and premises situated, &c. . . . .	25	10
Sept. 12. To ten sacks of corn at 10s. . . . .	5	0 &c. &c.

Above are the full particulars of the plaintiff's demand, pursuant to the rule of Court in such case made and provided. Dated the — day of — 1835.

To Mr. D. A. Defendant's Attorney,  
[or "Agent,"]

Yours, &c.  
P. A. Plaintiff's Attorney,  
[or "Agent,"]

Particulars of demand in action on a surety bond.

In the —.

Between { A. B. Plaintiff,  
and  
C. D. Defendant.

This action is brought by the above plaintiff against the above named defendant, as the surety for E. F. of, &c. agent, for the recovery of damages sustained by the plaintiffs in consequence of the breaches of the condition of the bond or writing obligatory mentioned and set forth in the declaration in this cause.

The breaches of the condition of this bond are,

First, That the said E. F. did not from time to time, on the first day of each and every month, during the time he continued in their service, transmit to the plaintiffs a full and correct statement in writing of all goods and merchandize which came to his hands as agent for the plaintiffs.

Secondly, &c. [here six distinct breaches were stated.]

should be described in the particulars *in every possible shape* that could be admissible under the counts in the declaration; as for instance, *first*, the claim might be for £—— for a suit of clothes, as *sold and delivered to the defendant himself*; *secondly*, for the like sum as due for clothes as sold to the defendant, and delivered to *a third person* at his request; *thirdly*, for the sum of £——, as the price or value of such clothes received by the defendant for the use of the plaintiff; and, *fourthly*, for the like sum as due upon an account stated by and between the defendant and the plaintiff.

It has been held at nisi prius that the plaintiff ought to give credit for all the sums paid; (*d*) but that decision, if tenable, is not observed in practice, and the best course is to state that the plaintiff proceeds for a named sum, being the real just balance, thus impliedly but not expressly admitting any payment on account, or at least without specifying in particular any items for monies paid on account, and always avoiding the admission of any set-off. However, in order to take from a defendant any necessity for a plea of payment of part of the plaintiff's demand, it may, as we have seen, be advisable expressly to confine the declaration and particulars to the just balance proceeded for, and that is the modern practice. (*e*) Particulars of demand should also be so framed that the opponent cannot read them in evidence for himself, without a proper accompanying qualification or circumstance against himself, corresponding with the fact; as for instance, when an item for money lent, &c. is stated in particulars, if at the time of the loan the defendant admitted he owed a named balance, then immediately after such item the plaintiff might in his particulars properly add "At the same time the defendant admitted that besides " that item he owed the plaintiff the sum of £——."

Where the plaintiff refused to deliver particulars, the Court

Consequences  
of plaintiff's  
not complying  
with order for  
particulars.

The plaintiffs estimate these damages to the full amount of the penalty of the bond of 700*l.*, which they seek to recover in this action. Dated this — day of —, 1835.

To Mr. —,  
Defendant's Attorney or Agent.

Yours, &c.  
Plaintiff's Agent.

(*d*) *Adlington v. Appleton*, 2 Campb. 410. The propriety of that decision was immediately after it was pronounced doubted. There is not in a Court of law any reciprocity in candour, and why should a plaintiff be compelled to admit payments on account, when a defendant is

not compellable to admit receipts or loans, &c.

(*e*) *Ante*, vol. iii. 472; Bosanquet on Rules of Pleading, page 51, note 48; see *forms*, *id.* 85 to 88; and 2 Chitty on Pleading, 6th edit, in notes.

CHAP. XVIII.  
II. PARTICULARS OF  
DEMAND.

of King's Bench refused the defendant permission to sign judgment of non pros. (*f*) It is, however, now the practice to obtain a further order to deliver particulars within a named time, and expressly reserving liberty to defendant to sign judgment of non pros, if the order be not complied with, (*g*) and a form of entering the judgment of non pros in such a case has been given; (*h*) and at least the plaintiff himself must take care to avoid the consequences of the action being out of Court, if he do not declare within a year. (*i*)

Prescribed time  
of pleading  
after particulars  
delivered.

The general rule of Hil. T. 2 W. 4, reg. 48, orders that a defendant shall be allowed the same time for pleading after the delivery of particulars under a judge's order, which he had at the return of the summons; nevertheless judgment shall not be signed till the *afternoon* of the day after the delivery of the particulars, unless otherwise ordered by the judge. (*k*)

III. Of de-  
manding oyer  
of a deed, &c.  
declared on. (*l*)

III. OF DEMANDING OYER.—When the plaintiff's declaration, or any subsequent pleading, *necessarily* makes *profert* of a deed, the defendant may, before the time for pleading has expired, but not afterwards, *demand or crave oyer thereof*, and thereupon he will be entitled to have a copy of the *whole* deed and of the *attestations* and *names of witnesses* brought to and delivered to him, he paying for the same fourpence per sheet, of seventy-two words each. But if a bond be declared on, and profert thereof made, and the condition refer to *other* articles or an indenture, the defendant cannot demand oyer of the latter, but must, if an inspection be essential, make a distinct and special application for a copy of the same; nor has the defendant any right to see or read the original of such last mentioned deed. (*m*) Such inspection can only be obtained by summons or motion. (*n*) The *demand* of oyer is to be in the form in the note. (*o*) There

(*f*) *Burgess v. Swayne*, 7 Bar. & Ctes. 485; *Somers v. King*, 7 Dowl. & Ryl. 125; *Sutton v. Clark*, 8 Bing. 165; 1 M. & Scott, 271; 1 Dowl. 259.

(*g*) 2 Arch. K. B. 4th ed. 877.

(*h*) T. Chitty's Forms, 2d edit. 691.

(*i*) *Ante*, 445.

(*k*) See construction in *Tate v. Botfield*, 3 Dowl. 218.

(*l*) See in general Tidd, 9th ed. 586; 2 Arch. K. B. 4th ed. 866.

(*m*) See the whole practice Tidd, 9th ed. 586; 2 Arch. K. B. 4th ed. 866.

(*n*) 2 Arch. K. B. 4th ed. 866.

(*o*) In the King's Bench [or "Common Pleas," or "Exchequer of Pleas."]

Between { A. B. Plaintiff,  
and  
C. D. Defendant.

The defendant demands oyer and copy of the writing obligatory mentioned in the declaration in this cause and the condition thereof [or "of the indenture," "articles

is no *express* alteration in the previous practice as to oyer, excepting that Reg. Gen. Hil. T. 2 W. 4, reg. 44, orders that "If a defendant, after craving oyer of a deed, omit to insert it at the head of his plea, the plaintiff, on making up the issue or demurrer book, may if he think fit insert it for him; but the costs of such insertion shall be in the discretion of the taxing officer." This rule assimilated the practice in this respect of the Common Pleas to that of the King's Bench. (p) It would be desirable if there were a rule enabling a defendant to set out on oyer only so much of the document as may be deemed essential to his plea, leaving the plaintiff to set out the rest, if important, in his replication or subsequent pleading. In an action on a deed, in which a profert will be necessary, or on any instrument of which an inspection may be ordered, it is advisable for the plaintiff's attorney, in order to avoid delay in the first instance, or at least at the time of declaring, to send the original to London, ready to be produced, in case of demand of oyer, for inspection, for otherwise delay may arise in sending for such original.

IV. INSPECTION, &c.—There are also other cases in which, although the declaration has not made profert of a deed, and therefore the defendant could not *demand oyer*, yet the declaration having referred to, or at least being founded upon or connected with a *written instrument*, which it may be material for the defendant to inspect and have a copy of before he pleads, he may, at this stage of the action, obtain the same upon *summons*, in case a previous application should not have been complied with. (r) The practice upon this subject, as well as upon the *production of public documents*, as for instance Court Rolls, &c. has already been stated with admirable perspicuity. (s) There has not been any recent rule altering the practice there stated, excepting Reg. Gen. Hil. T. 2 W. 4,

IV. Inspecting  
of other private  
and public documents. (q)

of agreement," "charter-party," or "deed poll," mentioned in the declaration in this cause. Dated this — day of — A. D. 1835.

Yours, &c.

G. H. Defendant's Attorney,  
[or "Agent."]

To Mr. E. F. Plaintiff's Attorney [or "Agent."]

(p) Tidd, 589.

(q) See in general Tidd, 9th ed. 586, 589; 2 Arch. K. B. 4th ed. 870 to 875; 2 Arch. C. P. [46, 90,] 222, 223.

(r) *Id. ibid.*; see proceedings by a

plaintiff in order to obtain inspection and copy of written document to declare on, ante, 433 to 436.

(s) Tidd, 9th ed. 586 to 589.

CHAP. XVIII.  
IV. INSPECT-  
ING  
DOCUMENTS,  
&c.

r. 102, which orders that "An order upon the lord of a manor "to allow the usual limited *inspection* of the Court rolls on the "application of a copyhold tenant, may be *absolute in the first* "instance, upon an affidavit that the copyhold tenant has ap-  
"plied for and been refused inspection," which rule assimilates the practice of the Common Pleas to that of the King's Bench. (t) But that rule only applies when an action is depending, and not to an ex parte application; and if an application to inspect the Court rolls of a manor is made when no action is pending, then the rule must be nisi only in the first instance. (u) And according to a recent decision, unless the party applying for an inspection of parish books allege that he is interested therein, no inspection will be afforded; (x) and there is a general distinction between the jurisdiction and practice of Courts of law and Courts of equity, that as regards *private* documents a party has no right to come into a Court of *law* as into a Court of equity, with any motion or proceeding equivalent to or in the nature of a bill of discovery. (y) In a recent case, however, in the Practice Court of the King's Bench, an application was made absolute against an attorney even before writ for the production of an agreement for a lease prepared by the brother of the attorney, who was deceased, as well for the applicant, a landlord, as for the tenant. (z)

V. Proceedings under interpleader act, and applications to Court of Law under interpleader act, or by sheriff at common law.

V. OF BILLS OF INTERPLEADER *in equity*, and *motions on interpleader act*, 1 & 2 W. 4, c. 58. If, when a defendant has ascertained from the declaration, or particulars of demand, or otherwise, the nature of the plaintiff's claim, he find that he (the defendant) being an agent or stakeholder, and that some *third* person claims an interest, and might hereafter sue him with effect or at least with risk for the same subject-matter of demand, then it may be *necessary* either to file a bill of interpleader *in equity*, (a) or to apply to the *Court of law* in which the action is depending, in the manner authorized by the 1 & 2 W. 4, c. 58. (b) We have seen that that enactment (c) contains two very different provisions, giving distinct jurisdiction, *first*, in relief of *stakeholders, agents, and persons sued in certain*

(t) Tidd, 594; Jervis's Rules, 70, note (s).

(u) *Ex parte Best*, 3 Dowl. 38.

(x) *Burrell v. Nicholson*, 3 Bar. & Adol. 649.

(y) Per Littledale, J., in *Johnson v. Brazier*, 1 Adol. & El. 626.

(z) *Ex parte Bretter*, 1 Harr. & Wol. 212; and see *Doe v. Slight*, 1 Dowl. 163.

(a) *In equity, ante*, vol. ii. 417 to 420.

(b) *At law, ante*, vol. ii. 341 to 347.

(c) See the act stated and some decisions, *ante*, vol. ii. 341 to 347.



*actions*, and as it would seem either relating to goods or ordinary money claims, from *double* liability; and, *secondly*, in further and *more extensive* relief of *sheriffs* and other *officers* endangered in the execution of process. Before that act, *third* persons sued for goods or a debt by one claimant, and also threatened, or in danger of another action by another person, must have resorted to a Court of Equity; and although *sheriffs* might be relieved on motion, yet their remedy before the statute was imperfect; and although a sheriff could obtain time to return a writ, yet he could not in general obtain the costs of applying to the Court. (d) We have in a prior page in part considered the enactments in this statute and some of the decisions thereon, and the reader's reference to that part of the work is requested. (e) Other decisions have been collected in the recent editions of the principal works on practice. (f) But since the observation in the prior part of this work and the publication of any work on practice, there have been numerous decisions, and which we will now collect. These show how extensive and important the operation of this act is in practice by saving the much greater expense of a suit in equity in many cases, though the statute is still but of comparatively *limited* operation.

Substance of  
enactment in  
first section.

It will be observed that the recital in the *first* section states the absence of relief at law to *third* persons in general, and discloses the limited intent of the enactment, and *only extends to certain named actions*, probably intended only to include ordinary claims for *money* and *debts* and *goods*, viz. *assumpsit*, *debt*, *detinue*, and *trover*, and *not extending* to an action of *covenant*, *replevin*, or *trespass*, or *ejectment*; and only authorizes an application *after declaration and before plea*; and the *first* section empowers the Court or *any single judge, even at chambers*, to interfere on affidavit and motion, or summons, on the defendant bringing the money into Court, or submitting to the disposal of the goods as directed by the Court; and if the claim is still disputed the Court is to direct the trial of a *feigned issue* to be tried between and at the expense of the actual claimants, and to order the *payment of costs* as may be just and reasonable.

A party may apply for relief under the *first* section, although Application un-

(d) See observation on defects in prior law, Wordsworth's Rules, 68, 69; *Rex v. Cocke*, 1 McClell. & Young, 198; Tidd, 1000, 1017.

(e) *Ante*, vol. ii. 341 to 347.

(f) Tidd's Supp. A.D. 1833, 128 to 131; 2 Arch. K. B. 4th ed. 855 to 861; 2 Arch. C. P. [74, 113, 116.]

CHAP. XVIII.  
V. INTER-  
PLEADER ACT.

der first section,  
1 & 2 W. 4, c.  
58.

he claims *à lien* on the goods against all parties; (g) and an auctioneer or agent employed by one party, and who has sold goods, and then has an action brought against him by his employers for the proceeds in one Court, and by a third person also for the proceeds in another Court, must apply after declaration for rules in both the Courts; and although he has advanced money to his employer on account before the adverse claim had been made, he must in his action pay into Court either the whole proceeds or so much as the Court may direct, but still subject to the final order of the Court. (h)

It seems that under the *first section* the application for relief may be either to a *single judge* at chambers or to the Court in banc; (i) but under the *sixth section*, in relief of *sheriffs* and officers, the application *must* be to the latter. (k) The first section is confined to the *particular actions* specified, and there is no direct jurisdiction in ejectment; (l) and an application under the same section cannot be made *before* declaration, though the sheriff, under the *sixth section*, may apply to the Court before any action or proceeding has been commenced. (m) A stakeholder acting with good faith is entitled, under the first section, as in Courts of Equity, to his *costs* of coming to the Court, out of the fund in dispute, and which are ultimately to be paid by the unsuccessful party. (n) The *first section* expressly directs that the application shall be on *affidavit*, or otherwise showing that the defendant in the action does not claim any interest in the subject-matter of the suit, but that the right thereto is *claimed* or *supposed* to belong to some third party who has sued or *is expected* to sue for the same; and that the defendant *does not collude* with such third party, but is ready to bring into Court, or to pay or dispose of the subject-matter of the action as the Court or a judge may order or direct; and thereupon the Court or judge is to make a rule or order to show cause. (o)

Claims of *third persons* under an *execution*, and to which the *sixth section* more particularly applies, do not arise at so

(g) *Cotter v. Bank of England*, 3 M. & Scott, 180; 2 Dowl. 728, S. C.

(h) *Allen v. Gilby*, 3 Dowl. 143.

(i) *Ante*, vol. iii. 28; *Smith v. Wheeler*, 3 Dowl. 431; *Shaw v. Roberts*, *id.* 25.

(k) *Id. ibid.*; *Brackenbury v. Laurie*, 3 Dowl. 180; per Alderson, B. *Cook v. Allen*, 2 Dowl. 11; 1 Cr. & M. 542.

(l) *Smith v. Wheeler*, 1 Gale, 15.

(m) Per Patteson, J. in *Green v. Brown*, 3 Dowl. 337; *Parker v. Linnett*,

2 Dowl. 562.

(n) *Parker v. Linnett*, 2 Dowl. 562; *Cotter v. Bank of England*, 3 M. & Scott, 180; 2 Dowl. 728, S. C.; *Dunar v. Mackintosh*, 3 M. & Scott, 174; 2 Dowl. 750, S. C.; and see *Ford v. Dilly*, 3 Bar. & Adol. 885.

(o) See forms of affidavit and proceedings on first section, T. Chitty's Forms, 2 edit. 666, 667.

early a stage in the cause, but not until after judgment; and when a writ of fieri facias, or other execution against property, has been issued; but they may as well be considered here, as we are noticing the first section.

We have seen that under the *first* section a defendant can only apply to the Court in the enumerated actions, and then not until *after* declaration and before plea; but that a sheriff is not thus limited, and he may and ought to apply to the Court in *some form at the earliest opportunity*, as soon as he has distinct notice of a claim or other impending liability, even *before any proceedings.* (*p*) In one case it was held that eleven days after the sheriff's knowledge of an expected claim was not too late. (*q*) But in another case neglect to apply to the Court for eight days was holden unreasonable. (*r*) And he should apply at the earliest opportunity, although delay will not always preclude relief. (*s*) Even after an attachment has been obtained against the sheriff for not returning a writ of fi. fa. he may be let in and obtain relief on terms of paying the costs of the attachment. (*t*) If a sheriff receive a notice on 23d January of a claim to goods seized by him under a fi. fa. he will not be entitled to relief under the interpleader act, unless he come to the Court in the same Hilary Term. (*u*) In another case it was held that if a sheriff, having seized goods under a fi. fa., received notice of an intended fiat against the defendant on 28th December, he will be entitled to relief, if he come to the Court on the second day of the term after the assignees have been appointed, although as long after as the 16th April. (*x*) And indeed there must be a *known claimant* and an *actual claim* before he can apply under *this act*; (*y*) and it is a sheriff's duty, before he applies, to inquire into and examine the probable sufficiency of the claim, for if on the least consideration it would appear unfounded in fact, or illegal in law, then the sheriff would have to pay the costs of a rule; (*z*) yet when the sheriff has any intimation that he is in peril, he may apply to *enlarge the time* to sell under a fieri facias, or enlarge

Time of application.

(*p*) Per Patteson, J. in *Green v. Brown*, 3 Dowl. 337; and *Parker v. Linnett*, 2 Dowl. 562; and per Williams, J. in *Foot v. Dick*, 1 Harr. & Wol. 207; *Ridgway v. Fisher*, 1 Harr. & Wol. 191; 3 Dowl. 567.

(*q*) *Skipper v. Lane*, 4 M. & Scott, 283; 2 Dowl. 784; but see *Cook v. Allen*, 3 Tyrw. 386.

(*r*) *Ridgway v. Fisher*, 1 Harr. & Wol. 189.

(*s*) *Dixon v. Ensell*, 2 Dowl. 621.

(*t*) *Alemore v. Adeane*, 3 Dowl. 498.

(*u*) *Ridgway v. Fisher*, 1 Harr. & Wol. 191; 3 Dowl. 567.

(*x*) *Barker v. Phipson*, 1 Harr. & Wol. 191; 3 Dowl. 590, S. C.

(*y*) *Bentley v. Hook*, 2 Cr. & M. 426; 4 Tyr. 229; *Isaac v. Spilsbury*, 3 M. & Scott, 341; 10 Bing. 3; 2 Dowl. 211, S. C.

(*z*) *Bishop v. Hinzman*, 2 Dowl. 166.

CHAP. XVIII.  
V. INTER-  
PLEADER ACT.

the time of returning the writ. (a) Even when a notice had been given by *some* person, but whose name did not appear, that a fiat in bankruptcy had been issued against the defendant, and that assignees had been chosen, and the assignees appeared to the rule nisi obtained under this act, yet as it did not appear that the assignees authorized such notice, the rule was *discharged with costs*, though the Court said the sheriff might have moved to enlarge the return of the writ, and then when a claim had been actually made he might have renewed his application. (b)

The sheriff has a right to apply to the Court, although the plaintiff has abandoned his execution; (c) and although the goods taken in execution were at the time in the possession of third persons claiming as trustees for creditors; (d) and a sheriff is not bound, when a claim of a third person is made under an execution, to accept an indemnity tendered by the plaintiff, but may insist on applying to the Court. (e) When the sheriff has been allowed to withdraw from possession by a rule under the interpleader act, he cannot afterwards, and after he is out of office, be compelled to re-enter. (f)

A sheriff, when an adverse claim has been made to goods under an execution, should immediately give notice thereof to the plaintiff in the action before he has been ruled to return the writ, or if he delay, he will have to pay the costs of that rule. (g)

When sheriff  
not relieved.

The Court will not relieve the sheriff if he neglect to inquire into the nature of the claim; and if it turn out that they were obviously unfounded or illegal, he would have to pay the costs of the rule. (h) Nor will the Court interfere on behalf of the sheriff when he has seized goods in execution which are already in custody of the law under a landlord's distress. (i) The Court will not relieve the sheriff if he have delivered part of the goods seized under a fi. fa. to the claimant, (k) or have paid over proceeds of an execution; (l) nor if the under-sheriff's partner be concerned as attorney for one of the parties, as for the assignees of a bankrupt who claimed the goods. (m) And although, when there is a charge of negligence against

(a) *Bentley v. Hook*, 2 Cr. & M. 426;  
*Isaac v. Spilsbury*, 3 M. & Scott, 341;  
10 Bing. 3; 2 Dowl. 211, S. C.

(b) *Bentley v. Hook*, 2 Cr. & M. 426.

(c) *Baynton v. Harvey*, 3 Dowl. 344;  
*Wells v. Hopkins*, id. 346.

(d) *Allen v. Gibbon*, 2 Dowl. 292.

(e) *Levy v. Champneys*, 2 Dowl. 454.

(f) *Wilton v. Chambers*, 3 Dowl. 12.

(g) *Brain v. Hunt*, 2 Cr. & M. 418.

(h) *Bishop v. Hinman*, 2 Dowl. 166.

(i) *Haythorn v. Bush*, 2 Dowl. 641.

(k) *Brain v. Hunt*, 2 Cr. & M.  
418; 2 Dowl. 391.

(l) *Chalon v. Anderson*, 3 Tyrw. 237;  
*Cook v. Allen*, id. 586.

(m) *Dudden v. Long*, 1 Bing. N. C.  
299; 3 Dowl. 139.

the sheriff, the Court will nevertheless interfere to protect him against adverse claims; yet the rule will be so modified, as to leave the parties liberty to sue the sheriff for such negligence. (n) And where assignees of a bankrupt brought trover against the sheriff, and alleged want of care in selling for the best price, and therefore the amount of proceeds was disputed, the Court refused to interfere on the motion of the sheriff. (o)

CHAP. XVIII:  
V. INTER-  
PLEADER ACT.

The sheriff need not in his *affidavit* in support of the application under the *sixth* section deny collusion with the claimant. (q) Though in a prior case it was doubted whether he should not so swear, (r) as expressly required when an application is made under the *first* section. (s) In general no supplemental affidavit will be allowed; but if the delay can be satisfactorily accounted for, there must be a fresh motion and rule upon a new affidavit. (t)

Affidavit, motion, and proceedings. (p)

Where an *execution creditor* does not appear on being served with the sheriff's rule it has been considered that the Court cannot bar his claim; because the power of barring claims is by the act confined to the claims of *third* persons. (u) But where a *third* person claims under an execution, and the sheriff moves under the sixth section, making him a party to the rule, and swears to due service of the rule, then, although he do not appear, the Court may bar his claim; and by the rule absolute compel him to pay the execution creditor's costs of showing cause against the rule, (x) and also the sheriff's costs. (y)

When third party's claim barred, and he to pay costs.

Where application is made by the sheriff for relief under the sixth section the Court will not try the merits of the respective claims upon affidavit; but must, if still contested, direct an issue. (z) And the costs of such issue must in general be paid by the unsuccessful party. (a) It seems, that in an issue under this act, the claimant should be the plaintiff, and the execution creditor the defendant. (b)

When issue to be directed.

If a party distinctly *make* and *continue* a claim upon goods

When costs payable, and to whom.

(n) *Brackenbury v. Laurie*, 3 Dowl. 180.

(o) *Gibson v. Humphrey*, 3 Tyrwh. 588.

(p) *Donniger v. Hinzman*, 2 Dowl. 424; *Dobbins v. Green*, 2 Dowl. 509; but see *Cook v. Allen*, 3 Tyrw. 586; 2 Dowl. 11.

(q) See forms of affidavit, &c. under sixth section, T. Chitty's Forms, 2d edit. 668 to 671.

(r) *Cook v. Allen*, 2 Dowl. 11; 3 Tyrw. 586.

(s) *Ante*, 622; and *ante*, vol. ii. 344.

(t) *Cook v. Allen*, 2 Dowl. 11; 3 Tyrw. 586, S. C.

(u) *Donniger v. Hinzman*, 2 Dowl. 424.

(x) *Perkins v. Benton*, 3 Tyrw. 51; 2 Dowl. 108.

(y) But see *post*, 626.

(z) *Bramridge v. Adshead*, 2 Dowl. 59, *Allen v. Gibbon*, 2 Dowl. 292.

(a) *Bowen v. Bramridge*, 2 Dowl. 212.

(b) *Bently v. Hook*, 4 Tyr. 229; 2 Cr. & M. 426, S. C.

CHAP. XVIII.  
V. INTER-  
PLEADER ACT.

taken in execution, he will thereby incur the risk of paying the costs of an application to the Court or a judge by the sheriff; and although he do not afterwards appear to a rule obtained by the sheriff, or he neglect to try an issue directed to be tried, yet the Court of Exchequer made absolute the rule for barring his claim, and make him or the defendant in the execution, if he caused the claim to be made, pay the costs of the sheriff's application. (c) But in a subsequent case in C. P. that Court would not allow the sheriff applying to be relieved under the interpleader act his costs, where the claimant had given notice not to sell; and per Ch. J. Tindal, "The sheriff is extremely well off in being indemnified at so cheap a rate as he is, and cannot have his costs. The Court of Exchequer have thought one way, but we think another." And the Court also refused the plaintiff in the execution his costs of appearing to the sheriff's rule; and the Court said such costs would not be allowed to such a plaintiff except in case of extremely improper conduct in the opposite party. (d) And when an issue is directed by the Court under the sixth section, between the plaintiff in an execution and the claimant, and such plaintiff afterwards abandons all claim, the sheriff may by rule of Court recover from the plaintiff the costs of keeping possession of the goods and sale and of the application; although in the first instance the plaintiff gave no instructions to take the goods. (e) And although in a late case the Court of K. B. refused the sheriff the costs of applying to the Court under the interpleader act, yet they allowed him the extra expenses he had been put to by obeying the rule of Court directing an issue. (f) But before the sheriff makes a supposed claimant a party to the rule there should be an application to that party to ascertain whether he *pursists* in such claim; for otherwise the sheriff may have to pay him his costs of appearing to the rule if he then abandon all claim. (g) On the other hand, the Court on such application by the sheriff will, on proper grounds shown, order the sheriff or the execution creditor to pay to a *third* party appearing and successfully prosecuting his claim his costs of such appearance. (h) But where

(c) *Lewis v. Eicke*, 2 Cr. & M. 321; 2 Dowl. 337; *Philby v. Ikey*, 3 Dowl. 222; *Ford v. Dilly*, 5 Bar. & Adol. 885; and see *Perkins v. Burton*, 3 Tyrw. 51; 2 Dowl. 108, S. C.; *Scales v. Sargeson*, 3 Dowl. 707.

(d) *Oram v. Sheldon*, 3 Dowl. 640; and see *Armitage v. Foster*, 1 Harr. & Wol. 208, in K. B.

(e) *Dabbe v. Humphries*, 1 Bing. N. C. 412; 3 Dowl. 377.

(f) *Armitage v. Foster*, 1 Harr. & Wol. 208.

(g) *Bowen v. Brambridge*, 2 Dowl. 213; *Philby v. Ikey*, 2 Dowl. 222; *Oram v. Sheldon*, 1 Hodges, 92.

(h) *Ford v. Dilly*, 5 Bar. & Adol. 885.

a claimant afterwards informed the execution creditor that he abandoned his claim, and did not intend to appear to the sheriff's rule, it was held that neither the sheriff nor the execution creditor were entitled to costs.(i)

Where a landlord has given notice of his claim for rent the sheriff must pay it promptly, or will have to pay the costs of the landlord's appearance to a rule obtained by the sheriff in respect of a claim made by assignees; but where assignees claim, and afterwards the fiat is superseded, the Court refused to make the sheriff pay the costs of the assignees' appearance to the sheriff's rule;(k) and although the landlord be ordered to give security for the amount of rent paid to him by the sheriff, yet the latter must pay the costs of such security.(l)

Although the powers of the *courts of law*, as well at common law as under the sixth section of the interpleader act, in protection of a *sheriff* or other *officers* when executing the process of the Courts, is thus extensive, yet we have seen that the powers of relieving under the *first* section of the act are limited to certain specified actions; and therefore many cases will still arise where, at this stage of an action, if not sooner, it will be necessary to file a bill of interpleader in equity, the practice relating to which has already been considered.(m) We have seen that when the claims are merely *equitable* it has been supposed that the act of 1 & 2 W. 4, c. 58, does not apply, though the act is not in terms limited to legal claims.(n)

VI. Of bills of interpleader in equity.

At this stage of an action, when the declaration has disclosed the particulars of the cause of action, if not before, it is advisable, if there be no legal defence but one merely equitable, to file a *bill* in a Court of equity, and pray and move for an *injunction to stay all proceedings at law*. The practice and proceedings in these cases have already been sufficiently explained or referred to.(o)

VII. Of filing a bill in equity, praying for an injunction to prevent or restrain an action or proceeding at law.

Besides ascertaining the particulars of the plaintiff's claim or demand, it may frequently be desirable, even at this stage of an action, to obtain a *discovery of other facts*, as the residence of the plaintiff, so as to be certain that he will be forthcoming to pay costs,(p) or *other facts*, in order to prepare the plea or

VIII. Of obtaining a *discovery of other particulars*.

(i) *Oram v. Sheldon*, 1 Hodges, 92; 3 Dowl. 640, S. C.; ante, 626, note (d).

(k) *Clark v. Lord*, 2 Dowl. 55, 227.

(l) *Clark v. Lord*, 2 Dowl. 227.

(m) *Ante*, vol. II. 417, 418.

(n) *Ante*, vol. II. 345, note (y).

(o) *Ante*, vol. II. 414 to 417.

(p) *Neal v. Holder*, 3 Dowl. 493.

CHAP. XVIII.  
VIII. BILLS OF  
DISCOVERY.

defence at law, and some of the proceedings enumerated in the analytical table have that tendency; but the only *comprehensive general mode* of obtaining information is still only by *filing a bill in equity for a discovery*, and which in Courts of equity still constitute an important branch of practice. (q) We have touched on this remedy on several occasions, and it would be out of place here fully to examine it. (r) A Court of law will so far recognise the right of a defendant to a discovery, that if it clearly appear that a discovery is necessary to a defence at law, they will give the defendant further time to plead, for the very purpose of enabling him in the meantime to obtain a discovery by a bill in equity. (s) In A. D. 1833 an attempt was made in the House of Lords to introduce a bill, enabling a plaintiff on affidavit that he had a just cause of action, and a defendant on affidavit that he had a good defence on the merits, to exhibit interrogatories before a commissioner upon any fact not tending to criminate the opponent, or subject him to a penalty, or affect any estate or interest the title to which is not in dispute in the cause, and, with some other exceptions, but such bill was not passed; (t) and however advisable, with reference to the saving time and expense, and at present with the exception of the proceedings enumerated in the analytical table, and occasionally some discovery that may be elicited by other occasional rules nisi, a discovery can only be enforced in a Court of equity.

IX. Of staying  
proceedings at  
law, on ground  
of plaintiff's  
incapacity to  
sue or ignorance  
of the proceed-  
ing or of the in-  
justice of his  
suing. (u)

At this stage, if not sooner, an application is to be made to the Court in banc to stay the proceedings, on the ground of the plaintiff's *incapacity* to sue, or the impropriety of his suing; though unless under particular circumstances, the Court will not try the merits at law on affidavits. Thus, if it be shown by affidavit that the plaintiff is not the holder of nor beneficially interested in a bill on which he has brought an action, nor authorized the action, but that another person is the beneficial holder, the Court will in some cases stay the proceedings. (x) So, where a party having been indicted for felony sued his

(q) *Ante*, vol. ii. 50, 54, 419; 1 Mad. Ch. Prac. 196 to 216.

(r) *Ante*, vol. ii. 48 to 52, 54, 55, 348, 349, 419.

(s) *Whitter v. Cazalet*, 2 T. R. 683; 2 Arch. K. B. 4th edit. 870. But see *Foreman v. Jeyes*, 5 Bar. & Adolp. 835, and *post*.

(t) Lord Wynford's suits at law bill, ordered to be printed 22d of February, 1833, opposed by Lord Eldon and Lord

Lyndhurst, and negatived on second reading, without a division, in April, 1833, as tending to destroy the boundaries between courts of law and equity; but certainly containing many desirable enactments.

(u) See in general Tidd, 9th edit. 517 to 539.

(x) *Stone v. Butt*, 2 Cr. & M. 416; 2 Dowl. 335; and see Chitty on Bills, 8th edit. §35.



bankers for money deposited with him, which it was sworn was the produce of the felony, the Court of Common Pleas, on application, gave time to plead in a month after the trial of the indictment; (y) so in an action for words imputing murder, the Court gave leave to plead until the next term, upon the ground that the plaintiff was to be tried for the murder in the mean time upon an indictment then pending. (z) And although a Court of law cannot *directly* prevent an exercise of a legal right of action, yet it may control the action when justice requires, as where an action had been commenced in the name of a person having the legal interest, yet if his abuse of the proceeding to the injury of the party beneficially interested be suspected, the Court may stay the proceedings on the defendant's bringing the money into Court, and it will be there impounded until it can be safely paid out under a subsequent order of the Court. (a) Where a plaintiff deposited a bill of exchange, on which he was suing, in the hands of a third person, and at the same time gave him notice of the action, the Court held, that he did not thereby part with his right of action, and although the third person afterwards brought an action on the same bill, they would not at the instance of the defendant stay the first action. (b)

CHAP. XVIII.  
IX. STAYING  
PROCEEDINGS  
ON PLAINTIFF'S  
INCAPACITY.

When a statute gives *another* specific remedy not by action, and yet, instead of pursuing it, an informer has adopted an action, there is a class of cases in which the Courts will interfere summarily; as if any person, except the attorney-general, or some revenue-officer, were to prosecute an action for a penalty incurred under the laws for the protection of the customs and excise-duties, (d) or stamp-duties, (e) &c. It is obvious that although the objection to the form of proceeding would constitute a complete defence on the trial, yet it is just to stop the proceeding in limine to prevent expense, which, perhaps, the defendant might not be able to recover back from the plaintiff in such untenable proceeding.

X. Staying proceedings in an action on a penal or other statute, not authorizing present proceeding. (c)

When an action is prosecuted by an attorney without proper authority, the Court will stay the proceedings, for otherwise

XI. Want of authority to attorney to sue.

(y) *Deakin v. Praed*, 4 Taunt. 825; *Doe dem. Baker v. Roe*, 3 Dowl. 496.  
*Sibson v. Niven*, Barnes, 224. (b) *Marsh v. Newell*, 1 Taunt. 109.  
 (z) *Sibson v. Niven*, Barnes, 224; 1 (c) Tidd, 9th edit. 517 to 530.  
 Arch. K. B. 4th edit. 238. (d) Tidd, 519.  
 (a) *Jones v. Bramwell*, 3 Dowl. 488; (e) Tidd, 520.

CHAP. XVIII.  
XI. STAYING  
PROCEEDINGS  
NO AUTHORITY  
TO SUR.

the defendant might be twice charged. (f) So, if an unqualified attorney prosecute an action, the proceedings may, on motion, be stayed till a competent attorney has been appointed, though the proceeding, as a declaration, should be returned, and the same cannot be treated as a mere nullity on account of the incompetency of the attorney. (g) There are, however, numerous instances in which the incompetency of a party's attorney to practice *at all* constitutes no ground of motion or application to the Court to stay the proceeding, if he really had authority from the client. (h)

XII. Staying  
proceedings, on  
ground that no  
debt is due.

We have seen that it is a general rule that the Courts will not stay the proceedings on affidavits that there is no existing debt, as that it has been paid, unless the plaintiff's affidavit, in answer to the application, do not deny the defendant's allegation; (i) but, nevertheless, the Courts have sometimes relaxed this rule, especially where a party has been arrested and is in custody, and has difficulty in obtaining bail, (i) or where the plaintiff has in writing admitted that he has no right of action. (k) Where the Commissioners of a Court of Request had previously allowed the plaintiff the benefit of his claim by way of set-off to a larger claim of the defendant upon him, the Court of Exchequer expressed their regret that they could not stay the plaintiff's action for the amount of the sum so allowed. (l) However, where a larger sum has been indorsed on a writ than was due, by which the defendant was misled, the Court afterwards stayed the proceedings on the payment of the real debt and costs of writ only, provided the defendant applied promptly after the plaintiff's particulars had been delivered. (m)

In an action commenced byailable process, the Court will not stay proceedings until after the trial of an indictment for perjury, founded on the plaintiff's affidavit of debt, (n) any more than they will grant a new trial, on the ground that an

(f) *Robson v. Eaton*, 1 Term Rep. 62; *Buckle v. Roach*, 1 Chitty's Rep. 194; and see *Doe dem. Baker v. Roe*, 3 Dowl. 496; but see *id.* 193 (h); Tidd, 93, 529; 2 Arch. 4th edit, 853, 628, 643; uncertificated attorney, Arch. K. B. 4th edit. 27, 853.

(g) *Bayley v. Thompson*, 2 Dowl. 655; *Hilleary v. Hungate*, 3 Dowl. 56; *Constable v. Johnson*, 1 Cr. & M. 88; *ante*, vol. ii. 15, 16

(h) *Ante*, vol. ii. 15; *Hilleary v. Hungate*, 3 Dowl. 56; *Glyn v. Hutchinson*, *id.*

529; *Bayley v. Thompson*, 2 Dowl. 655.

(i) See the cases, *ante*, vol. iii. 369, 370; Tidd, 530, note (b); 2 Arch. K. B. 4th edit. 852; *Smith v. Curtis*, 2 Dowl. 223; *Tucker v. Tucker*, 1 Hodges' Rep. C. P. 15.

(k) *Ante*, vol. iii. 370, note (n).

(l) *Smith v. Curtis*, 2 Dowl. 223; *semble*, on ground that the commissioners had no jurisdiction to allow such set-off.

(m) *Elliston v. Robinson*, 2 Cr. & M. 343; 2 Dowl. 241, S. C.

(n) *Johason v. Wardle*, 3 Dowl. 550.

CHAP. XVIII.  
XII. STAYING  
PROCEEDINGS  
NO DEBT.

indictment for perjury has been found against one of the principal witnesses, on whose testimony the verdict was founded, because to grant such application would be an encouragement to motions of that nature, and whenever a party found himself pressed with such an action, the course would be to indict the defendant for perjury, and then move to stay the proceedings.(n) Nor will the Court, on motion, stay proceedings, on the ground that the claim is barred by the statute of limitations, as that it is a matter to be pleaded and tried,(o) and yet we have seen the Courts have interfered as regards arrest and bail in a strong case of that nature.(p)

If an attorney commence an action for his fees and costs, without having delivered his signed bill a month, the Court, on motion, will stay his proceeding.(q) But although a verdict had been found against an attorney, finding that he had been guilty of gross negligence, the Court refused to stay the proceedings in his action for his costs, in the same proceeding to which such negligence was alleged to relate.(r)

The Court will not, at the instance of a *plaintiff*, stay the proceedings in an action on a bill against the acceptor, on the ground that the drawer has paid the debt and costs of action against him, as the acceptor has a right to be paid his costs of defending the action against him.(s)

If it be sworn and not denied that there are several pending actions for *precisely* the *same cause*, the Court will put the plaintiff to his election and stay the proceedings on the rest, and not compel the defendant to plead the pendency of the first action in abatement, upon which he would not be entitled to costs;(t) but if the identity be denied, or not very clearly established, the Court will not interfere;(u) and the circumstance of a plaintiff having been non prossed in a prior action of replevin for taking the same goods, will not induce the Court to stay the proceedings in a subsequent action of trespass for taking the same goods, it being considered that such judgment of non pros was not a judgment on the merits.(x)

XIII. Staying  
proceedings  
when several  
and concurrent  
actions pending  
for same  
cause.(t)

(n) *Johnson v. Wardle*, 3 Dowl. 550.  
(o) *Potter v. Macdonel*, 3 Dowl. 584; 1 Harr. & Woll. 189, S. C.  
(p) *Ante*, 369, 370.  
(q) *Semble*, as the 2 Geo. 2, c. 23, s. 23, prohibits any action until a signed bill has been delivered a month; see *Barr v. Wiggins*, 1 Clark & Fin. 125; but see 4 Moore, 4; Tidd, 334, that a defendant arrested on an attorney's bill cannot be

discharged out of custody, on ground that a signed bill not delivered.

(r) *Smith v. Roll*, 2 Dowl. 62.  
(s) *Lewis v. Dalrymple*, 3 Dowl. 433.  
(t) See in general Tidd, 528; 2 Arch. K. B. 4th ed. 848 to 851; *Miles v. Bristol*, 3 B. & Adol. 945; *ante*, vol. ii. 349, 350; *Souter v. Watts*, 2 Dowl. 263.  
(u) *Nicholls v. Lefevre*, 3 Dowl. 135.  
(x) *Liversedge v. Goods*, 2 Dowl. 141.

CHAP. XVIII.  
XIII. STAYING  
PROCEEDINGS,  
CONCURRENT  
ACTIONS.

So where in answer to a motion to stay the proceedings in a second action, the plaintiff disclaimed the act of the attorney in bringing the first action, the Court would not interfere. (y) So if an action or writ of scire facias be brought on a judgment pending a writ of error, the Court will, if the writ of error be not evidently for the mere purpose of delay, upon a prompt application, stay proceedings in such concurrent action or scire facias. (z) But if the defendant delay his application until the plaintiff has obtained a second judgment, the Court will not then stay or set aside an execution thereon. (a)

XIV. Staying  
proceedings in  
a second action  
after a former  
recovery or de-  
feat.

In some cases, though rarely, the Court will interfere, and *on motion* stay the proceedings in a second action, on the ground that there has been a former *recovery* in favour of the plaintiff, or former verdict and judgment for the defendant for the same cause, and that the second proceeding is harassing and vexatious; but as such former recovery may, if true, be effectually pleaded in bar, the defendant is in general put to *plead* that defence, (b) and which he could not do effectually unless the prior verdict and judgment actually *included* the demand sued for. (c)

XV. When or  
not proceedings  
stayed at law in  
order to render  
available a de-  
fence or relief  
in a Court of  
equity.

In a recent case it was considered that a Court of law will not stay proceedings at law in aid of equitable relief to be obtained in the Court of Chancery, (d) nor on ground that a bill is depending in Chancery for the same cause, (e) nor in general on the ground that a criminal proceeding instituted by the party applying is about to be tried. (f) And where the plaintiffs obtained a verdict against the defendant in an action under an award in K. B., and the Court of Chancery, upon bill filed and matter appearing on the award itself, granted an injunction to stay further proceedings, and the plaintiffs nevertheless signed judgment and took defendant in execution, yet the Court of K. B., on application for a rule nisi to discharge the defendant out of custody, refused to interfere, although it was sworn that the plaintiffs kept out of the way to avoid an attachment out of the Court of Chancery; (g) and yet there are cases

(y) *Souter v. Watts*, 2 Dowl. 263.

(z) Tidd, 530, 531.

(a) *Robinson v. Tuckwell*, Willes, 183; Sir G. Cooke, 159, S. C.

(b) 2 Arch. K. B. 850; *Liversedge v. Goode*, 2 Dowl. 141; *Harrington v. Johns*, Cowp. 744; *Pechell v. Layton*, 2 T. R. 512, 712.

(c) *Hadley v. Green*, 2 Tyrw. R. 390.

(d) *Foreman v. Jeyes*, 5 Bar. & Adol. 835; but see *ante*, 628.

(e) *Murphy v. Cadell*, 2 Bos. & Pul. 137; *Wise v. Prowse*, 9 Price, 391.

(f) Tidd, 538, 539.

(g) *Foreman v. Jeyes*, 5 Bar. & Adol. 835. The Chancellor, however, on application, ordered the defendant to be discharged.

in which Courts of law have interfered, (g) and time to plead has been given at law purposely to enable the defendant in the mean time to file a bill of discovery in Chancery. (h)

CHAP. XVIII.  
XV. STAYING  
PROCEEDINGS,  
&c.

When an action is *brought or proceeded in* contrary to good *faith*, the Court will, debito justitiæ, stay the proceedings; (i) as where an action was brought pending a reference, which it was agreed should operate as a stay of proceedings, and yet could not be pleaded as a legal bar, the Court will stay the proceedings. (k) But the Court on motion will not discharge a defendant out of custody, or stay proceedings on the ground that the plaintiff caused him to be arrested after the plaintiff had consented in writing to give the defendant time, not elapsed, to pay the debt by instalments, there not appearing any *new* consideration for the plaintiff's agreement to wait. (l)

XVI. Staying  
action or pro-  
ceeding as con-  
trary to agree-  
ment or good  
faith. (i)

If the debt sought to be removed be under forty shillings, and is recoverable in the County Court, or in another inferior Court, (and *no other* mode of objecting to the action in the superior Court, has been enacted, (m)) then such superior Court will stay the proceedings on that fact appearing either from the declaration or particulars of demand, or the admission of the plaintiff or his attorney, or otherwise established by affidavit not contradicted. (n) But if there would not be an adequate remedy in another Court, the superior Court will not interfere, because a creditor is not to lose a just debt on account of the smallness of the amount; (o) and therefore in support of any application of this nature to stay proceedings, the affidavit must show that the plaintiff has a perfect remedy in another Court. (o)

XVII. Staying  
action, or pro-  
ceeding on  
ground of being  
frivolous or for  
too small a sum.

From the great number of reported cases relating to motions to *stay proceedings* until the plaintiff, *when abroad*, has given *security* for costs, it is obvious that this is an important branch of practice, and may be properly here considered, because the

XVIII. Staying  
proceedings  
until security  
for costs, plain-  
tiff being per-  
manently  
abroad.

(g) *Davis v. Saller*, 2 Crom. & J. 466, there cited.

(h) 2 T. Rep. 683; 1 Arch. K. B. 238.

(i) Tidd, 515, 516, 529, 1134; 2 Arch. 4th ed. 853; *Cash v. Wells*, 1 Bar. & Adol. 375.

(k) Tidd, 529; but see *Loues v. Ker-mode*, 2 Moore, 30.

(l) *Udall v. Nelson*, 4 Nev. & Man. 637.

(m) But if a particular mode of relief, as by plea or suggestion, &c. is prescribed, it should in general be strictly observed. Per Lord Kenyon, in 1 East, 354; and see the statutes, Tidd, 9th ed. 954 to 962.

(n) Tidd, 9th ed. 515 to 539; 2 Arch. 4th ed. 851; 1 Chitty on Pleading, 5th ed. 476.

(o) *Ante*, vol. i. 28, note (g); *Tubb v. Woodward*, 6 Term R. 175.

CHAP. XVIII.  
XVIII. SECURITY FOR  
COSTS.

application should be made at the earliest opportunity *after* appearance or justification of bail, and before any further proceeding by a defendant. (p) But the application should not be made in a bailable action until after the twenty days for excepting to bail have expired. (q) A defendant cannot move after he has pleaded, unless his affidavit state that he was not aware of the plaintiff being abroad at the time of pleading. (r) It is not however too late after an order for time, provided it be before pleading. (s) There is an express rule in Reg. Gen. Hil. T. 2 W. 4, r. 98, that "an application to compel the plaintiff to give security for costs, must in ordinary cases be made before issue joined," which settled the previously conflicting practice as respects the time of the application; (t) and in no case can the application be after judgment signed. (u) But it seems that the affidavit in support of the application need not state the stage of the proceedings, and that if there be any objection on that ground it must be shown in answer. (x) In general, if the plaintiff *permanently* reside *abroad*, or in Ireland or Scotland, the defendant must apply for security for costs. (y) But not a British mariner only *occasionally* abroad, but having his family resident in England, (z) nor a person only temporarily abroad; (a) though if it appear that the plaintiff be permanently resident abroad, though he be occasionally in this country, he is bound on application to give this usual security; (b) but if a pauper admitted to sue in forma pauperis will be absent from England for eighteen months, the Court will compel him to give security for costs, or stay his proceedings until his return. (c) But not if the plaintiff be a peer, though in equity the practice is otherwise. (d) And if the plaintiff be an officer actually employed in his majesty's service abroad, he need not give security. (e) But if only one of several plaintiffs be in England, although the rest be abroad, then no security for costs will be ordered. (f)

(p) See in general Tidd, 9th ed. 534 to 538; 2 Arch. K. B. 4th ed. 862 to 866; *Preuve v. Biron*, 4 T. R. 697; *Anonymous*, 2 Chit. R. 152; *Carr v. Shaw*, 6 T. R. 496.

(q) Per Patteson, J. March 22, A. D. 1833, MS.

(r) *Brown v. Wright*, 1 Dowl. 95; *Duncan v. Stint*, 5 Bar. & Ald. 702; 1 Dowl. & R. 348, S. C.

(s) *Wilson v. Minchin*, 2 Tyr. 166; 2 Cr. & J. 87, S. C.; *Gurney v. Key*, 1 Harr. & Wol. 203; 3 Dowl. 559.

(t) Tidd, 537; *Jervis's Rules*, 69, note (v).

(u) *Bohrs v. Sessions*, 2 Dowl. 710.

(x) *Jones v. Jones*, 2 Crom. & J. 207; 2 Tyr. 216.

(y) 2 Arch. K. B. 4th ed. 862.

(z) *Ford v. Boucher*, 1 Hodges, 58, overruling *Wells v. Barton*, 2 Dowl. 160.

(a) *Taylor v. Fraser*, 2 Dowl. 622.

(b) *Gurney v. Key*, 3 Dowl. 559.

(c) *Foss v. Wagner*, 2 Dowl. 499.

(d) *Earl Ferrars v. Robins*, 2 Dowl. 636; *Lord Aldborough v. Burton*, 2 M. & R. 401; 5 Legal Obs. Index, 45.

(e) *Lillie v. Lillie*, 2 M. & R. 404; *Lord Nugent v. Harcourt*, 2 Dowl. 578.

(f) *Orr v. Bowles*, 1 Hodges, 23; 2 Crom. & J. 88; 2 Tyr. 167, S. C.

And in general a plaintiff will not be required to give security for costs, or to disclose his place of residence, where there is no doubt that he sues in his own right on his private right of action, and it does not appear that he is out of the kingdom. (*g*)

CHAP. XVIII.  
XVIII. SECURITY FOR COSTS.

Before any application to the Court or a judge, there should be a civil application to the plaintiff's attorney, requiring him voluntarily to give security for costs, if not the applicant will be ordered to pay the costs; (*h*) and unless there has been a previous private application, the Court will not direct a stay of proceedings. (*i*) Nor will the Court permit a stay of proceedings if the motion be delayed till the last day of the term. (*k*) The affidavit should show such previous request and refusal, or no stay of proceedings will be granted; and the affidavit should state that the plaintiff is resident and not merely temporarily abroad; (*l*) and a rule nisi, with a stay of proceedings, cannot be obtained the last day of a term. (*m*) The Court will not make a second order for further or additional security, although the first sureties become insolvent. (*n*)

Course of proceeding to obtain security.

If an insolvent proceed with an action after executing his assignment, although no assignees are appointed, the Court will stay the proceedings until he or some assignee or creditor has given security for costs. (*p*) And if assignees of a bankrupt go on with an action brought by him before he became bankrupt, they must find security for the costs incurred as well before as

XIX. Staying proceedings until security for costs when plaintiff insolvent. (*o*)

(*g*) *Lloyd v. Davis*, 1 Tyr. 533.

(*h*) *Behrs v. Session*, 2 Dowl. 710.

(*i*) *Jones v. Jones*, 2 Crom. & J. 207;

see form of notice and affidavit Tidd's Forms, 180. The form of notice may be thus:

In the —.

Between { A. B. Plaintiff,  
and  
C. D. Defendant.

Notice of motion to stay proceedings till security for costs has been given.

Take notice that this Honourable Court will be moved on — next, or so soon after as counsel can be heard, for a rule to show cause why all the proceedings in this cause should not be stayed until security be given for the payment of costs. Dated, &c.

To Mr. —,  
Plaintiff's Attorney.

Yours, &c.  
Defendant's Attorney.

(*k*) *Grenow v. Pointer*, 3 Dowl. 571.

(*l*) *Taylor v. Fraser*, 2 Dowl. 622;  
*Ford v. Boucher*, 1 Hodges, 58; see form of affidavit Tidd's Forms, 180.

(*m*) *Grenow v. Pointer*, 3 Dowl. 571.

(*n*) *Aliven v. Furnival*, 2 Cr. & M. 555.

(*o*) See in general Tidd, 9th ed. 534, 535; 2 Arch. K. B. 4th ed.

(*p*) *Doyle v. Anderson*, 2 Dowl. 596.

CHAP. XVIII.  
XIX. PLAINTIFF A BANKRUPT, &c.

after the fiat; and when the action was brought in Easter term, and a fiat was issued against the plaintiff on 2d November, and before the next Easter term the assignee gave notice of trial for the sittings after Easter term, the motion for security for costs was allowed late in that term. (q) In general, however, the alleged insolvency of a plaintiff does not afford a ground for compelling him to find security for costs, and the Court refused to grant a rule calling upon the defendant in replevin to find security for costs, although it was sworn that neither the defendant nor the broker were able to pay them, and the defendant had taken the benefit of the insolvent act. (r)

When not in a qui tam action on account of plaintiff's poverty.

But even in a *qui tam* action, the Court will not stay the proceedings until security for costs on the ground of the plaintiff's poverty, and having commenced several similar actions. (s)

XX. Staying proceedings in ejectment or qui tam actions until residence of plaintiff be stated or security for costs given. (t)

In ejectment, if the residence of the lessor of the plaintiff be unknown, and in qui tam actions, the Courts will stay proceedings until the residence be accurately stated, or in the alternative until security for costs be given. (t) And giving the plaintiff's residence as "at Peel's Coffee-house, Fleet Street," is too general, and the defendant may obtain an order or rule for a better residence. (u) We have seen that in *all personal actions* a defendant has now a right to call on and compel the plaintiff's attorney to state the true residence of the plaintiff; (x) and if plaintiff's attorney deliver a false statement, he may be proceeded against by attachment and have to pay costs. (y)

XXI. Staying proceedings until payment of costs of a prior action. (z)

In case of a *second ejectment* the proceedings may in general on application be stayed until the costs of a prior action founded on the *same title* have been paid, and also the costs of an action for the mesne profits; (z) and this, although the former action was discontinued before consent rule or plea; (a) and where the assignees of an insolvent brought a second ejectment, the case was considered within the rule. (b) But the

(q) *Mason v. Polhill*, 3 Tyr. R. 595; 2 Dowl. 61, S. C.

(r) *Hiskett v. Biddle*, 3 Dowl. 634.

(s) Tidd, 9th ed. 535; *Gregory v. Elridge*, 2 Crom. & M. 536; 2 Dowl. 259.

(t) Tidd, 9th ed. 533, 534.

(u) *Hodson v. Gamble*, 3 Dowl. 174.

(x) 2 W. 4, c. 39, s. 17; ante, vol. iii.

210, 251; Reg. Gen. Mich. T. 3 W. 4; r. 14.

(y) *Neal v. Holder*, 3 Dowl. 493; ante, vol. iii. 351.

(z) Tidd, 9th ed. 538; *Doe d. Cottrell v. Roe*, 1 Chitty's R. 195.

(a) *Doe v. Langdon*, 5 Bar. & Adol. 864.

(b) *Doe d. Standish v. Roe*, id. 878.



Court refused to stay proceedings in a real action until the costs of a prior ejectment had been paid. (c)

CHAP. XVIII.  
XXI. STAYING  
PROCEEDINGS,  
&c.

There are also some particular acts, which expressly authorize *summary applications*, principally between declaration and plea, as the *annuity act*, 53 G. 3, c. 141; (d) the *mortgage act*, 7 G. 2, c. 20; (e) the *landlord and tenant act*, 11 G. 2, c. 19, s. 17; *bail-bond act*, 4 Ann. c. 16; (f) *replevin bond act*, 11 G. 2, c. 19, s. 23, and numerous other acts, the summary proceedings under which have been partially noticed in previous pages. When it is supposed to be expedient to make an application under either of these acts, it is particularly essential to examine each varying enactment and precisely to comply with the particular provision.

XXII. Staying  
proceedings  
under other  
particular sta-  
tutes.

There are other cases, as well at common law as under particular statutes, that it would be difficult to enumerate, where a defendant may obtain relief by *summary application* to a judge or the Court, *before he has by pleading* increased the expense and professed to refer his defence to a jury. And such mode of determining *collateral* matters, independent of facts and merits, to be properly tried by a jury, on principle, should be encouraged, as in general attended with less expense than a trial at nisi prius or a formal argument on demurrer in banc. Thus probably to protect such an individual from liability to pay an arrear of interest on a judgment, the lord's act, 32 G. 2, c. 28, s. 20, enacts that no action *of debt* on a judgment shall be brought against a person discharged under that act, although *scire facias* may be issued so as to have execution against his future effects; and if such action of debt were brought, the Court, to lessen costs, would probably interfere on motion, although there might be a more expensive defence by plea.

XXIII. Stay-  
ing proceedings  
in other cases,  
not before enu-  
merated, with-  
out consent.

But we have seen that neither the Court nor a judge has, at this stage of an action, any discretionary power, *without the plaintiff's consent*, to stay proceedings upon *unusual* terms, however just and reasonable. As on the terms of the defendant's undertaking to pay the debt by *monthly* instalments, (g) though we find that he has considerable discretionary power as to the time of issuing execution after a writ of inquiry or verdict; and although most of the Court of Request acts invest

XXIV. When  
a judge or the  
Court has no  
power to stay  
proceedings on  
unusual terms,  
without consent,  
even on reason-  
able security.

(c) *Bowyear v. Bowyear*, 2 Dowl. 207;  
*Chutfield v. Souter*, 3 Bing. 167.

(d) *Ante*, vol. ii. 329; Tidd, 522.

(e) *Ante*, vol. ii. 331.

(f) *Id.* 333.

(g) *Ante*, vol. iii. 28; *Kirby v. Ellison*, 2  
Dowl. 219; 4 Tyr. 239.

CHAP. XVIII. the commissioners with a wholesome discretionary jurisdiction  
 XXIV. STAY- in this respect, and although a bill was recently attempted to  
 ING PROCEED- be passed to extend that power to the superior Courts, (h)  
 INGS, &c. yet at present neither has that jurisdiction.

XXV. Striking  
 out superfluous  
 or scandalous  
 matter and se-  
 cond counts. (i)

If the defendant cannot *stay the proceedings* on one of the several before mentioned grounds, his next step, before his time for pleading has expired, will be to *endeavour to reduce the length of the declaration*, either on account of *superfluous matter* or *unnecessary counts*, objectionable before or since the late rules; as that a count on a bill of exchange or promissory note, or an indebitatus count in assumpsit or debt, exceeds the length expressly *prescribed* by Reg. Gen. Trin. T. 1 W. 4, and subject to costs as prescribed by that rule; (k) or that there is a *second count on the same subject-matter* of complaint, contrary to Reg. Gen. Hil. T. 4 W. 4, reg. 5, 6 and 7, which also subjects unnecessary counts, pleas, or allegations to be struck out. (l) So if a declaration unnecessarily contain defamatory, indecent or impertinent matter, the objectionable words may on application be struck out; as if in a declaration at the suit of a surgeon it be unnecessarily stated that he had cured the defendant of the venereal disease, and exemplary costs were ordered to be allowed to the applicant. (m)

To whom and  
 how to apply.

The Reg. Gen. Hil. T. 4 W. 4, reg. 6, seems imperative, that the application to strike out a *second count* shall be to a *single judge at chambers*, and not to the *Court in banc*; and the decision of the single judge would probably be considered conclusive. (n) Before that rule it was the practice, at least in *new cases*, to *move the Court* on an affidavit, shortly describing the declaration and its length, and the objectionable matter, and any vexatious expressions used by the plaintiff or his attorney with respect to the length of the declaration, or his

(h) See Lord Wynford's Suits at Law Bill, ordered to be printed 28 February, 1833, last clause, but negatived in second reading in Lords, without a division, April, 1833. If the superior Court had to exercise such adverse jurisdiction, their time would be incessantly occupied by determining upon long and frequently contradictory and uncertain affidavits upon the adequacy of proposed security to be given as the price of indulgence, and in a Court of law at least it would be difficult to sustain a principle that a plaintiff, who may have urgent immediate occasion for the payment of his admitted just debt, should in favour of a defendant

incur the risk of becoming a bankrupt, or being obliged to compromise with his own creditors in order to prevent inconvenience to his debtor.

(i) See in general Tidd, 9th ed. 616 to 619; 1 Arch. K. B. 4th ed. 224; 3 *id.* 828.

(k) *Ante*, 476.

(l) *Ante*, 486.

(m) *Anonymous*, 2 Wilson, 20; *Sanderson's bail*, 1 Chitty's R. 676.

(n) *Seemle*; see observations of Denman, C. J., and Patteson, J., in *Rex v. Archbishop of York and others*, 1 Adolph. & Ellis, 397; 3 Nev. & Man. 453, S. C.; *ante*, vol. iii. 35.

determination to increase costs; (o) or not unfrequently on a short affidavit merely verifying and annexing the declaration, and producing it to the Court, though perhaps the latter course was objectionable, as it might render it necessary for the plaintiff to take a copy of the declaration filed with the affidavit, if he should show cause. The Court would then in a *clear case*, in order to avoid the increase of expense by attendance before the master or prothonotary, themselves order the objectionable matter to be struck out, and in cases of vexation, as when the plaintiff was an attorney, that the plaintiff should pay the costs of the application. (p) But if the case be not clear, the Courts will refer the matter to the master or prothonotary, and decide upon his report. (q)

CHAP. XVIII.  
XXV. STRIKING OUT  
COUNTS, &c.

Before the recent rule as to striking out second counts, the Court of King's Bench, of late, in a clear case, declined to interfere on motion, saying the case was more fit for application to a *judge at chambers*; (r) and since such rule it may be inferred that an application in cases of this nature should now, at least in the first instance, be made to a judge at chambers, especially when the matter objected to has not very vexatiously increased the length and expense, (as the unnecessary repetition of venue,) and when a motion to the Court would, as observed by the Court in a modern case, in reality be more vexatious even than the matter complained of. (s) In a late case, although the declaration deviated from the prescribed form of *commencement*, and irregularly described the plaintiff as debtor to the king, the Court of Exchequer, on motion, refused to grant a rule until after an application had been made to the plaintiff's attorney to strike out the objectionable matter, and he had refused to comply, but upon such refusal they granted a rule nisi for the irregularity. (t)

As respects the *time* of application it would seem essential that the declaration should have previously been *delivered*, or if filed, that the defendant should have *taken* it out of the office. (u) It may be after an order for time to plead. (x) It should in strictness be made before pleading, (x) but in one

Time of application.

(o) As where a counsel in an action, in which he was personally interested, had declared that he had purposely drawn the declaration in a lengthy and intricate way, on purpose to catch the defendant and scourge him with a rod of iron, and that he had so improved the art that the paper-book would amount to three thousand sheets, and he would ruin his opponent, and where the Court directed the settling of the issue on a *quarter of a sheet of paper*, *Yates v. Carlisle*, 1 Bla. Rep. 270.

(p) *Tidd*, 616, note (d); *Bayley v. Watkins*, 1 Chitty's Rep. 449, (a), 450; *Gabell v. Shaw*, 2 Chitty's Rep. 299.

(q) *Newby v. Mason*, 1 Dowl. & R. 508; *Bayley v. Watkins*, 1 Chitty's Rep. 450, (a).

(r) MS.

(s) *Brindley v. Bennett*, 2 Bing. 184; 9 Moore, 358, S. C.

(t) *Hart v. Dally*, 2 Dowl. 237.

(u) *Law v. Williamson*, Hil. 31 Geo. 3, C. P.; *Impey*, C. P. 7th edit. 179; *Tidd*, 618.

(x) *Willkins v. Perry*, R. T. Hardwick, 129; *Law v. Williamson*, *Impey*, C. P. 6th edit. 170; 2 Arch. K. B. 4th edit. 829.

CHAP. XVIII. instance in Common Pleas a motion succeeded even after plead-  
XXV. STRIK- ing; but, at all events, the application must be before further  
ING OUT expense has been incurred by the superfluous matter having  
COUNTS, &c. been engrossed on the record. (y)

Mode of apply-  
ing to strike out  
a second count,  
under Reg. Gen.  
Hil. T. 4 W. 4,  
r. 5 and 6.

Independently of any express rule of Court it will be obvious to every fair practitioner, that before he puts the plaintiff to any expense he should *first civilly apply* to his attorney, and in writing point out the superfluous matter objected to, and request him to strike it out, and not apply to a judge or the Court, until compliance with such request has been refused; and even then the defendant's attorney should well consider whether the Court may not observe that really a motion to strike out is more vexatious than the previous introduction of the superfluous matter. (z)

The Reg. Gen. Hil. T. 4 W. 4, r. 6, orders, that where more than one count shall have been used in *apparent violation* of the 5th rule, the opposite party shall be at liberty to apply to a judge, suggesting that two or more of the counts, pleas, &c. are founded on the *same subject-matter of complaint, or ground of answer, or defence*, for an order that all the counts, pleas, &c. introduced in violation of the rule, be struck out at the cost of the party pleading, whereupon the judge *shall* order accordingly, unless he shall be satisfied, &c." (a)

The usual form of a *summons* and order are given in the note. (b) The taxed costs ultimately paid in this case to the

(y) *Thomas v. Jackson*, 10 Moore, 152; (z) See observation of Court in *Brind-*  
2 Bing. 453, S. C.; but see *Yates v. Car-* ley v. *Dennett*, 2 Bing. 184.  
lisle, 1 Bla. R. 270. (a) See the terms of the rule, *ante*, 486.

Form of sum-  
mons to strike  
out one count.

(b) *Marsh* } Let the plaintiff's attorney or agent attend me at my chambers in  
v. } Serjeants'-Inn, to-morrow, at three of the clock in the afternoon, to show  
*Griffin*. } cause why the superfluous counts in the declaration in this action should  
not be struck out, and why the plaintiff should not pay the costs occasioned by this  
application.  
J. Parke.  
Dated &c.

Form of order  
thereupon.

I allow the first count and the count for money had and received and on an ac-  
count stated, being satisfied upon cause shown, that a *distinct subject-matter of com-*  
plaint is bona fide intended to be established in respect of each of such counts. But  
I order that the common counts for work and materials and money paid should be  
struck out, and that the plaintiff should pay the costs as prayed. W. B.  
Mr. Baron Bolland.

#### *Defendant's Attorney's Bill of Costs relating to such Summons and Order.*

Column of Items			Items as charged in Defendant's Attorney's Bill.					
taxed off.						£.	s.	d.
£.	s.	d.	Attending Mr. — on declaration, when he recom-	}	mended a summons to be taken out to strike out the	0	6	8
0	6	8	superfluous counts.....					
			Summons for that purpose, copy and service .....			0	5	0
0	6	8	Instructions for Brief for Mr. — to attend judge on	}	summons .....	0	6	8
0	3	4	Drawing same, and fair copy one brief sheet.....			0	10	0

defendant,(c) merely on account of introducing the few words, "and in the sum of £—— for work and labour done and materials found by the plaintiff for the defendant at his request, "and in £——, for money paid by the plaintiff for the defendant at his request," occasioned the *plaintiff several pounds*, and the *defendant* also some pounds, not allowed on taxation, as appears by the bill of costs also stated in the note, besides the costs of *three* attendances of 6s. 8d. each, paid by the plaintiff to his own attorney, (and if he also had attended by counsel, his costs of resisting the summons would have been nearly equal to those of the defendant,) for his trouble in opposing the defendant's summons,(d) and as the defendant had paid his counsel a fee of three guineas, and his clerk 2s. 6d., for his attendance before the judge, in support of the summons, and the master only *allowed two guineas*, and also disallowed some other items, the defendant himself, although he succeeded, yet he gained rather an unprofitable victory, and, indeed, was considerably out of pocket, and his attorney alone profited at the expense of his brother practitioner, without obtaining any real advantage for his client. Hence it is clear that very few cases of second counts, or of repetition of venue,

CHAP. XVIII.  
XXV. STRIK-  
ING OUT  
COUNTS, &c.

£.	s.	d.		£.	s.	d.	
1	1	0	Paid him therewith, and clerk.....	3	5	6	
0	3	4	Attending him .....	0	6	8	
			Attending summons, and Mr. — was to see Mr. — } thereon previous to Baron's decision .....	0	6	8	
			Paid judge's clerk's fee .....	0	7	6	
0	3	4	Attending Mr. — on the subject of striking out the } counts, &c. and he decided to attend Baron again ..	0	6	8	
			Attending Mr. — as to course to be pursued, and he } recommended an attendance before Baron Alderson, } and attending at his lordship's chambers, but he was } not likely to attend for a fortnight, and Mr. — re- } commended a fresh summons before another baron ..	0	13	4	
0	3	4	Attending Mr. —, and instructing him to attend baron } — Mr. — declined taking a second fee .....	0	6	8	
			(N. B. No fresh summons was taken out.)				
			Attending summons when order made .....	0	6	8	
			Paid for order, copy, and service.....	0	5	0	
			Paid baron's clerk .....	0	7	6	
<hr/>				<hr/>			
3	0	4	Taxed off	Charged costs ....	8	0	4
				Struck off .....	3	0	4
				Allowed costs ....	5	0	0

(c) In this case the costs were not paid until the *conclusion* of the action, after a reference on the trial to a barrister, but it should seem, from the terms of the rule, that the costs of the summons and order might be enforced in *first* instance.

(d) The plaintiff's attorney would have been justified in also having had the as-

sistance of his counsel, or of the gentleman who settled the declaration, in *opposing* the summons, whereby the plaintiff's costs would have been much increased: they would, in fact, have been within £1 of what the defendant's were in supporting the summons.

CHAP. XVIII.  
XXV. STRIK-  
ING OUT  
COUNTS, &c.

can occur, when it will really be worth while for the benefit of the *defendant* to take out a summons to strike out superfluous counts or matter. If the words objected to had continued and been repeated in the *issue*, nisi prius record and briefs, the expense thereby increased could not, perhaps, have exceeded one pound.(e) The rule itself may be salutary, but it is to be hoped that few indeed will be the practitioners who will attempt to put it in force.

However there is another object, not perhaps more worthy, viz. that of *embarrassing and annoying the plaintiff and his attorney*, and depriving the former of the security of several counts varying the statement, and compelling him to proceed to trial on one count only at the risk of a variance which the plaintiff could not anticipate (in consequence of the witnesses being in the defendant's power, or of their having wilfully misrepresented the evidence they proposed to give), and of the judge refusing to permit an amendment, and this even in cases where counsel and pleaders of great experience and the most learned judges have considered it advisable, if not necessary, in a *mixed action*, as quare impedit, not within the above rule, to frame and permit even five special counts on the same subject-matter, as being essential to the fair and just trial of the right. (f)

Proceedings on  
such a sum-  
mons.

We have before suggested that it is expedient fully to explain to the learned judge why the second count was introduced, especially the bonâ fide object to avoid a variance; but if he should be of opinion that the second count ought not to be retained, the plaintiff's attorney should submit, and not pertinaciously retain the second count at the risk of losing *all* the costs in case a *distinct subject-matter* should not be established on the trial, but be prepared by affidavit, and in person and by counsel, to satisfy the judge on the trial that there had been a second count introduced in order to avoid a variance, but struck out, and thereby the more induce the judge to permit an amendment of the variance.

XXVI. Of re-  
ducing the  
length of plead-

When there are really *several distinct* subject-matters of complaint entitling a plaintiff in respect of each to *distinct*

(e) This would depend upon what pleas the defendant pleaded to these counts. If he pleaded non-assumpsit *only*, some fraction of a pound would pay them.

(f) In *Rex v. Archbishop of York and others*, 1 Adol. & Ell. 397; 5 Nev. &

Man. 453; Mr. Tidd and Mr. Chitty considered it essential to introduce *five* counts in quare impedit on the same subject, and which a learned judge sanctioned on summons expressly for leave to add three counts.

*damages*, the case is not within the Reg. Gen. Hil. T. 4 W. 4, nor have the Courts any jurisdiction to prevent the plaintiff from introducing into his declaration as many counts as there are contracts or injuries; and therefore where there were 286 counts, each upon a separate country banker's promissory note for one guinea payable to bearer, a rule nisi for reducing the length of the declaration was discharged. (g) But in a similar case by *consent*, and on a rule by which defendant undertook to permit all the notes to be given in evidence either before the master or a jury under the count upon an account stated, the Court ordered all the counts on the notes but one to be struck out. (h) But care must be taken that the bail consent not to be discharged, and that all other difficulties be anticipated.

CHAP. XVIII.  
XXVI. SHORT-  
ENING PLEAD-  
INGS, CONSENT.

ings by agree-  
ment and rule  
thereon.

At this stage of the cause also (i. e. between declaration and plea) are usually made applications to *consolidate several actions or demands into one*, when the same plaintiff having several claims against the same defendant, all complete at the same time, or at least before he has issued any writ, *vexatiously* or *unnecessarily* commences *several actions*, as upon several bills of exchange or promissory notes, or for several trespasses. In these cases the Court or a judge will upon summons or motion *compel* the plaintiff, however reluctant, to *consolidate* and include the whole in *one declaration*, and pay the costs of the application; and this although the plaintiff may thereby lose the security of the bail in the second action. (k) But where several actions have been brought upon separate bills or notes, or other causes of action *accruing at different times*, and immediately each so accrued, then, as the plaintiff was not bound to wait till all his claims had accrued due, his separate proceedings for each as they arose are not considered vexatious; and though the Court may on terms, and as a favour to the defendant, and with the consent of the plaintiff, pronounce a rule *suspending* the trials of more than one action, yet such rule will not be of course; (l)

XXVII. Of  
consolidating  
several actions  
into one. (i)

(g) *Lane v. Smith*, 3 Smith, 113; Tidd, 617.

(h) *Cunnack v. Gundry*, 3 Bar. & Ald. 272; 1 Chitty's R. 709, S. C., where see the proper form of the rule; and see observations of Lord Tenterden in *Oldershaw v. Tregwell*, 3 Car. & P. 58.

(i) See in general Tidd, 9th ed. 614 to 616; 2 Arch. K. B. 830 to 833; *Cecil v. Briggs*, 2 Term R. 639, and note; 1 Chit-

ty's R. 709.

(k) *Cecil v. Briggs*, 2 Term R. 639; *Anonymous*, note (a) 1 Chitty's R. 709; Tidd, 9 ed. 614.

(l) *Musenden v. O'Hara*, Tidd, 9 ed. 614; *Le Jeune v. Sheridan*, Forrest's Rep. 30; *Wise v. Prouse*, 9 Price, 393; *Oldershaw v. Tregwell*, 3 Car. & P. 58, and post.

CHAP. XVIII. and yet the term consolidation rule is, though improperly, used  
 XXVII. OF as applicable to both cases.  
 CONSOLIDATING  
 &c.

Of consolidation  
 rules suspending  
 the proceedings  
 in several ac-  
 tions on the  
 same policy or  
 bond, &c. against  
 several separate  
 defendants until  
 one action has  
 been tried.

So even when *several* actions have been properly and *neces-*  
*sarily* brought on the same *policy of insurance* against sea-  
 risks against *several separate* underwriters, it has long been  
 the practice, at the instance of the defendants, and as a favour,  
 provided the plaintiff will consent, to *suspend* the proceedings  
 in all the actions but one, until that has been tried; the other  
 defendants entering into and being bound by what is termed  
 a *consolidation rule*, (*m*) though that term seems here mis-  
 applied, for there is no *consolidation* of the several actions, but  
 merely a *stay of proceedings* in all but one, and an order that  
 they shall abide the result of the trial of that single action,  
 the other defendants engaging to pay the amount of their  
 several subscriptions and costs, in case a verdict shall be given  
 therein for the plaintiff; (*n*) but if the plaintiff will not consent,  
 the Court will stay his proceedings by giving the defendants  
 time to plead in all the actions but one, by which expedient his  
 actions are in effect stayed. (*o*) The Courts however will make  
 the defendants applying for the rule submit to reasonable terms,  
 as admitting the policy, and producing and giving copies of  
 books and papers, and undertaking not to file a bill in equity  
 or bring a writ of error. The consolidation rule in K. B. and  
 judge's order in C. P. renders the verdict in the action that is  
 tried obligatory only on the *defendants*, and not on the plain-  
 tiff; and in a late case the Court of K. B. refused, without the  
 consent of the plaintiff, to make a consolidation rule upon the  
 terms that both *the plaintiff* and the defendants should be  
 bound in all the actions by the event of one. (*p*) The practice  
 of suspending the proceedings in several actions now extends  
 to several separate actions on the *same bond* against several  
 obligors, and perhaps to the other cases where it may be mani-  
 fest that precisely the same point is to be tried in all the  
 actions. (*q*) Thus where five several separate actions are  
 simultaneously commenced and pending on a *bond*, viz. against  
 a principal and four several sureties, one of them may pay into  
 Court in the action against him a sum which it is insisted is suffi-

(*m*) See form of Rule in K. B., Tidd's  
 Forms, 224; and of judgment thereon, *id.*  
 336; and of the judge's order in C. P.,  
 Tidd's Forms, 224.

(*n*) Parks on Insurance, introd., and  
 1 Marshal on Insurance, 602; and per  
 Wood, B. in *Foreman v. Southwood*, 8

Price, 575, 576.

(*o*) *Id.*; Tidd, 9 ed. 615.

(*p*) *Doyle v. Anderson*, 1 Adol. & El.  
 635.

(*q*) See note (*r*), 645, *infra*, and *Older-*  
*shaw v. Tregwell*, 3 Car. & P. 58; *Nicholls*  
*v. Lefevre*, 3 Dowl. 135.



cient to cover the plaintiff's claim, and thereupon a judge's order may be obtained for staying the proceedings in the other actions on the terms that they should abide the event of the action to be tried, and an order was made in the subscribed form. (r)

But where six actions of trover had been brought against the *same defendant* by six different plaintiffs employing the same attorney, the Court refused to order the proceedings in five of them to be stayed to abide the result of one, the plaintiffs not consenting, and it being sworn that the causes of action were different in all of them. (s)

Before a plaintiff or several defendants consent to a rule of this nature, each should well consider whether all the actions and defences stand in precisely the same situation as to evidence, and decide accordingly.

The Courts will not allow a rule of this nature to be opened on the ground that evidence has been discovered since it was entered into, placing one defendant in a better or worse situation than the others. (t) However a consolidation rule was in one case modified, and a new trial granted on the ground of a material witness having absented himself, and on the terms of bringing the money into Court; (u) and although by the terms of the rule the verdict is to be binding on all the defendants, still this is subject to the just interposition of the Court. The proceedings to enforce judgment and payment under the consolidation rule have been fully stated by Mr. Tidd. (y)

There appears to have been only one *recent regulation* in the practice relative to this head, viz. Reg. Gen. Hil. T. 2 W. 4, r. 104, orders that "where money is paid into Court in several "actions which are *consolidated*, and the plaintiff, without

(r) *Cox v. Lythgoe* and four other defendants, in separate actions, July 22, 1835; and see *Oldershaw v. Tregwell*, 3 Car. & P. 58. But in *Royal Exchange Company v. —*, Hil. T. 1815, the Court refused to consolidate two actions on *two bonds*, though precisely similar, 1 Chitty's Rep. 709, in note.

*Cox and others v. R. Lythgoe*, Agent;  
*Same v. R. Lythgoe*, Schoolmaster;  
*Same v. J. Lythgoe*;  
*Same v. G. Lythgoe*;  
*Same v. J. Hollingworth*.

E. H. Alderson:—Upon hearing the attorneys or agents on both sides, I do order that the cause of *Cox v. Hollingworth* be tried; that the others be stayed and abide the event; and that if early judgment shall

Form of judge's order in an action pending in K. B.

be ordered in the action to be tried, judgment shall be given at the same time as to the other actions.

Dated the 22nd day of July, 1835.

(s) *Nicholls v. Lefevre*, 3 Dowl. 135.  
(t) *Pullen v. Parry*, Hil. T. 1812, 1 Chitty's R. 709, note (a).  
(u) *Holman v. —*, Hil. T. 1815, 1

Chitty's R. 710, in note.  
(x) Tidd, 615.  
(y) Tidd, 9 ed. 615, 616.

CHAP. XVIII. "taxing costs, proceeds to trial on one, and fails, he shall be  
 XXVII. Or "entitled to costs on the others up to the time of paying  
 CONSOLIDA- "money into Court," which rule assimilates the practice of  
 TING, &c. K. B. to the previous practice of C. P., which was considered  
 preferable. (s)

XXVIII. Ap- *Between declaration and plea*, an application by a defendant  
 plications to *to change the venue* or place of trial, from the county named in  
 change the the declaration to another county, is to be made when that  
 venue. (a) proceeding is *of right*, and *of course* on the *usual affidavit*, and  
 1. In what as *distinguishable* from *special applications* for the same pur-  
 cases applica- pose, which are now not in general to be made until *after plea*.  
 tion is of course Such an application may be useful as well when the defendant  
 or not. intends to plead and try the action as when he intends to suffer  
 judgment by default, and merely endeavour to reduce the  
 amount of damages upon the execution of an inquiry. An ap-  
 plication as of course is professedly made on the ground that  
 the transaction took place in the county named by the defend-  
 ant, and that it is more proper it should be tried there than in  
 the county named in the declaration; but very frequently the  
 defendant's object is to delay the trial when the venue has been  
 laid in London or Middlesex; and sometimes when the plain-  
 tiff has declared just before the assizes, and laid the venue in  
 the country, the application is then made with the same object  
 to change the venue into London or Middlesex, so as to delay  
 the trial until or after the next term. There is much learning  
 in the books upon the subject of venue and changing the  
 venue. (b) It was always a just principle that every action  
 should be tried in the very county where the subject of it oc-  
 curred, because it was supposed that probably subjects, in some  
 measure connected with local usages, would be *there* best un-  
 derstood and appreciated; and also because probably the wit-  
 nesses would reside there, and might be more readily brought  
 to that place of trial; so that besides the necessity for the  
 plaintiff's laying the venue in the proper county in *local* actions,  
 it was deemed proper to afford the defendant the opportunity  
 of compelling the trial in all actions in the proper county where  
 the transaction really occurred, if he would venture to swear  
*that the cause of action arose there and not elsewhere*; and this  
 was the reasonable origin of the practice of changing the

(s) Jervis's Rules, 71, note (h).

(a) See in general Tidd, 9th ed. 601  
 to 614; 2 Arch. K. B. 821 to 828; 2  
 Arch. C. P. [37 to 41], 189; and see a

full note to *Bagnall v. Shipham*, 1 Cramp.  
 & Jervis, 378, note (h).

(b) *Id.*

CHAP. XVIII.  
XXVIII.  
CHANGING  
VENUE.

venue. (c) It may suffice here to observe that in *local* actions the plaintiff is *obliged* to lay the venue in the proper county, and neither party, without the actual permission of the Court, can in such case change the place of trial. In *transitory* actions, where the subjects *might* have arisen in any county, the plaintiff, when privileged as a serjeant, barrister, attorney, or other officer of the Court, *and suing as such*, had and still has, on account of his attendance in the Courts at Westminster, relating to the interests of their clients, a right to lay and keep the venue in *Middlesex*, and then the defendant cannot change the venue or trial to another county. (d) In *other transitory* actions, the subjects of which arose abroad, or might and probably did in part occur in *several counties*, or in any county, although the *plaintiff* has in the first instance the *option* of laying the venue in any county he may prefer; and in such transitory actions the defendant is not allowed to change the venue, unless he can *properly swear* "that the plaintiff's" "cause of action arose in another named county different to" "that mentioned in the declaration, and not in that county nor" "elsewhere than in the county named by the defendant." And by a course of decisions (the principle of some of which, however, seems doubtful, and most of which require consideration,) it has been established that a defendant cannot properly make such an affidavit *in certain actions*, as where the cause of action arose *abroad*, or even *probably* arose in *several counties*, as an action against a carrier or lighterman for negligence, where the delivery of the goods was in one county and the loss or damage in another, (e) or an action for an escape or false return. (f) So all causes of action upon any *specialty*, as a bond, lease, policy of insurance, or charter-party under seal, in respect of the legal doctrine that *debitum et contractus sunt nullius loci*, and that bonds and other specialities are *bona notabilia*, wherever they happen to be, the venue could not be changed *as a matter of course* by the defendant. (g) And on account

(c) 3 Bla. Com. 294, 295.

(d) Tidd, 606. It will be observed that, although the uniformity of process act, 2 W. 4, c. 39, introduces new forms of proceedings, yet sect. 19 expressly reserves *privileges*, and an attorney, when plaintiff, and suing alone, still retains his privilege to lay and retain the venue in *Middlesex*, *Partington v. Woodcock*, 2 Dowl. 550; but then it must appear from the *declaration* or *proceedings* that the plaintiff sues as an attorney or in person, and not by another attorney, *Lowless v.*

*Tims*, 3 Dowl. 707.

(e) *Heathcote's case*, 2 Salk. 670; *Edle v. Glover*, cited Tidd, 603, note (i); but in *Williams v. Lane*, 4 Taunt. 729; and *Curtis v. Drinkwater*, 2 Bar. & Adol. 169, where in an action against a stage coach proprietor for injury to a passenger, who became so in one county and received an injury in another, the venue was changed.

(f) See cases Tidd, 603.

(g) See cases Tidd, 604; *Weatherby v. Goring*, 3 B. & Cres. 552.

CHAP. XVIII.  
XXVIII.  
CHANGING  
VENUE.

of the peculiar properties of *bills of exchange and promissory notes*, (implying a consideration, and being negociable and partaking in some respects of the properties of a specialty,) when a declaration *bona fide* contains even one count on either of those instruments, the plaintiff has a right to lay his venue in any county, and the defendant cannot change it as of course; (*h*) and this extends even to a promissory note, though not payable to order, and consequently not actually negociable in different counties. (*i*) But an I. O. U. or mere signed memorandum of agreement, though declared, is not within that exception, and the venue in the action thereon may be changed. (*k*) The same rule applies to an action for a *written libel*, published in different counties; (*l*) and in the latter case, if a defendant irregularly obtain a judge's order for changing the venue, the plaintiff may move to discharge it, without giving an undertaking to give material evidence. (*l*)

But in *most other* actions, as for common debts and simple contract claims, and for torts to the person or personal property, the defendant *may as of course* (*m*) (unless when a single plaintiff be thus privileged, and proceed as privileged on the face of the proceedings, (*n*)) move to change the venue, if he can conscientiously make the prescribed affidavit presently stated.

When the application must be *special* and on special affidavits and grounds.

In all *actions whatever*, (excepting where the plaintiff is privileged to lay and retain his venue in Middlesex, (*o*)) it seems that upon *special ground* and affidavit, showing *strong reasons* for the measure, and upon a *special application* to the Court for a rule nisi, and upon the defendant's submitting to just and reasonable terms, the Court may change the venue, even in those cases where it could not be changed as a matter of course. (*p*) The principal ground is the residence of *all or most of very numerous* witnesses in the county named by the defendant, and in such a case the venue may be changed, even in an action on a bond or other specialty, and indeed in *every description of action*; (*q*) but then the affidavits must state the

(*h*) See cases Tidd, 604; *Parmeter v. Otway*, 3 Dowl. 66; *Walthew v. Lyers*, 3 Dowl. 160; *Dawson v. Bowman*, id. 160; *semble*, overruling *Greenway v. Carington*, 7 Price, 564.

(*i*) *Smith v. Elkins*, 1 Dowl. 426.

(*k*) *Roberts v. Wright*, 1 Tyr. 532; *Slade v. Trew*, 2 Dowl. 65; 1 Tyr. 532, S. C.

(*l*) See cases Tidd, 605; but see other cases, *Hobart v. Wilkins*, 1 Dowl. 460; *Greenslade v. Ross*, 3 Dowl. 697; 2 Arch. K. B. 4th ed. 822, 823; *contra*

*Clementson v. Newcombe*, 1 Gale, 425; 1 Cr. M. & Ros. 776; 3 Dowl. 423, S. C.; *Dawson v. Bowman*, 3 Dowl. 160.

(*m*) In crim. con. *Guard v. Hodge*, 10 East, 32; in assault, *Shepherd v. Hall*, 2 Chitty's R. 417.

(*n*) *Ante*, 647, note (*d*).

(*o*) Tidd, 605; *Pitcher v. Sheriff of Monmouth*, 2 Marsh. 152; 2 Chitty's R. 418, in note.

(*p*) See cases Tidd, 605.

(*q*) *Foster v. Taylor*, 1 T. R. 781; and other cases, Tidd, 605.

precise defence, and not only show that there are numerous witnesses, but also the necessity for examining and intention to examine them, and the circumstance of there being many witnesses will not alone suffice; (r) and it must appear not merely that the expenses of a trial in the county where the plaintiff laid the venue would be greater, but that the expenses would be *very greatly* enhanced. (s)

CHAP. XVIII.  
XXVIII.  
CHANGING  
VENUE.

So when it is sworn and established to the satisfaction of the Court that *a fair trial cannot be had* in the county named in the declaration, the Courts would change the venue, as well in *transitory* as in *local actions*, before the 3 & 4 W. 4, c. 42, s. 22; (t) and that act, after reciting that unnecessary delay and expense is sometimes occasioned by the trial of local actions in the county where the cause of action has arisen, enacts, "that in any action depending in any of the *said* superior Courts, the venue in which is by law local, the Court in which such action shall be depending, or any judge of any of the said Courts, may, on the application of either party, order the *issue* to be tried, or writ of inquiry to be executed in any other county or place than in that in which the venue is laid; and for that purpose any such Court or judge may order a *suggestion* (u) to be entered on the record, that the trial may be more conveniently had, or writ of inquiry executed in the county or place where the same is ordered to take place." In a recent action of ejectment to try the validity of a will on the ground of insanity, the Court refused to enter a suggestion on the roll under this act to change the venue from Somersetshire to London, on the mere ground that the testator resided in London at the time of his death, and that the evidence of *one eminent medical man* living in London would be essential; because it appeared that the testator was most visited, and best known at his country estate in Somersetshire, where the will was made, and in which county there were also many witnesses. (x) And though under this act the venue may in effect be changed in an action of *trespass quare clausum fregit*, yet an allegation, that an impartial trial cannot be had, must be very satisfactorily established to induce the Court to interfere. (y)

Changing place  
of trial in local  
actions under  
3 & 4 W. 4, c.  
42, s. 22.

(r) Per Littledale, J., in *Parmeter v. Otway*, 3 Dowl. 69; *Crompton v. Stewart*, 2 Cramp. & Jer. 473.

(s) *Alcock v. Cook*, 6 Bing. 155.

(t) See cases, Tidd, 603.

(u) See form, T. Chitty's Forms, 715, 716.

(x) *Doe dem. Baker v. Harmer*, 1 Harr. & Wol. 80.

(y) *Briacos v. Roberts*, 3 Dowl. 434.

CHAP. XVIII.  
XXVIII.  
CHANGING  
VENUE.

Differences between the ordinary application, and one that is special.

There is this very material difference in the practice between applications by a defendant *as of course* upon the common affidavit to change the venue, and *special applications*, viz. that the former *must* be made *before pleading*; (z) whereas the latter cannot now *in general* be made *until after issue* has been joined, or at least until *after the defendant has pleaded*, a distinction introduced in order that the Court may ascertain from the *pleadings* what will be the precise point or issue to be tried; though probably cases may arise where the venue might be changed on special grounds, after judgment by default; as where numerous witnesses, or old or infirm witnesses, material to be examined on executing a writ of inquiry, reside in a particular county where the cause of action arose, as in an action of covenant on a farming lease; though the safer course would be to make a special application before judgment by default, offering that judgment as one of the terms.

Time of making the ordinary application to change venue.

From the numerous recent instances of applications to change the venue made *after plea*, it might be supposed that the long established practice had, as respects the *time* of application, been changed, but it has not. The rule still is, that a defendant cannot move to change the venue before he has appeared; (a) and that the usual and proper time to move to change the venue *as of course*, and upon the *common affidavit* that the whole cause of action accrued in the county named by the defendant, and not in that named by the plaintiff in his declaration, is to be made *after declaration and before plea*. (b) Anciently the application must have been made within eight days after declaration, being the utmost time allowed for pleading; (c) but it has long been settled that a defendant may as of course make the application in King's Bench and Common Pleas at any time after declaration and before pleading, and even after an order for time to plead on the terms of pleading issuably, (d) though when a defendant is under the terms of also taking short notice of trial at the first or other sittings within term in London or Middlesex, he cannot change the venue into the country, because a trial in the term would by that means be lost. (e) But where a defendant was under such terms in a

(z) *Ante*, 646.

(a) 1 K. B. 271; 1 C. P. 272.

(b) In K. B. and C. P. Rule Mich. T. 1651, s. 1; and see fully, note to *Bugnull v. Shipham*, 1 Cramp. & J. 377, 378.

(c) *Anonymous*, 2 Salk. 668; *Long v. Miller*, 2 Sira. 1192.

(d) *Suyers's R.* 207; *Rowley v. Allen*, Willes, 518; *Reg. Mich.* 16 Geo. 2, C. P. *Wilson v. Harris*, 2 Bos. & P. 320.

(e) *Petyt v. Berkeley*, Comp. 511; *Shipley v. Cooper*, 7 T. R. 698; *Nunn v. Taylor*, 1 Bing. 186; 7 Moore, 598, S. C. 2 Dowl. 240.

*country cause*, the Court permitted the defendant to change the venue, as the so doing would not delay the plaintiff. (f) In the Exchequer the defendant cannot as of course apply to change the venue after an order for time to plead on *all* the usual terms, and, therefore, when he is about to be subjected to terms, should take care to reserve liberty to change the venue. (g) But if he be only under the terms of *pleading isswably*, then he is at liberty to move to change the venue. (h) *After plea*, either in abatement or bar, it is too late and irregular in all the Courts to apply by the *common motion* to change the venue; (i) though if justice clearly require a *special* application it may be sustained after pleading. (k) When the practice of Common Pleas required a rule nisi, it could not be moved for on the last day of term, unless the declaration was delivered so late as to prevent the motion being made before; (l) but now as *the rule is absolute in the first instance in all the Courts*, a different rule would probably prevail. (m) But, although in ordinary cases, a defendant should apply to change the venue before he has pleaded, yet in favour of liberty, as where the defendant is a prisoner, his application may be granted even after issue and the cause has been taken down to trial, as where the venue was laid in Somersetshire, and the defendant made the cause a special jury, and on the trial sufficient special jurors not appearing, neither party prayed a tales, and afterwards, the defendant being still a prisoner, he was allowed to change the venue into Middlesex, so as to have an earlier trial, on the terms of his paying to the plaintiff the extra expenses of trying in Middlesex. (n) But the venue cannot be changed after a new trial has been granted. And if a defendant apply to change the venue after plea, the onus of showing *special* grounds for the change always lies upon him. (o)

In those cases in which we have seen that the defendant is *prima facie* entitled to change the venue, in support of the ap-

The practice in changing the venue in ordinary cases

(f) *Notts v. Curtis*, 2 Tyr. 307; 2 Cr. & Jer. 345, S. C.

(g) 1 Price, 146; *Waring v. Holt*, 3 Price, 3; *Brettargh v. Dearden*, M'Clel. & Y. 106; *Tonks v. Fisher*, 2 Dowl. 22.

(h) *Russell v. Hurst*, 3 Tyr. 218.

(i) *Talmash v. Panner*, 3 Bos. & P. 13; *Wigley v. Dubbins*, 4 Bing. 18; *Smith v. Walker*, 8 Taunt. 69; 2 Moore, 64, S. C.; *Amner v. Cattell*, 5 Bing. 208; *Moses v. Stevenson*, 1 Taunt. 58; see 1 Crompt. & J. 377, 8, note (h).

(k) *Bayley v. Beaumont*, 11 Moore,

S84.

(l) *Wood v. Winch*, Barnes, 480; *Thomour v. Rand*, id. 486; *Hayward v. Wells*, id. 489; Tidd, 609.

(m) But if the changing the venue would in any case prejudice the trial, the Court might impose terms, *semble*, *Amner v. Cattell*, 5 Bing. 208.

(n) *Keys v. Smith*, 2 Dowl. 210; and see 2 Arch. K. B. 4th edit. 825, note (t), as to a plaintiff's expediting a trial.

(o) *Higgins v. Houseman*, 3 Dowl. 549.

CHAP. XVIII.  
XXVIII.  
CHANGING  
VENUE.

Requisites of  
ordinary affi-  
davit.

By whom affi-  
davit to be  
sworn.

plication, he has long been required to make an affidavit "that the cause of action accrued in the county named in the affidavit, and not in the county named in the declaration, *nor elsewhere* than in the county first named in the affidavit," (*p*) and no deviating affidavit will be admitted; (*q*) and therefore, where the words "and *not elsewhere*" were omitted in the affidavit, the Court refused the common rule. (*r*) It would, from a recent decision, seem to be as well for a defendant, when the facts will warrant him in so doing, upon moving for the common rule, in addition to the above indispensable terms of his affidavit, to state the number of his numerous necessary witnesses resident in the county, into which he prays the venue to be changed, and his intention to subpoena them as witnesses, together with any other circumstances showing that it will be proper that the cause should be there tried. (*s*) It will be obvious that the *defendant himself* is most competent to make this affidavit, as he must best know, as well affirmatively as negatively, what are the supposed causes of action, and where they arose, but it has been decided that an equally positive affidavit made by the defendant's attorney will suffice, (*t*) though the safest course is, for the defendant himself, if in the country, to swear to the affidavit, and if sworn by a third person the affidavit should show that the defendant is abroad. (*u*) We have seen that there are many actions in which the defendant has no right *as of course* to change the venue, and, therefore, to prevent misrepresentation to the judge or the officer of the Court, who is to make the order, or draw up the rule, Reg. Trin. T. 49 Geo. 3, in King's Bench, and the practice in Common Pleas, requires the *declaration to be produced*, and the order or rule is to be drawn up as well upon reading the

(*p*) Sty. P. R. 631; Reg. Mich. 10 Geo. 2, reg. 2, (*c*), K. B.; 1 Sid. 185, 442; Say. Rep 77; Tidd, 609. The invariable form is thus, and the practitioner should remind the deponent, that if the affidavit be untrue in *any part* he might be indicted for perjury; and yet this affidavit is often too hastily made:—

Common form  
of affidavit on  
which to apply  
to change the  
venue.

In —.

C. D. of —, [*gentleman*,] the above-named defendant, maketh oath and saith, that the plaintiff's cause [or "causes"] of action [*if any*] arose in the county of —, and not in the county of —, [*the venue laid in the declaration*,] or elsewhere out of the said county of —, [*the first named county*.]

Sworn, &c.

Between, &c.

C. D.

(*q*) *Palmer v. Terry*, 2 Dowl. 566.

(*r*) *Jones v. Pearce*, 2 Dowl. 54.

(*s*) *Greenslade v. Ross*, 3 Dowl. 697.

(*t*) *Biddle v. Smith*, 2 Dowl. 219; *King v. Turner*, 1 Chitty's Rep. 58, 161; an affidavit to hold to bail may certainly be made by a third person, and a fortiori,

it would seem that an affidavit to change venue may be made by any third person, see *Kelly v. Devereux*, 1 Wils. 359; *Say. Rep.* 59, S. C.; *Pieters v. Loytjes*, 1 Bos. & P. 1; *Andrioni v. Morgan*, 4 Taunt. 231; 9 Price, 322; Tidd, 178.



above mentioned *affidavit*, but in King's Bench *on reading*, and in Common Pleas *inspecting the declaration*, the venue is ordered to be laid in the newly named county. (u)

CHAP. XVIII.  
XXVIII.  
CHANGING  
VENUE.

Until lately, the practice in K. B. and C. P. and Exchequer differed materially with respect to an application to change the venue. In K. B. the rule for the change was *absolute* in the first instance, but in C. P. it was *nisi* only; and the plaintiff had an opportunity of showing cause against the rule on affidavits. (x) But by the general rule of Hil. Term, 2 W. 4, reg. 103, the practice of all the Courts was assimilated to that of K. B.; it being thereby ordered that "in cases where the application for a rule to *change the venue* is made upon the *usual affidavit only*, the rule shall be absolute in the first instance; and the *venue shall not be brought back*, except upon an undertaking of the plaintiff to give material evidence in the county in which the venue was originally laid." (y) So that now if a defendant, in those actions in which it is of course to change the venue, will venture to swear, however falsely, that the whole cause of action accrued in a different county named by him, the plaintiff has no other course but to give what is termed the *usual undertaking*, viz. an undertaking to give some material evidence that originated or arose in the county originally named in the declaration, on which terms only can he retain the trial in the original county.

If however the venue has been *irregularly changed*, as in one of the actions in which we have seen a defendant cannot as of course change the venue upon the *common affidavit*, then the plaintiff may, upon an affidavit of the facts, and showing that the declaration was on a bond or bill of exchange or promissory note or libel, published in two or more counties, move to *discharge such rule or order*, without being placed under the terms of giving material evidence in the county where he had laid the venue; (z) and in a recent case, where inadvertently the venue had been changed on an application as of course on the usual affidavit and rule, although one count of the declaration was on a bill of exchange, and thereupon the plaintiff obtained a rule nisi for discharging such rule for changing the venue, the Court made the latter rule absolute, and refused to permit the defendant to go into special affida-

Discharging the order or rule for changing the venue as irregularly obtained.

(u) Tidd, 609; see the forms of judge's order and rule for changing the venue, *post*, 654, 655, in notes.

(x) And see fully the previous practice, Tidd, 608, 611, 612; and the note to *Bagnall v. Shipham*, 1 Crom. & Jer. 377, 378.

(y) See the former practice, Jervis's Rules, 70, note (a).

(z) *Clementson v. Newcomb*, 1 Gale, 60; 1 Crom. M. & R. 776; 3 Dowl. 425, S. C.

CHAP. XVIII.  
XXVIII.  
CHANGING  
VENUE.

vits, showing that all the witnesses resided in the county into which the venue had been thus irregularly changed; saying that the defendant should have moved a *special* on those affidavits. (a) But where in an action for a *libel* the defendant had changed the venue *after plea of general issue*, and a plea of justification of the truth of the libel upon the usual affidavit, and also upon *special ground* stated in the affidavit, that the residence of his witness was in Lancashire, and the plaintiff applied to bring back the venue to Middlesex, on affidavits that there was no truth in the libel, and that he believed he could not have a fair trial in Liverpool, and that he had eight witnesses in London, the defendant consenting to withdraw the plea of general issue, and to produce a copy of the newspaper, to save expense of witnesses from the stamp office, the Court refused the rule prayed by plaintiff. (b)

The plaintiff may also in a *special affidavit*, showing that an impartial trial cannot be had in the county named by the defendant, and into which he has removed the venue, and, on a special application and rule nisi, may *bring back* the venue to the original county. (c) But where a defendant had changed the venue to the county where the cause of action arose, it was held to be no reason for bringing back the venue that the action was for the balance of an election dinner, and that the defendant was treasurer of the county, and an electioneering agent, and a person of great influence there, it being a special jury cause. (d)

Of the plaintiff's undertaking to give material evidence in original county, and what a compliance.

In general, however, a plaintiff, when he is well advised that he can safely undertake to give material evidence in the first named county, usually gives the proper undertaking, and thereby gets rid of the effect of the common rule for changing the venue, and tries the cause in such first named county. The subscribed forms of the usual rule and order and undertaking will elucidate the practice. (e) The application by the plaintiff

(a) *Id. ibid.*; *Dawson v. Bowman*, 3 Dowl. 160.

(b) *Greenlade v. Ross*, 3 Dowl. 697.

(c) See form of affidavit in such a case, T. Chitty's Forms, 637.

(d) *Hill v. Payne*, 3 Dowl. 695.

Form of rule to change the venue in term time.

A. B. } (e)  
agst. }  
C. D. } Upon reading the affidavit of C. D., and the declaration in this cause, it is ordered, that the venue in this action be laid in the county of —; but it is further ordered, that the plaintiff be at liberty to discharge this rule upon producing counsel's [or in C. P. "serjeant's"] hand to the clerk of the rules and orders of this Court, and undertaking at the trial of this cause to give material evidence of some matter in issue arising in the county of —, where the cause of action was first laid. Upon the motion of Mr. —.

On — day of —, A. D. 1835.

to discharge the defendant's rule for changing the venue, should properly be made immediately, or at least before the venue has been altered in the declaration or issue; (f) but there are instances of the application having succeeded even after the cause had been carried down to trial and made a remanet; (g) and as a defendant, when a prisoner, has been allowed after a trial has gone off from defect of jurors to move to change the venue, so as to expedite the trial, there seems no reason why a plaintiff should not be equally allowed thus to expedite a trial. (h)

CHAP. XXVIII.  
CHANGING  
VENUE.

The older instances of what is deemed sufficient evidence in compliance with this rule, have been collected in previous publications. (i) In a recent action against a coach proprietor for negligence, proof that the plaintiff suffered pain and incurred expense in the county where he had originally laid the venue, was considered to be a sufficient compliance with his undertaking to give material evidence of a matter in issue arising there; (k) and it has been decided that the putting into the post a letter in the county where goods were made, directed to A. in another county, and containing an invoice of the quantity, quality, and price of goods sent at the same date to A. by another conveyance, was *material evidence* in the first county, so as to satisfy an undertaking by the plaintiff to give material evidence there. (l)

What is deemed  
material evi-  
dence.

The Courts in general now refuse to change the venue on a special application *before issue has been joined*, because until then the precise nature of the question to be tried, and consequently the number and description of the witnesses, cannot well be ascertained. And this rule applies more strongly in

Time of apply-  
ing on special  
grounds.

A. B. } Upon reading the affidavit of C. D., and the declaration in this cause, I  
v. } order that the venue in this action be laid in the county of —. Dated this  
C. D. } — day of —, 1835. [Judge's or Baron's signature.]

Form of judge's  
order to change  
venue in vaca-  
tion.

A. B. } On — the — day of —, A. D. 1835.  
agst. } Upon reading the rule [or "order"] made in this cause, on — the —  
C. D. } day of —, A. D. 1835; and the plaintiff hereby undertaking at the trial  
of this cause to give material evidence of some matter in issue arising in the county of  
—, where the cause of action was originally laid, it is ordered that the said rule be  
discharged. Upon the motion of Mr. —.

Rule to retain  
the venue upon  
the usual un-  
dertaking.

By the Court.

(f) 1 Crompt. 114; 2 Arch. K. B. 4th ed. 825.

K. B. 4th ed. 625, 626.

(g) See cases, 2 Arch. K. B. 825.

(k) Curtis v. Drinkwater, 2 B. & Adol.

169

(h) Keys v. Smith, 2 Dowl. 210.

(l) Linley v. Bates, 2 Tyr. 746.

(i) Tidd, 9th ed. 612, 613; 2 Arch.

CHAP. XVIII.  
XXVIII.  
CHANGING  
VENUE.

answer to an application before plea; thus, in an action for breach of covenant in a farming lease, although probably the question of breaches and damages would have to be proved by local witnesses from the county where the lands were situate, yet it might turn out otherwise, for the defendant might plead a release, and an issue thereon might as well be tried in another county. (m) At all events a special application cannot be made *until after plea*. (n) In a recent case, where the plaintiff knew that a special application would be made, (it having previously been refused, because it was made before plea and issue joined, and on such refusal leave was given to renew the application after issue was joined,) a learned judge, upon a special affidavit that there were twenty necessary witnesses to prove the defendant's set-off, who resided in Montgomeryshire, and that the defendant could not defray the expense of their travelling to Middlesex, where the venue was laid in Easter Term, 1835, changed the venue to Montgomeryshire, although it was sworn on behalf of the plaintiff that *his* witnesses were on their journey to town, and the trial would thereby be delayed till the long vacation. (o) Hence it seems always advisable for a defendant who resolves to try to change the venue, to give the plaintiff *the earliest written notice of that intention*. The same practice extends to indictments for misdemeanor, as for a conspiracy, in which the defendants cannot move to change the venue on the special ground that numerous necessary witnesses reside in another county until after plea and issue has been joined. (p) It seems questionable whether an application to change the venue in an indictment can be entertained after a special jury are struck, which jury of course would not try the indictment, if the trial were removed. (q)

There is it is true an instance of an application to change the venue on *special grounds*, (as in an action for a libel, on the ground that special pleas of justification *were about* to be pleaded, and that numerous witnesses lived in the county into which it was proposed to change the venue,) *even before actual pleading*. (r) But it seems now to be the established practice not to allow the venue to be changed on *special grounds* until *after the defendant has pleaded*; and in an action of covenant on a farming lease of land in Essex for breach of covenants relating to the cultivation of the land, the Court refused to allow the venue to

(m) *Maude v. Sessions*, 1 Crompt. M. & Ros. 86.

(n) *Cotterill v. Dixon*, 3 Tyr. 705.

(o) *Jones v. Gee*, 1 Harr. & Wol. 183.

(p) *Rex v. Forbes and others*, 2 Dowl. 440.

(q) *The King v. Tarpeley*, 1 Harr. & Wol. 58.

(r) *Robson v. Blackwell*, 2 Dowl. 65.

be changed from Middlesex to Essex before plea, because it did not follow that the defence or pleas referred to in the affidavit would afterwards *be adhered to*, and perhaps ultimately the defendant might plead a release, rendering all the suggested testimony of the supposed numerous witnesses useless. (s)

CHAP. XVIII.  
XXVIII.  
CHANGING  
VENUE.

In support of a *special application* more particularity has of late been required than heretofore, (t) and *the affidavit* must state the nature of the action and where the facts occurred, and at all events that they arose in the county to which the venue is proposed to be removed, *and not elsewhere*. (u) It must also be sworn what pleas have been pleaded and what is the real defence intended to be tried, and the number of witnesses on the behalf of plaintiff as well as of the defendant, and that they are material and necessary, and that the defendant *intends to examine them* on the trial, and that they reside in the county named by the defendant, (x) together with every other local circumstance, as the custom or usage of the latter county, or the peculiar facts that might induce the Court to believe that the trial in the county named by the defendant will be more conducive to justice than if the action were tried in the county where the plaintiff originally laid his venue; and if it be the fact, the defendant may properly swear that his pecuniary circumstances will not enable him to bring the witnesses to London to try the cause there, according to the venue in the declaration. It seems also advisable in general to swear to a sufficient defence on the *merits*, though when facts are stated leading to that conclusion, the expressly swearing to merits may, it would seem, be omitted. (y)

Requisite affidavit in support of a special application.

Upon such special affidavit, a summons to show cause before a judge in vacation, or a rule nisi in term, must be obtained, which is to be served as other rules not requiring personal service; and the plaintiff, upon as full affidavits as he may be advised, may show cause, and an order or rule thereupon will be granted or refused.

Special rule nisi or summons.

When on account of political excitement and other circumstances a fair trial cannot be had in the county where the

Costs.

(s) *Weatherby v. Goring*, 3 Bar. & Cres. 552; 5 Dowl. & Ryl. 541; *Bohra v. Sessions*, 2 Dowl. 699; *Maude v. Sessions*, 1 Cr. M. & Ros. 86; 4 Tyr. 275; but see the observations of Littledale, J. in *Parmeter v. Otway*, 3 Dowl. 69, 70.

(t) Per Littledale, J. in *Parmeter v. Otway*, Dowl. 69.

(u) *Palmer v. Terry*, 2 Dowl. 566; *Lancaster v. South*, 2 Tyr. 501; 2 Crom.

& J. 659, S. C.

(x) *Crompton v. Stewart*, 2 Crom. & Jer. 473; *Tonks v. Fisher*, 2 Dowl. 23; *Parmeter v. Otway*, 3 Dowl. 66, 69; *Ladbury v. Richards*, 7 Moore, 82.

(y) *Johnson v. Nevison*, 2 Dowl. 260; *Johnson v. Berrisford*, 2 Cr. & M. 222, and per Littledale, J. in *Parmeter v. Otway*, 3 Dowl. 66; *Lancaster v. South*, 2 Tyr. 501; 2 Crom. & J. 659, S. C.

CHAP. XVIII. venue has been laid by the plaintiff, the defendant may change  
XXVIII.  
CHANGING the venue without immediately paying the costs, and they will  
VENUE. be properly costs in the cause, in which case, if the plaintiff  
ultimately succeed, he will then get them, and if he fail, he  
would not have to pay them. (x)

---

(x) *Lewis v. Morris and another*, 2 Dowl. 60; *quere*, see *Cotterill v. Dixon*, *id.* 112.

## CHAPTER XIX.

## PROCEEDINGS BY A DEFENDANT BETWEEN DECLARATION AND PLEA, WHEN HE HAS NOT EVEN A PARTIAL DEFENCE.

I. Of Defending for time and proceeding in a cross action and setting off the claims after judgment .....	660	relating to judgments by default, writs of inquiry, &c. ....	675
II. Of payment of debt and costs ..	ib.	The practical proceedings on signing judgment by default and executing inquiry	677
III. Of obtaining time by agreement, and by rule for that purpose	662	Before whom inquiry to be executed....	678
IV. Of Cognovits .....	664	Notice of .....	ib.
V. Of Warrants of attorney .....	669	Continuance of notice	ib.
VI. Of Judgment by Default.....	671	Countermand of ....	ib.
General observation .....	672	Of setting aside judgment ..	680
Utility of a plea as to part, &c. ....	674	VII. Reference to Master or Prothonotary .....	681
Recent enactments and rules			

If a defendant, after having taken advantage of every irregularity or availed himself of either of the proceedings considered in the last chapter, have no defence, legal or meritorious, and yet has a *cross demand*, he may then in some cases properly defend the action and proceed in his *cross action*, in order to set off *one judgment against the other*; but if he have no such cross demand, he then, if he have the immediate means, settles the action against him in those actions, when it is competent to do so, by *paying the debt and costs*; or if not able to do so immediately he endeavours to obtain *time by consent*, with or without *collateral security*, or by entering into a *rule of Court* for the payment of the debt and costs, or the debt only, by instalments; or he gives a *cognovit*, confessing that certain named damages have been sustained, and with or without a stay of execution; or he executes a *warrant of attorney*, with or without a *defeasance*, stating the agreed terms of indulgence if any; or the defendant agrees to withdraw his plea, or he neglects to plead in due time and *suffers judgment by default*; upon which, in an action of assumpsit or for damages, it is usual to execute a *writ of inquiry*; or if the action be on a bill of exchange or promissory note, or be covenant on a mortgage deed or for rent, the amount of the damages may be referred to the Master or one of the Prothonotaries. We will examine each of those proceedings in this chapter.

CHAP. XIX.  
PROCEEDINGS  
BY A DEFENDANT, &c.

Subjects of this chapter.

CHAP. XIX.  
I. DEFENDING  
PENDING A  
CROSS ACTION.

I. Of defending for time and prosecuting a cross action so as to set off the claim on one action against the other.

I. In an action for a *debt*, a cross *money* claim may be *set off* against the demand of the plaintiff, and if of equal amount, constitutes of itself, under a *plea* of set-off, a complete legal defence, and if not of equal amount, the difference may be paid into Court by the defendant, after which the action may be entirely resisted. But the cases to be noticed under this head are those where the cross claim of the defendant cannot legally be pleaded or taken advantage of as a set-off; in these cases, if the cross demands are *very considerable*, and the continuing solvency of the plaintiff be doubtful, so as to render it hazardous to pay his claim, and afterwards to seek to recover from him the amount of the defendant's claim, it may be advisable to defend the plaintiff's action *and to press on as rapidly as possible to judgment in a cross action*; because if judgment in the latter be obtained before the plaintiff can issue execution in his action, the Court will set off the two judgments against each other, and thus the defendant may avoid actual payment in money of more than the balance or difference, if any, between the two cross demands, &c.; (a) and we have seen that [the Court of C. P. in one case *even stayed execution* in an action till judgment could be obtained by the defendant in his pending cross action, so as to enable him to *avail himself of and set off such judgment when obtained*. (b) But as it is but just that the respective attornies should be at all events paid the amount of their costs, the judgments are only to be set off subject to their lien, (c) except as regards collateral costs. (d) On this account, and as it follows that such costs must be paid to the respective attornies, at all events it is not the interest of either party when solvent, or when the claims are small, to incur the expense of such litigation; but it is advisable for a defendant to settle the claims on him, and *afterwards* commence his cross action, except in cases where a set-off can be legally set up as a strict and complete defence.

II. Of a motion or summons to stay proceeding on payment the whole debt and costs, (e)

II. In all actions for a mere *money demand* it has been usually supposed that a defendant may, *as of right*, move to stay proceedings on payment of the *full debt* claimed and costs. But this is not so; for the Court may, before making an order, im-

(a) *Ante*, vol. i. 667; Tidd, 9th ed. 991, 992.

(b) *Ante*, vol. i. 667, note (s); *Masterman v. Malin*, 7 Bing. 435.

(c) This now is so in all the Courts, Reg. Gen. Hil. T. 2 W. 4, reg. 93; *ante*, vol. iii. 607; *Dommell v. Hellyer*, 2 Dowl. 54; *Cowell v. Betteley*, *id.* 780. Notice of

this rule was inadvertently omitted in the first edition of vol. iii. *ante*, p. 321.

(d) Reg. Gen. Hil. T. 2 W. 4, reg. 93; *ante*, vol. iii. 607, 608.

(e) See in general Tidd, 9th ed. 540 to 545; 2 Arch. K. B., 843 to 845; 833, 834, 836; Chitty on Bills, 8th ed. 599 to 601.



CHAP. XIX.  
II. PAYING  
DEBT AND  
COSTS.

pose any reasonable terms; (f) and therefore where a defendant had moved to stay proceedings on payment of debt and costs, in order to proceed in a cross action for a claim he had on the plaintiff, a judge at *chambers*, and afterwards the Court, refused to stay proceedings unless upon the terms of allowing his cross demand to be set off and deducted, so as to render his cross action unnecessary and thus defeat the same. (f) So, although an acceptor cannot by direct adverse proceedings be compelled to pay more than the costs of the action against himself, yet, if pending actions against himself and other parties to the bill, he take out a summons to stay proceedings on payment of debt and costs, he will in general have to pay the costs of the action not only against himself, but also of the actions against the drawer and indorsers; (g) and when those are considerable, the best course for an acceptor may be to suffer judgment by default, in which case he can only be compelled to pay the principal and interest, and the costs of the action against himself. (h) When however an acceptor has tendered the debt and costs at an earlier stage, and the plaintiff's attorney *afterwards* improperly commenced actions against the drawer and other parties, the Court stayed the proceedings on payment of the costs of that action only. (h) And the Court or a judge will not at the instance of *the plaintiff* make an order in an action on a bill against an alleged acceptor to stay proceedings without costs, or generally on the ground that the drawer has paid the bill, if the defendant acceptor contest his liability and insist on trying the action against him, in order to recover the costs of his defence. (i)

Upon a summons to stay proceedings upon payment of a named sum and costs, if the plaintiff insist that more is due, the judge cannot make an order, and then the only course is to pay the sum into Court under the usual rule for that purpose, noticed in the next chapter. (k) In that case, if the plaintiff should afterwards take the money out of Court and discontinue, he will only be entitled to costs up to the time of the first offer, and not to any subsequent costs, although he suggest as a reason for not proceeding further, that he could not find a material witness; (l) but if the plaintiff show that really

(f) *Jones v. Shepherd*, 3 Dowl. 421.

(g) *Id. ibid.*; Chitty on Bills, 8th ed. 599, 600; but see exception, *Hodson v. Gunn*, 2 Dowl. & Ry. 57.

(h) *Id. ibid.*; *The King v. Sheriffs of London*, 2 Bar. & Ald. 192; but see exception in *Hodson v. Gunn*, 2 Dowl. & Ry. 57, and *Carno v. Legh*, 6 Bar. &

*Cres.* 124; 9 Dowl. & R. 126.

(i) *Lewis v. Dalrymple*, 3 Dowl. 433.

(k) And see 2 Arch. Prac. K. B. 833, 834, 836.

(l) *Hale v. Baker*, 2 Dowl. 125; *ante*, vol. iii. 281, qualifying *Edwards v. Harrison*, 11 Price, 533.

CHAP. XIX.  
II. PAYING  
DEBT AND  
COSTS.

more was due, and yet assign a sufficient reason for not proceeding, it would be otherwise.

In actions for *general damage*, as replevin after an avowry for a distress damage feasant, or in an action of trespass or trover, a defendant cannot *stay the proceedings* by any payment into Court, (m) though under the 3 & 4 W. 4, c. 42, sect. 21, noticed in the next chapter, by leave of a judge, a sum of money to cover the supposed damages may in *all personal actions*, except for injuries to the *person*, be paid into Court, after which the plaintiff would proceed at the peril of having to pay costs, if he do not recover a verdict for larger damages.

III. Of voluntary adjustments of an action enforced by a rule of Court.

We are now to suppose that there is no defence, nor cross demand, but that the defendant is unable *immediately* to pay the debt and costs. In this case, unless the plaintiff or his attorney will *concur* in terms of settlement, the superior Courts have no power to *compel* a stay of the proceedings in an action on any terms however reasonable, excepting those of *immediate payment of the debt and taxed costs*; and we have seen that neither a judge at chambers nor the Court in banc can (except by consent) make an order or rule to stay proceedings on payment of the debt and costs by monthly or other *instalments*; (n) and yet as regards an immediate execution after a trial, the 1 W. 4, sect. 1, c. 7, sect. 2, appears to give a judge at nisi prius authority to direct execution to issue at *such time* as he shall think fit for a *part or the whole*, and subject to *any condition or qualification*. In practice many cases occur where it would be salutary if a judge had power to stay proceedings on the defendant giving ample security by deposit of goods or documents, but no such power exists; (o) and hence defendants are frequently induced to gain time, so as to obtain funds, either by a motion for some supposed irregularity, or by false pleading, or by some other of the few dilatory expedients still in some cases available.

Supposing, however, that terms of arrangement can be *agreed upon*, without the defendant's executing a *cognovit* or

(m) Tidd, 9 ed. 544, 545.

(n) Kirby v. Ellier, 2 Crompt. & M. 515; ante, vol. iii. p. 32.

(o) Most of the Court of Request acts give the judges of those Courts' jurisdiction full powers in this respect. Lord Wynford's suits-at-law-bill, ordered to be printed, 28 Feb. 1833, contained a clause enabling a defendant to take out a summons to stay proceedings on payment of debt or delivery up of possession of house,

lands, or goods, at such time as a judge should order, and the judge was authorized to make an order on security satisfactory to him, and to be complied with within three months. But that bill was opposed by Lord Eldon and Lord Lyndhurst, and negatived on the second reading without a division, in April, 1833; but *seem* that such an enactment would be salutary.

warrant of attorney, or actually suffering judgment by default, the performance may be effectually secured, not only by deposit of or by direct charges upon, or assignments of property, or other collateral securities, but also by a *rule of Court*, in which such terms may be embodied; and this may in some cases constitute a preferable security even to a *judgment*: for where a defendant had agreed to pay a weekly sum, which was to be increased on a contingency, and the stipulation had been made a *rule of Court*, it was held that the defendant's discharge under the Insolvent Act, 7 G. 4, c. 57, s. 50, 51, did not extend to subsequent accruing payments, and that an *attachment* might issue for the non-payment; though if, instead of the rule of Court, a judgment had been obtained, it would have been otherwise. (p) And where a defendant in an action for verbal slander, after notice of trial, signed a paper, in which, after reciting that the plaintiff had consented, on the defendant's paying the costs and making an apology, to stay proceedings, and the defendant made such apology, it was held that this was a positive undertaking by the defendant to pay the costs, and that as the plaintiff had stayed the proceedings, the Court would by rule and attachment enforce the defendant's agreement to pay the costs, although the written undertaking had not expressly stipulated that it might be made a rule of Court. (q) And where an attorney in that character gives an undertaking in a cause to pay money, or do other act, performance may be enforced by summary motion, although perhaps an action might not be sustainable for breach of the engagement, on account of its not expressing the consideration pursuant to the statute against frauds. (r)

In bailable actions, and in cases of indorsed bills of exchange and promissory notes, or where a *third person* may be *surety* for the defendant, a plaintiff and his attorney must take care that before either consents to *give time or indulgence* in an action beyond the time which the defendant would obtain by the ordinary course, the bail, as *such* surety, or other responsible third party, expressly consent to the time or indulgence being given, and that the same shall not prejudice the

CHAP. XIX.  
III. ADJUST-  
MENT BY RULE  
OF COURT.

Caution to be  
observed by  
plaintiff and  
his attorney in  
giving time.

(p) *Lawrence v. Walker*, 1 Harr. & Woll. 205; 3 Dowl. 614.

(q) *Tardrew v. Brook*, 5 Bar. & Adol. 880, where see the form of undertaking; but it is recommended to adopt more express terms of agreement, as well to apologise as to pay costs, and at least that the latter engagement shall be made a rule of

Court, and the costs taxed as between attorney and client.

(r) *Ante*, vol. ii. 339, 340; *Evans v. Duncombe*, and *In re Greaves*, 1 Crompt. 372 to 376; *Hall v. Ashurst*, 3 Tyr. 420, and see *Ex parte v. Gardiner*, 2 Dowl. 520; when not, *Ex parte Gardiner*, 9 Legal Obs. 331.

CHAP. XIX.  
III. ADJUST-  
MENT BY RULE  
OF COURT.

claim against them; for otherwise they would, or at least might be discharged from liability, on the ground that any such indulgence may induce the principal debtor to relax his exertions to pay the debt, on relief of the ultimate liability of his bail or of sureties, and perhaps may in the interim prefer and pay other more pressing claimants. (s) It would be advisable always to have a written stamped agreement to this effect, and that the fresh security express that it is accepted at the request of the bail or surety, testified by his subscribed signature.

IV. Of *Cognovits* and proceedings thereon. (t)

When a writ has already been issued against a defendant, a *cognovit actionem*, or in other words, a written confession of the action, subscribed by the defendant but not sealed, and authorizing the plaintiff to sign judgment and issue execution usually for a named sum, is a very usual mode of saving the expenses of further proceedings in an action: though when no writ has been issued, the more usual security, having the same effect, is a *Warrant of Attorney*. When a party is a *trader*, subject to the bankrupt laws, there is a distinction between a *cognovit* and a *warrant of attorney*, materially in favour of the former, viz. that a *fieri facias* founded on a *warrant of attorney* may be defeated by a commission or fiat issued within two calendar months afterwards, unless an act of sale under such *fi. fa.* has taken place; (u) whereas the 1 W. 4, c. 7, sect. 7, reciting that by an act passed in 6 G. 4, c. 16, sect. 108, it was provided that no creditor for a valuable consideration, who shall sue out execution upon any judgment obtained by default, confession, or *nil dicit*, shall avail himself of such execution to the prejudice of other fair creditors, but shall be paid rateable with such creditors; and whereas by reason of such provision, plaintiffs have been and may be deterred from accepting a *cognovit actionem* with stay of execution, whereby the expense of further proceedings in such action might have been and may be saved or diminished, for remedy thereof it is enacted, "that no judgment signed, or execution issued after the passing of this act, on a *cognovit actionem* signed after declaration or delivered, or judgment by default, confession or *nihil dicit*, according to the practice of the Court, in any action commenced adversely and not by collusion, for the purpose of

(s) See the cases as to bail being discharged, Tidd, 9th ed. 295; *ante*, vol. i. 128, 129; Chitty on Bills, 8th ed. 441, 456.

(t) As to *cognovits* in general, see Tidd, 9th ed. 559 to 562; 2 Arch. K. B. 4th

ed. 562; *ante*, vol. ii. 335.

(u) 6 G. 4, c. 16, s. 81 and 108; *Garrison v. Sanctuary*, 1 Nev. & Man. 52; 4 Bar. & Adol. 235, S.C.; *Cresford v. Sarley*, 4 Bar. & Adol. 87.

"*fraudulent preference*, shall be deemed or taken to be within "the said provision of the said recited act." So that now a judgment on a *cognovit*, provided it be given *after the declaration* has been filed or delivered, and without express intent to give a fraudulent preference, is not affected by the 6 G. 4, c. 16, s. 103, and has all the advantages in that respect as an adverse judgment after verdict. We have considered the recent General Rule of Hil. T. 2 W. 4, reg. 72, as to the requisites of cognovits as well as warrants of attorney executed by a *prisoner* or person in actual custody.(x) And where a cognovit was given by a defendant against whom a writ had been issued, and who from the conduct of the parties was led to believe he was under duress, no attorney being present, it was set aside, though it was positively denied that he was in custody, or that a warrant had been issued against him.(y) That part of such rule that requires the attorney to *declare* himself to be an attorney for the defendant, and state that he subscribes as such, has been construed to mean that such declaration and statement should be *in writing*;(z) and a form of such declaration has been suggested in a previous page, and will be found in a subscribed note.(a) Before, however, a defendant executes a cognovit, naming the amount of the supposed debt, he should carefully ascertain that it does not exceed the *real debt*, for the Court will not allow a subsequent inquiry, nor can the legality of the transaction be afterwards so readily impeached as a warrant of attorney in general may be.(b)

CHAP. XIX.  
IV. OF COG-  
NOVITS.

With respect to the *time* of giving a cognovit, although regularly, from the very nature of the instrument, and from its being properly an admission of the statement in the plaintiff's declaration, and should therefore strictly not precede it, (and when the defendant is a trader this may be essential under the above statute,) yet it has long been held that a cognovit before declaration is valid;(c) and it has even been held that it may be given after process has been issued, and before it has been served;(d) or even before any process, or at least before filing a bill against an attorney;(e) nor is it even essential to declare

Time of giving a  
cognovit.

(x) *Ante*, vol. ii. 335.

(y) *Turner v. Shaw*, 2 Dowl. 244; and see *Fisher v. Nicholas*, *id.* 251; 2 Cro. & M. 215.

(z) *Fisher v. Nicholas*, 2 Crom. & M. 215; 2 Dowl. 251; and see *Bligh v. Brewer*, 1 Crom. M. & Ros. 651; 3 Dowl. 266, as to what is a sufficient compliance.

(a) *Ante*, vol. ii. 335, note (r), and

see form of cognovit, *infra*, 666.

(b) *Bligh v. Brewer*, 3 Dowl. 266.

(c) *Morley v. Hall*, 2 Dowl. 494; *Clarke v. Jones*, 3 Dowl. 277, 278; *Davis v. Hughes*, 7 T. R. 207, note (a).

(d) *Kirby v. Jenkins*, 2 Tyr. 499; *Bligh v. Brewer*, 3 Dowl. 266.

(e) *Davis v. Hughes*, 7 T. R. 207, as observed upon by Taunton, J. in *Morley v. Hall*, 2 Dowl. 495.

CHAP. XIX.  
IV. Or Cog-  
NOVITS.

Terms of cog-  
novit, when  
payable by in-  
stalments.

before judgment is signed on a cognovit. (f) It also, though only by leave of a judge of the Court, may be given after plea, and in that case Reg. Gen. Hil. T. 2 W. 4, reg. 100, orders that "Where the defendant, after having pleaded, is allowed "to confess the action, he may withdraw his plea *in person*, "without the appearance of the attorney or his clerk for that "purpose, before the officer of the Court;" which rule assimilated the practice of K. B. and Exchequer to that of C. P. (g)

If the debt or costs are to be paid by instalments, and the agreement of the parties is, that the plaintiff shall *not* be at liberty, in case of one default, to issue execution for the whole, care must be observed, on the part of the defendant, so to express the agreement, for otherwise the plaintiff may issue execution for the whole; as where the cognovit was in these words:—"I confess this action and that the plaintiff hath suffered damages to the amount of £50, besides his costs and "charges to be taxed, but no judgment is to be signed, or "execution issued, unless default shall be made in payment of "£25, together with the aforesaid costs, by instalments of 10s. "each calendar month, the first thereof to be payable on the "14th day of June next, and a similar one on the 14th day of "each succeeding month, till the whole be paid. Dated." It was held that on any default the plaintiff might sign judgment and issue execution for the whole of the debt and costs remaining unpaid; (h) a comprehensive form of cognovit is given in the note. (i)

(f) *Morley v. Hull*, 2 Dowl. 494.

422; Imp. C. P. 340.

(g) *Tidd*, 560; Imp. K. B. 10th. ed.

(h) *Rose v. Tomlinson*, 3 Dowl. 49.

Full form of a cognovit, the whole debt payable on one day, with suggested stipulations as to sale, &c.

(i) In the K. B., [or "C. P." or "Exchequer of Pleas."]

Between A. B. Plaintiff,  
and  
C. D. Defendant.

I confess this action, and that the plaintiff hath sustained damages to the amount of £—, [usually the damages laid in the declaration, so as to authorize a judgment sufficient to cover all contingencies,] besides his costs and charges to be taxed by the Master, [or in C. P. "by one of the Prothonotaries," or if already taxed or agreed upon as is desirable to save time and expense, say, "to the amount of £—."] And in case I shall make default in payment of the sum of £—, [the real debt,] being the actual debt in this action, together with the said costs, on the — day of — next, the plaintiff is to be at liberty to enter up judgment for the said sum of £—, [the first sum confessed, or if in debt, and the whole debt be confessed, then say, "the said debt,"] together with all interest justly payable in respect thereof, and the said costs, and to sue out execution thereon for the said sum of £—, [the real debt,] and interest, and the said costs; and also for the costs of entering up such judgment, and of suing out execution thereon, officer's fees, sheriff's poundage, possession-money, expenses of private or public sale, costs of levying, and all other incidental expenses; and also that it shall be lawful for the said plaintiff and his attorney and the sheriff and his officers to continue in possession a reasonable time in or upon any messuage, buildings, land or premises in my possession for the purpose of there preparing for sale and selling of my goods and chattels taken in execution in this action. And I do hereby undertake not to bring any writ of error, or file any bill in equity, nor make

When a cognovit or warrant of attorney, payable by instalments, authorizes successive executions for each instalment as it becomes due, then the plaintiff may charge the defendant in execution for each of the defaults accordingly, without any previous application to the Court for leave. (k) If a cognovit stipulate "not to bring a writ of error, or delay execution," although it do not contain an express release of errors, nor is under seal, yet if the defendant afterwards, contrary to good faith, issue a writ of error, the plaintiff may treat it as a nullity, and it is no supersedeas. (l) It seems advisable to fix the amount of the costs in the cognovit, by which the necessity for giving a day's notice of taxing the costs and of appraising the defendant of the intention to issue execution is avoided. (m)

The 3 G. 4, c. 39, s. 4, enacts, "that if a cognovit or warrant of attorney *shall be given*, subject to any *defeasance* or condition, such defeasance or condition shall be written on the *same paper* or parchment on which such cognovit or warrant of attorney shall be written, before the time when the same or a copy thereof respectively shall be filed, otherwise such cog-

Defeasance.

any application to any Court or judge in this action, nor do any other matter or thing whereby the plaintiff may be delayed in entering up his judgment, or suing out execution thereon, or selling under the same as aforesaid, and if any such proceeding should be had by me contrary to this stipulation, I will pay all the costs thereby incurred, and that no such proceeding shall have any effect whatever, and the said plaintiff may plead my release of any supposed error. And that it shall not at any time, or in any event be necessary, previous to issuing the said execution, to revive the said judgment, or to sue out or to execute any writ of scire facias. And that it shall be lawful for the plaintiff to have in force at the same time several writs of execution in different counties. Dated this — day of —, A. D. 1835. C. D.

Witness, Y. Z., [or if executed by a defendant whilst in custody, then in pursuance of the above Reg. Gen. Hil. Term, 2 W. 4, Reg. 72, let the attestation be thus. See *Fisher v. Nicholas*, 2 Crom. & M. 215; 2 Dowl. 251.]

"Signed, sealed, and delivered by the said C. D., in the presence of me Y. Z., being an attorney of the Court of —, expressly named and requested by the said C. D. to attend as his attorney before and at the execution hereof, and to witness his execution hereof as his attorney, and I having before the said C. D. executed the same, duly informed the said C. D. of the nature and effect of this instrument, and I subscribe this attestation as such attorney, and for the said C. D., and at his request, in pursuance of the rule of Court in that behalf. Y. Z."

[Same as the above to the asterisk and then as follows.]

Which said costs are to be paid on the — day of — next, and which said debt of £ — is to be paid by the instalments following, that is to say, £ — on the — day of — next, £ — on the — day of — next, and £ —, the residue of the said debt, is to be paid on the — day of —, A. D. 1836. And if default shall be made in payment of the said costs, or of either of the said instalments, or any part thereof, then execution may issue for the whole of the said costs and debt then remaining unpaid, together with the costs of entering up judgment, &c. [Same as the last to the end.]

The like, where the debt is to be paid by instalments, and execution to issue for the whole on one default.

[Same as the last, but in lieu of the words, "then remaining unpaid," say,] then execution may from time to time issue for so much of the said costs and instalments as shall, according to the said stipulation and times of payment aforesaid, have become due and payable, together with the costs of entering up judgment, &c. [Same as the first form to the end.]

The like, when execution is only to be issued from time to time, for the instalment that has become due.

(k) *Davis v. Gompertz*, 2 Dowl. 407.

(m) *Griffiths v. Liversedge*, 2 Dowl.

(l) *Best v. Gompertz*, 2 Cr. & M. 427. 143.

CHAP. XIX.  
IV. OF COG-  
NOVITS.

Stamp.

novit or warrant of attorney shall be null and void, to all intents and purposes." But this only means void as to assignees of bankrupts and creditors, and does not defeat the validity of the instrument as between the plaintiff and the defendant.(n)

A mere cognovit does not require any stamp,(o) but if it be of the value of £20 or upwards, and contain any terms of agreement, as if it be payable by instalments, and implies an agreement to wait accordingly,(p) it must be stamped as an agreement, and which it may, like other agreements not under seal, be within twenty-one days after it is executed without payment of any penalty, and at any time afterwards on payment of the duty and £5 penalty. But a stipulation in a cognovit not to take advantage of its having been given before declaration does not render a stamp necessary.(q) And if the plaintiff's attorney write a memorandum on a *separate* paper, not intended as a defeasance, but merely for the satisfaction of a defendant, stating that the cognovit is not to be put in execution for a fortnight, that does not render a stamp necessary.(r) On this account, to save expense, it may be advisable to draw up a cognovit without any terms of agreement, and merely to give him on a separate paper a memorandum of the terms, upon performance of which he will avoid execution.(r) Rules nisi have been granted and made absolute on the ground that a cognovit is not duly stamped;(s) but as a proper stamp may be impressed before showing cause, such a motion will not, in general, be of any ultimate avail.(t) And the Courts of law as well as of equity will enlarge the hearing of a rule so as to afford an opportunity of getting the proper stamp impressed.(u) And in a late case a rule nisi to set aside a cognovit was refused, because that objection would be of no avail, as the plaintiff might get it stamped before he could be required to show cause.(x) The practice, however, in general, is to grant a rule nisi, so that the Courts may not permit the evasion of the stamp duty. If a rule for setting aside the proceedings on a cognovit be made absolute, on the ground that it was not duly stamped, the cognovit is nevertheless to remain on the file, or in the plaintiff's possession, and after getting the document

(n) *Bennett v. Daniel*, 10 Barn. & Cres. 500.

(o) See observation of Taunton, J., in *Morley v. Hall*, 2 Dowl. 497.

(p) *Pitman v. Humphrey*, 2 Tyrw. 500.

(q) *Green v. Gray*, 1 Dowl. 350.

(r) *Morley v. Hall*, 2 Dowl. 497. If it were intended as a defeasance, then, if not written on the cognovit itself, the

latter would be void as against creditors, by 3 G. 4, c. 39, s. 4, *Bennett v. Daniel*, 10 Bar. & Cres. 500.

(s) *Pitman v. Humphrey*, 2 Dowl. 500.

(t) *Rose v. Tomblinson*, 3 Dowl. 49.

(u) *Doe v. Roe*, 5 Bar. & Ald. 768; 1 Dowl. & Ryl. 433.

(x) *Clarke v. Jones*, 3 Dowl. 277, 278.



duly stamped, he may again sign judgment and issue execution, and the costs of the first rule may be set off against the debt and costs, subject to the attorney's lien.(y) But where a prisoner applied without adequate ground to set aside proceedings on a cognovit because it was not stamped, the Court discharged the rule without costs, because it had been made by a man struggling to obtain his liberty.(z)

CHAP. XIX.  
IV. Of Cognovits.

The 3 G. 4, c. 39, s. 3, enacts that every *cognovit* given in the Court of K. B., or a true *copy* thereof, if given in any other Court, shall, together with an *affidavit* of the time of the execution thereof, be *filed* as therein directed, *within twenty-one days* after such cognovit shall have been executed, otherwise the same shall be void against the assignees if the defendant become bankrupt. But it is settled that the cognovit continues valid against the defendant himself.(a)

Cognovit to be filed within twenty-one days.

At one time it was decided that a creditor who had a cognovit, upon which he had not signed judgment, had a preferable security; because he might elect in case of bankruptcy to prove the original debt, or sign judgment, although the defendant had obtained his certificate.(b) But it has recently been decided that where a defendant gives a cognovit for debt and costs, although as between attorney and client, and before judgment signed becomes a bankrupt, his certificate is a bar to the plaintiff's claim.(c)

Cognovit discharged by bankruptcy and certificate.

We have already stated the recent rules and decisions relating to *warrants of attorney*.(d) The preceding practice has been very fully considered in the best works;(e) and many of the observations relating to *cognovits* will here apply.

V. Of Warrants of Attorney.

A warrant of attorney is usually an authority under seal to certain attornies named therein, to appear for the defendant in a named court, (*though it is advisable to authorize the judgment in either Court*), and to receive a declaration therein in an action of *debt* for a fixed sum (*sufficient to cover a principal debt and interest*),(f) as due upon an account stated, (*though sometimes the bond, or other subsisting security, is injudiciously named; but which should be reserved, and kept on foot as a distinct and not merged security;*) and thereupon to *confess* the same action, or else to suffer a *judgment* by nil dicit, or otherwise, to pass against the party; and that thereupon exe-

(y) *Pitman v. Humphrey*, 2 Dowl. 500.

(z) *Morley v. Hall*, 2 Dowl. 497.

(a) *Bennett v. Daniel*, 10 Bar. & Cres. 500.

(b) *Wyborne v. Ross*, 2 Taunt. 58.

(c) *Metcalf v. Watling*, 2 Dowl. 552,

overruling *Wyborne v. Ross*.

(d) *Ante*, vol. ii. 333 to 337.

(e) *Tidd*, 9th ed. 545 to 550, and 2 Arch. K. B. 569 to 581.

(f) *Davison v. Overend*, 6 Car. & P. 222, 224.

CHAP. XIX.  
V. OF WAR-  
RANTS OF  
ATTORNEY.

*cution* may issue for the said sum of £ — (*the nominal debt*), together with the costs of suit, and all other reasonable and incidental costs and charges attending the said judgment and execution and sale. And then follows a release of errors, and on that account the party seals and delivers this instrument as a deed; and a *defeasance*, stating the times of payment, &c. is usually subscribed, and signed by both parties.

A warrant of attorney is more frequently given independently of any action, and very generally as a *prospective* security, and although at the time it is executed nothing is due from the party. It is in that respect a convenient collateral security to bankers and others, in consideration of their agreeing to make pecuniary advances, or to suffer a customer to overdraw his account, or a traveller or other agent from time to time to receive monies on account of a principal.

We have seen that when a party giving a warrant of attorney is a *trader*, liable to the *bankrupt law*, an execution founded upon the same is liable to be defeated under 6 G. 4, c. 16, s. 108; and therefore in a case of that nature the better course is to issue a writ for any sum actually due, and to declare as soon as practicable, and afterwards to obtain a *cognovit*, which cannot then be impeached by the assignees or creditors. (g) And an execution upon a warrant of attorney is invalid, if the levy be made after the commencement of an *insolvent debtor's* imprisonment. (h)

The recent alterations in the practice as to warrants of attorney are but few. We have seen that Reg. Gen. Hil. Term, 2 W. 4, reg. 72, requires the presence of an attorney, particularly named by a party who executes the same *whilst a prisoner*, and also requires a particular written form of attestation; (i) and reg. 73 orders that "leave to enter up judgment" on a warrant of attorney above one and under ten years old, "must be obtained by a motion in term, or by order of a judge in vacation, and if ten years old or more, upon a rule to show cause." (j)

Where a female gives a warrant of attorney before she marries, it is necessary to obtain leave of the Court to enter up judgment against her and her husband. (k)

If by the terms of the *defeasance* a demand is to precede judgment or execution, it must be made. (l) The subscribing

(g) *Ante*, 664.

(h) *Kelcey v. Minter*, 1 Bing. N. C. 781.

(i) *Ante*, 665.

(j) See the former practice, Tidd, 9th ed. 552, 553; Jervis's Rules, note (w).

(k) *Staples v. Purser and wife*, 3 Moore & Scott, 800; and 2 Dowl. 764, S. C.

(l) *Copper v. Dando*, 1 Harr. & Wal. 11; 4 Man. & Nev. 333, S. C.

witness to a warrant of attorney must in general make affidavit of the execution; and his signing the jurat of the affidavit as the commissioner before whom it is sworn is not sufficient. (m) But where an attesting witness to an old warrant of attorney is abroad, his affidavit need not be produced; and it then suffices to produce the affidavit of the plaintiff himself, stating the facts. (n) But such affidavit in support of a motion for leave to enter up judgment on a warrant of attorney given when no action was depending, should *not be intitled* in any cause. (o) And affidavits to enter up judgment upon a warrant of attorney need not now, as heretofore was requisite, swear that the party was alive in the full term. (p) And if the defendant be resident in the West Indies, then an affidavit of his having been seen alive within four months suffices. (q) As respects the continuing existence of the debt, the plaintiff's attorney, who had always managed the plaintiff's money concerns, is competent to swear to such debt. (r) With respect to stipulations that the debt or costs shall be payable by *instalments*, the decisions relative to cognovits are equally applicable to warrants of attorney. (s) It has been held, that as each instalment becomes due the defendant may repeatedly be taken in execution, though discharged as to the first execution. (t) If a bankrupt, after he has obtained his certificate, execute a warrant of attorney, it may be enforced against him. (u)

When a defendant has no defence, either on the *pleadings* or the *law* or *merits*, and he has no cross action to set off, nor the means of immediately paying the debt and costs, nor can obtain time on the terms of his entering into a *rule* to pay by instalments, or giving a *cognovit* or *warrant of attorney* as above suggested, then, to prevent a greater increase of costs by *pleading and trial*, he should omit pleading in due time, i. e. within the limited times before stated, or extended time obtained from a judge; (x) or if under terms of pleading issuably, &c. he sometimes pleads a plea not strictly issuable, but inviting a demurrer, and thereupon the plain-

VI. Judgment  
by Default.

(m) *Field v. Beacroft*, 2 Tyrw. 283; 2 Crompt. & J. 217, S. C.

(n) *Taylor v. Leighton*, 3 M. & Scott, 423; 2 Dowl. 746.

(o) *Davis v. Stanbury*, 3 Dowl. 440.

(p) *Cookman v. Hellyer*, 1 Bing. N. C. 3; 2 Dowl. 816, S. C.; *Robinson v. Leslie*, 3 Dowl. 531.

(q) *Fursey v. Pilkington*, 2 Dowl. 452.

(r) *Ashman v. Bowdler*, 2 Crompt. & Jerv. 212.

(s) *Ante*, 666.

(t) *Atkinson v. Baynton*, 1 Hodge's R. 7; *Davis v. Gompertz*, 2 Dowl. 407.

(u) *Duncan v. Sutton*, 1 Bing. N. C. 431.

(x) If the declaration be so defective, that a judgment by default would not aid it, then when defendant wants time it may be advisable in such a case to suffer judgment by default, and afterwards to move in arrest of judgment, or bring a writ of error; for by pleading, the effect of the objection may be removed.

CHAP. XIX.  
VI. JUDGMENT  
BY DEFAULT.

tiff having previously given notice to plead and demand of plea when necessary, and not having *received* a plea in due time, and which must now in all cases be *delivered*, he signs judgment by *nil dicit*, that is for default of a plea. Afterwards, if the action be in *debt*, the plaintiff may *immediately* issue execution; a circumstance which will obviously induce a defendant's attorney in general to avoid suffering judgment by default in that form of action. But if the action be in *assumpsit*, except on a bill of exchange or note or check, or in *covenant*, (except for rent or for mortgage money), or in *case*, *replevin*, *trover*, or *trespass*, the plaintiff must by *writ of inquiry* ascertain and fix by the *inquisition* of a sheriff's jury the amount of the damages; though when an action of *assumpsit* is on such *bill, note, or check*, or an action of *covenant* is for *rent or mortgage money*, then the amount of damages may, by a long established practice, be *referred to the master*; and upon the return of the inquisition or master's assessment, final judgment is to be signed for the sums thus differently ascertained and costs, and *execution* issues. (y) The former practice relative to judgments by default and writs of inquiry, and other proceedings thereon, is fully stated in the works on practice previously published, and will not here be repeated; (y) and we shall therefore here only add a few observations, and state the few recent enactments, rules, and decisions upon the same.

General observations on judgments by default.

Judgment by *default* may be signed not only in consequence of no plea whatever having been delivered, but also in consequence of such plea when necessary not having been signed by counsel, or that the defendant having been subjected to the terms of pleading issuably, has pleaded a plea that is deemed not issuable within those terms. The cases when or not a judgment may be signed in respect of either of these defects in the plea will be more properly examined when we in a following chapter consider the requisites of pleas. Two points however may be anticipated, viz. that notwithstanding the plea may be defective, and indeed a nullity in respect of one of the defects alluded to, still the same may not dispense with the necessity for a regular notice to plead, rule, and demand, nor will the plaintiff be entitled to sign judgment until he has waited the full time for pleading regularly; because the defendant may perhaps discover his error, and before the time for signing judgment deliver a correct plea. (z) So if in an

(y) Tidd, 9th ed. 562 to 570; 2 Arch. Prac. K. B. 4th ed., 582 to 611.

(z) *Nollekins v. Severn*, 2 Crom. & Jer. 333; Arch. K. B. 4th ed. 241.

action of debt the defendant plead the general issue as to a part, and as to the residue a tender, but omit to pay the money alleged to have been tendered into Court, judgment cannot on that account be signed as for want of a plea to the *whole* declaration; though if the plea of tender had extended to the whole it might have been so; but the judgment at most should have been signed as to the sum named in the plea of tender; and the Court set aside the entire judgment as irregular. (a)

CHAP. XIX.  
VI. JUDGMENT  
BY DEFAULT.

The suffering judgment by default, (excepting in an action of debt,) only admits the precise allegation in the declaration, and that *something* is due or claimable. Thus it admits that an agreement or contract, as stated in the declaration, was made and signed, and is duly stamped, and that the plaintiff at least in part performed it, so as to be entitled to recover, but unless in cases of precise fixed claims, it leaves the defendant to dispute the goodness or value of the work done or goods delivered. And where the declaration is general, as for work and labour and materials, the defendant, on a judgment by default, is at liberty to cross examine the plaintiff's witnesses, who are called to prove the work done, as to whether the work sworn to by them was or was not done on the defendant's retainer, and the under-sheriff having refused to permit such cross-examination, the inquisition was set aside; Parke, B. observing, "the undersheriff was mistaken; a judgment by default admits *something* to be due but *disputes* the *amount*; the question *therefore* was properly put," (b) and at least after notice from the defendant of his intention to dispute the value of work done, he may, on executing an inquiry, prove that the same was improperly done, and not according to the contract, so as to reduce the plaintiff's claim to the real value, although the declaration was special. (c) Hence it seems that in an action of assumpsit for goods sold, or work done and materials found on various occasions, a plaintiff is not in strictness by a judgment by default relieved from the necessity of proving the delivery of each article, or the extent of the work done, though certainly in practice, when a defendant has not by plea denied the plaintiff's action, there is a strong feeling on the part of the jury, when executing a writ of inquiry, to be satisfied with slighter evidence than on a trial.

In consequence, however, of the strict necessity for proving each item of claim on an inquiry in an action of assumpsit,

(a) *Chapman v. Hicks*, 2 Dowl. 641.

(b) *Williams v. Cooper*, 3 Dowl. 204.

(c) *Chapel v. Hickey*, 2 Crompt. & M. 214.

CHAP. XIX.  
VI. JUDGMENT  
BY DEFAULT.

which is avoided in an action of *debt*, it is advisable, when practicable, to adopt the latter form of action. It has been recently held, that a judgment by default may be signed on such a holiday as has merely been established for the relief of the officers, but who may still waive the day of leisure. (b)

Utility of plea of non assumpsit, except as to the sustainable part of plaintiff's claim, and letting the plaintiff take judgment by nil dicit in part. (c)

When a defendant in an action of assumpsit, or covenant, is not prepared to pay the money into Court, and the declaration contains not only the recoverable claim, but also others clearly not sustainable, then it may be advisable to plead only to the latter, and let the plaintiff sign judgment by default as to the former, in which case the plaintiff must either enter a *nolle prosequi* as to the unsustainable part of his claim, or will proceed to issue and trial at the peril of costs as to the latter; or the defendant may, to avoid the costs of an inquiry, confess the action as to part, and as to named damages, and plead as to the residue; but then immediately execution for the sum confessed might issue.

Recent enactments by 1 W. 4, c. 7, that writs of inquiry may be returnable in vacation, and immediate judgment and execution had, unless, &c.

The principal and most important recent regulation respecting judgments by default and writs of inquiry is, that in 1 W. 4, c. 7, sect. 1, which *after reciting* that the judgment and executions in actions brought in the Courts of law at Westminster, are often delayed by reason of the interval between the terms, enacts, "that any writ of inquiry of damages to be issued "as or by either of those Courts, by whatever form of process "the action may have been commenced, (d) may be made *returnable and returned on any day certain in term or vacation*, to be named in such writ, and thereupon at the return "thereof a rule for judgment may be given, (e) costs taxed, "final judgment signed, and execution issued forthwith, *unless "the sheriff* or other officer before whom the same may be executed, shall *certify* under his hand upon such writ, that "judgment ought not to be signed until the defendant shall "have had an opportunity to apply to the Court to set aside "the execution of such writ, or one of the judges of the said "Courts shall think fit to order the judgment to be stayed until "a day to be named in such order: Provided always, that in "case the signing of judgment on such writ shall be postponed

(b) *Bennett v. Potter*, 2 Crom. & J. 622.

(c) And see forms of pleas, 3 Chitty on Pleading, 5th ed. 909 and 1030 a, 6th ed.

(d) *Semble*, therefore this enactment extends to actions removed into either Court

at Westminster, though not commenced there.

(e) Since rendered unnecessary by the Reg. Gen. Hil. T. 2 W. 4, r. 67; *Jervis's Rules*, 60, note (g).

" by reason of such certificate or order, or by the choice of the plaintiff or otherwise, and judgment shall be afterwards signed thereon, such judgment shall be entered of record as of the day of the return of such writ, unless the Court shall otherwise direct." The 4th section authorizes the Court to grant a new writ of inquiry. The 6th section suspends the taxation of costs between the last day of August and 21st October in every year.

CHAP. XIX.  
VI. JUDGMENT  
BY DEFAULT.

Before the 3 & 4 W. 4, c. 42, sect. 16, when a judgment on demurrer or by default had been obtained on a bond, and it became necessary to suggest breaches, the truth of the same and the consequent damages must have been tried and assessed by a jury *before one of the judges*; but that they deemed it unnecessary, the 3 & 4 W. 4, c. 42, sect. 16, after reciting that, " And it would lessen the expense of trials and prevent delay, if such writs of inquiry as hereinafter mentioned were executed, and such issues as hereinafter mentioned were tried *before the sheriff of the county* where the venue is laid," therefore enacts, " That all writs issued under and by virtue of the statute 8 & 9 W. 3, c. 11, sect. 8, shall, unless the Court where such action is pending, or a judge of one of the said superior Courts, shall otherwise order, direct the *sheriff of the county* where the action shall be brought, to summon a jury to appear *before such sheriff*, instead of the justices or justice of assize or nisi prius of that county, to inquire of the truth of the breaches suggested, and assess the damages that the plaintiff shall have sustained thereby; and shall command *the said sheriff to make a return thereof* to the Court from whence the same shall issue, at a day certain in term time or in vacation, in such writ to be mentioned; and such proceedings shall be had after the return of such writ as are in the said statute in that behalf mentioned, in like manner as if such writ had been executed before a justice of assize or nisi prius."

The enactments in 3 & 4 W. 4, c. 42, as to writs of inquiry of truth of breaches, and assessment of damages, to be executed before the sheriff.

Sect. 17 directs certain *issues* also to be tried before the sheriff, as will hereafter be noticed.

Sect. 18 enacts, " That *at the return of any such writ of inquiry*, or writ for the trial of such issue or issues as aforesaid, costs shall be taxed, judgment signed, and *execution issued forthwith, unless the sheriff* or his deputy, before whom such writ of inquiry may be executed, or such sheriff, deputy, or judge before whom such trial shall be had, *shall certify under his hand upon such writ* that judgment ought not to be signed until the defendant shall have had an opportunity to

Upon the return of a writ of inquiry or a trial of issues, judgment to be signed, unless, &c.

CHAP. XIX.  
VI. JUDGMENT  
BY DEFAULT.

Sheriff as to  
such issues to  
have the like  
powers as  
judges at nisi  
prius.

Provisions of 1  
W. 4, c. 7, to  
extend to such  
writs of inquiry  
and issues.

Sheriffs to name  
deputies to be  
resident in Lon-  
don.

Rules of Hil.  
Term, 2 W. 4.  
relative to judg-  
ment by de-  
fault.

How soon may  
be signed.

" apply to the Court for a new inquiry or trial, or a judge of  
" any of the said Courts shall think fit to order that judgment  
" or execution shall be stayed till a day to be named in such  
" order, and the verdict of such jury, on the trial of such issue  
" or issues, shall be as valid and of the like force as a verdict of  
" a jury at nisi prius; and the sheriff or his deputy or judge,  
" presiding at the trial of such issue or issues, shall have the  
" like powers with respect to amendment on such trial as are  
" hereinafter given to judges at nisi prius."

Sect. 19 provides, " That the provisions contained in the sta-  
" tute 1 W. 4, c. 7, sect. 1, (f) shall, so far as the same are ap-  
" plicable thereto, be extended and applied to judgments and  
" executions upon such writs of inquiry and writs for the trial  
" of issues in like manner as if the same were expressly re-  
" enacted herein."

And sect. 20 enacts, " That the sheriff of each county in  
" England and Wales shall severally name a sufficient deputy,  
" who shall be resident or have an office within one mile from  
" the Inner Temple Hall, for the receipt of writs, granting  
" warrants therein, making returns thereto, and accepting of  
" all rules and orders to be made on or touching the execution  
" of any process or writ to be directed to such sheriff."

We will now notice the other recent rules, enactments, and  
decisions relating to judgments by default.

The Reg. Gen. Hil. Term, 2 W. 4, contains several rules  
relating to judgments by defaults, &c. Reg. Gen. 66, orders  
that " judgment for want of a plea after demand may in all  
" cases be signed *at the opening of the office in the afternoon*  
" *of the day after* that on which the demand was made, but  
" not before." This rule assimilates the practice of King's  
Bench and Exchequer to that in Common Pleas, for before  
this rule, in King's Bench the plaintiff had always to wait  
*twenty-four hours* after his demand of plea, exclusive of Sun-  
day, which gave rise to much discussion and uncertainty re-  
specting the time of demand, and when the twenty-four hours  
expired, but now in all the Courts, even if the demand of plea  
were not until just before nine o'clock in the evening, the  
plaintiff may sign judgment in the afternoon of the next day,  
unless in the interim the defendant has pleaded. (g)

Reg. 67 orders that, " after the return of a writ of inquiry,  
" judgment may be signed at the expiration of four days from

(f) *Ante*, 674.

(g) See the previous practice, Tidd, 9th ed. 477; Jervis's Rules, 59, n. (p).



"such return, and after a verdict or nonsuit on the day after the appearance day of the return of the distringas or habeas corpora, without any rule for judgment;" (*h*) which rule assimilates the practice of K. B. to the previous practice in C. P. and Exchequer. Before this order (67) it was necessary in K. B. to give a rule before final judgment on the inquisition could be signed; but in C. P. and Exchequer, though the plaintiff was required to wait the four days, yet no rule was necessary. (*h*)

Reg. 101 orders that "there shall be no rule for the sheriff to return a *good jury* upon a writ of *inquiry*, but an *order* shall be made by a judge upon *summons* for that purpose." Before this order, in C. P. a special rule was necessary, though absolute in the first instance; and in K. B. the application for a good jury upon an inquiry was a common motion, drawn up on counsel's signature. (*i*) It will be observed that both those proceedings were attended with expense, without the opponent having an opportunity of resisting the application, or the Court or a judge exercising any judgment in allowing the application; but now the rule requires the actual decision of a judge at chambers, if the summons be opposed.

Reg. 105 orders that "after judgment by default, the entry of any subsequent continuances shall not be required." This last rule assimilates the practice of K. B. to the former practice in C. P. (*k*) But still if it should be necessary to state any fact that has recently occurred, as a death, or change of attorney, pending the suit, the facts may be stated as having occurred at the proper date, by adopting the language of former entries of an imparlance or continuance, according to the state of the cause, and as suggested in a subsequent page. (*l*)

When the plaintiff is entitled to sign judgment by default, and the defendant's appearance has previously been entered, the plaintiff's attorney makes what is termed an *Incipitur* of the declaration on paper, and an *Incipitur* on the roll, and these are to be taken to the clerk of the judgments (or in C. P. to the prothonotary,) who will sign the interlocutory judgment, and as evidence of that official act, will sign the judgment, and *mark the judgment paper*; so that the Court itself does not pronounce any interlocutory judgment, and the same is signed as a matter of right, though by an officer regularly authorized for the purpose.

The practical proceedings on signing judgments by default, &c.

(*h*) See previous practice, Tidd, 9th ed. 581, 903; Jervis's Rules, 60, n. (g).

(*i*) See former practice, Tidd, 485, 486, 576, 787; Jervis's Rules, 70, n. (y).

(*k*) Tidd, 569, 678; and see Jervis's VOL. III.

Rules, 71, n. (c).

(*l*) See form suggested, *post*, 701, note (z), and see Index of this volume, tit. Suggestion.

CHAP. XIX.  
VI. JUDGMENT  
BY DEFAULT.

Issuing writ of  
inquiry.

The judgment having been thus signed, the plaintiff's attorney next *issues* the *writ of inquiry* when necessary, as is usual in actions of assumpsit, (except on bills, notes or checks, or other cases referred to the Master to compute, presently stated,) covenant and actions for *torts*, as case, trover, or trespass, and in actions of debt on bond, conditioned for the performance of any other acts than a single payment of money. The writ of inquiry is usually engrossed on parchment, and is sealed at the proper office, upon which the small fee of 7*d.* is paid. In C. P. it is to be signed by the prothonotary, but in K. B. this is not necessary. It may we have seen be made returnable on a day certain in vacation. It is usual to indorse on the writ the day it is to be executed, being some day before the return day, and there is an express rule that the writ, when to be executed in London or Middlesex, shall be left at the sheriff's office the day before it is to be executed at the latest; (*k*) and indeed, as well in cases where under the new rule a good jury has been applied for, (*l*) as in all other cases, even more time should be afforded to the under-sheriff. The plaintiff's attorney is to pay to the under-sheriff, with the writ of inquiry, to be executed in London, 1*l.* 9*s.* 4*d.*, and if in Middlesex, 1*l.* 10*s.* 4*d.* and if in any other county, 1*l.* 11*s.* 6*d.*, and in each case 4*d.* additional for each witness. The under-sheriff thereupon summons the jury who are to execute the inquisition.

Of a good jury.

If the judge has upon application under Reg. Gen. Hil. Term, 2 W. 4, reg. 101, made his order for an inquisition before a *good jury*, the under-sheriff is to summon a *better sort* of common jury, and the costs of such good jury are usually allowed to the plaintiff. (*m*)

Of notice of inquiry, continuance thereof, and countermand.

From the books on Practice it will be obvious that the sufficiency of the *notice of inquiry*, and the *continuance* and *countermand* thereof, are frequent subjects of litigation, (*n*) and to those works we must here refer. The general rule in all the Courts is, that if the venue be laid in London or Middlesex, and the defendant live within forty *computed* miles from London, it suffices to give *eight days'* notice to the defendant of executing the writ of inquiry, *exclusive* of the day of giving the notice, and *inclusive* of the day on which the inquiry is to be executed; and the same eight days' notice is sufficient when the venue is laid in any *other county*. But when the

(*k*) Reg. Hil. Term, 23 Geo. 3, K. B. and C. P.

(*l*) As ante, 677, Reg. Gen. Hil. Term 2 W. 4, reg. 101.

(*m*) *Wilkinson v. Malin*, 1 Crom. & Mees. 238; 3 Tyrw. 255; 1 Dowl. 630,

S. C. See previous practice, *Cabot v. Gordon*, 2 M. & R. 124, 128.

(*n*) Tidd, 9th ed. 576 to 578; 2 Arch. K. B. 4th ed. 595; Chitty, Summary Prac. 125 to 127, fully as to Time.

venue is laid in London or Middlesex *and* the defendant lives above forty computed miles from London, then there must be *fourteen days'* notice of inquiry, although *ten days'* notice of trial of *an issue* joined would in such case suffice. (o)

As since the 1 W. 4, c. 7, s. 1, and the 3 & 4 W. 4, c. 42, writs of inquiry may in all cases not only be executed before a sheriff in the vacation, *but the judgment and execution thereon will, as of course, be immediate, unless the sheriff* can be induced to *certify* that the defendant ought to have time till the next term, either to move in arrest of judgment, or for a new trial, or unless a single judge can, on application, be induced so to certify, (p) it will frequently be advisable, in cases of the least difficulty or doubt on any point of law, to have the assistance of *counsel* on behalf of a defendant, first giving early notice of the intention to retain such counsel, to the plaintiff's attorney. It will also be advisable to be prepared with an *affidavit of facts*, sufficient to induce the sheriff or a judge to interfere to suspend immediate execution. The practice on that occasion will be nearly similar to that to be observed in order to induce a learned judge not to authorize immediate execution after the *trial of an issue*, and will therefore be considered in that part of the work.

The execution of the writ of inquiry and attendance of counsel.

It will here be proper to notice a few recent decisions relative to judgments by default and notices of inquiry; and first it seems that there is a file on which the inquisition and subsequent proceedings thereon are filed, and a fee for so filing them is charged and allowed to a plaintiff's attorney. It has been decided that a writ of inquiry having been executed, and a defendant taken in execution in vacation, under the 1 W. 4, c. 7, s. 1, the plaintiff's attorney should file the *inquisition and subsequent proceedings*, or suffer them to be copied, in order to give the defendant an opportunity of inspecting them, so as to ascertain whether there be any ground for arresting the judgment under sect. 4; and where the plaintiff's attorney refused to file such inquisition and proceeding, he was, on a rule nisi, compelled to do so with costs. (q)

Recent decisions.

It has also been decided that where a defendant is under terms of taking *short notice of trial*, he is not thereby bound to take short notice of inquiry, (r) and therefore where a defendant prays an extension of his time of pleading, or other favour, the plaintiff's attorney will do well to pray that he may also be

(o) See Chitty's Summary of Practice, 125, fully as to the time.

(p) *Ante*, vol. iii. 93, 94.

(q) *Townsend v. Burns*, 3 Tyrw. 104.

(r) *Stevens v. Pell*, 2 Crum. & M. 421; 4 Tyrw. 267; 2 Dowl. 335, S. C.

CHAP. XIX.  
VI. JUDGMENT  
BY DEFAULT.

required to take short notice of inquiry. (r) But where eight days' notice of executing a writ of inquiry were given, instead of fourteen, it was held that the defendant ought immediately to return the same to the plaintiff's attorney, with notice of the irregularity in his proceeding, (r) and he having neglected to give any explicit notice, was refused costs, though the inquiry was set aside. (r) Where neither the process nor the declaration had been personally served on the defendant, and the defendant had not appeared to the writ of summons, but a distringas had been obtained, and a judge's order for entering an appearance for the defendant sec. stat., and on application at the defendant's residence, the people there refused to state where he was gone, and thereupon the Court had given leave to stick up notice of the declaration in the office, and leave a copy at such house afterwards; the Court, on application for leave to serve a *notice of inquiry*, by sticking it up in the office, and leaving a copy at such the defendant's last residence, granted a rule that *sticking up the notice of inquiry in the office* and leaving a copy at the defendant's last place of residence should be good service, unless cause was shown within a week. (s)

Of setting aside  
a judgment by  
default, when  
irregular or re-  
gular.

In general if a defendant do not plead *in due time*, the plaintiff's attorney, at the opening of the office in the subsequent afternoon, may sign judgment as for want of a plea, unless a *plea in bar* has in the meantime been pleaded, and which the plaintiff in that case is bound to accept, though delivered after the time for pleading has expired. (t) But if the defendant's attorney deliver a plea *in abatement* after the expiration of the four days within which it must be regularly pleaded, or omit to make the requisite affidavit, it may be treated as a nullity, and it will be advisable to return it. (u) So if the defendant be under terms of *pleading issuably*, and demur specially merely in respect of a technical objection, or deliver any other plea not issuable within the terms of the order, the defendant may sign judgment; though we have before seen that the safer course is to apply for leave to do so. So if a special plea requiring counsel's signature be delivered unsigned, it may be treated as a nullity, and judgment signed.

(r) *Stevens v. Pell*, 2 Crom. & M. 421;  
4 Tyr. 267; 2 Dowl. 355, S. C.

(s) *Watson v. Delcroix*, 2 Crom. & M.  
425; 2 Dowl. 396; 4 Tyrw. 266, S. C.;  
*ante*, vol. iii. 296; *post*, 705, (a).

(t) *Amphlit v. Temple*, 2 Tyr. 312; 2  
Cromp. & J. 358, S. C.

(u) *Nolleken v. Scern*, 2 Cromp. & J.  
333; 1 Dowl. 320.

In all these cases, however, of *regular judgments by default*, if a defendant apply *promptly* upon a sufficient *affidavit of merits* (x) to set aside the judgment, whether interlocutory in *assumpsit* or final in *debt*, the Court or a judge will almost as of course set aside such judgment on payment of costs and pleading an issuable plea, and agreeing to take short notice of trial, (and to which the plaintiff's attorney should take care to have added short notice of *inquiry*,) and any other reasonable terms the Court or judge may in each case think fit to impose, as admitting handwriting, &c. and sometimes giving judgment of the term. Most of these points will be considered when we speak of the practice relating to a *defendant's pleading*.

If the judgment has been *irregularly* signed, then of course the Court will, on a prompt application, set it aside; and if the irregularity and the practice upon the point be clear, the Courts will make the *plaintiff pay costs* almost of right, or rather of course. (y) It is in general advisable, however irregular the judgment may have been, to swear to a good defence on the merits, whenever the facts will justify the so swearing, as naturally more strongly inclining the Court in favour of the application.

When a defendant has suffered judgment by default to a declaration containing a count upon a Bill of Exchange, Promissory Note, Check on a Banker, Mortgage Deed, Lease, or contract for Rent, or payment of an Annuity, or in an action on an Award merely for the payment of money, although the plaintiff may still execute a writ of inquiry, (a) yet it has long been the practice to adopt the less expensive and more expeditious course of referring such claim to the master or prothonotary of the Court, to ascertain and fix by his allocatur the amount of the principal money and interest that may be payable, and to tax the plaintiff's costs; but in these cases, if the declaration contain any count or breach upon any other description of claim, there must, before final judgment, be an entry of *nolle prosequi* relating to the same. In these cases, after interlocu-

VII. Of References to the Master or Prothonotary, to compute, &c. (s)

(x) See requisites, *ante*, 543, 544.

(y) Per Dampier, J. 1 Chitty's R. 398, 399, in note; and *ante*, 597 to 601.

(s) See the practice in these cases, Tidd, 9th ed. 370 to 373; 2 Arch. K. B. 4th ed. 590, 602, 603; T. Chitty's Forms, 2d ed. 405 to 407; Chitty on Bills, 8th

ed. 600 to 604.

(a) Where it appears doubtful how much remains due, the Court will still direct a Court of inquiry, *Jardine v. Williams*, 7 Law Journal, page 31, Mich. T. 1828, K. B.; Chitty on Bills, 8th ed. 802, *addenda*.

CHAP. XIX.  
VII. REFER-  
ENCE TO  
MASTER, &C.  
TO COMPUTE.

tory judgment by default for want of a plea, or for not producing the record (where a plea of judgment recovered has been pleaded,) has been signed, or demurrer in favour of the plaintiff given, the course is to make a concise affidavit of the nature of the claim declared on, so as to show that the case is fit to be referred to the master or prothonotary, and stating what judgment has been signed, and thereupon *in term time* counsel is instructed to move for a *rule nisi* that the claim and costs be so referred to such officer, which having been obtained as of course, and drawn up and duly served, then upon producing a sufficient affidavit of the service of the rule nisi, the Court will make the same *absolute*, unless sufficient cause be shown in due time. *In vacation* a judge on summons, and the signature of counsel, grants his fiat for drawing up the rule. (b) The practice has already been sufficiently stated; (b) and to avoid repetition we shall only notice points and recent decisions not before stated.

If in an action against three defendants on a note, they all suffer judgment by default, service of the rule nisi to compute on one of them suffices, because by such judgment they admit they were partners quoad that transaction, and notice to one therefore legally operates as notice to all. (c) The circumstance of a bill or note having been *lost*, constitute no answer to a rule nisi of this nature, although the defendant may still at law be in jeopardy. (d) But if the Court be satisfied on the behalf of a defendant, that there is a fair question for a jury as to the amount really due on the bill, they will leave the plaintiff to his writ of inquiry, and will not make absolute a rule for referring to the Master or Prothonotary by the usual rule to compute. (e)

Of showing  
cause against  
the rule nisi to  
compute.

No irregularity previous to or in signing the interlocutory judgment can be shown as cause against a rule nisi to compute, but should be made the subject of a cross motion to set aside such judgment for irregularity, and in the mean time to stay proceedings on such judgment, and in that case the Court will usually direct that both the rules shall be brought on together. (f) But the defendant may show as cause upon affidavit any fact which establishes either that according to the

(b) *Id. ibid.*

(c) *Figgins v. Ward*, 4 Tyr. 282; 2 Dowl. 364; 2 Crom. & M. 424, S. C.

(d) *Clarke v. Quince*, 3 Dowl. 26; *Brown v. Messer*, 3 M. & Sel. 281; *Allen v. Miller*, 1 Dowl. 420.

(e) *Jardine v. Williams*, K. B. Mich. T. A. D. 1828; 7 Law Journal, 31; Cbit. on Bills, 8th ed. 802, addenda.

(f) 1 Bos. & Pal. 360; *Marryatt v. Winkfield*, 1 Chitty's R. 119.

existing practice the instrument is not such a claim as can be referred to the master, or that under the particular circumstances an inquiry before the sheriff, attended by witnesses, will be more just, as in the case before mentioned, where the defendant insisted he had made payments on account, and where the defendant's witnesses cannot be compelled to attend before the master, nor can he receive parol evidence without express authority. (g)

CHAP. XIX.  
VII. REFERENCE TO  
MASTER, &C.  
TO COMPUTE.

---

(g) *Jardine v. Williams*, *supra*, 682 (e); *Noy v. Reynolds*, 1 Harr. & Wol. 14.

## CHAPTER XX.

PROCEEDINGS BETWEEN DECLARATION AND PLEA, WHERE THE  
DEFENDANT ADMITS THE ACTION TO BE IN PART SUSTAINABLE.

I. Of paying money into Court.....	684
II. Of restoring deeds or goods .....	691
III. Of compounding a penal action .....	693

## CHAP. XX.

I. OF PAYMENT  
OF MONEY OR  
DAMAGES INTO  
COURT, either  
as of course at  
common law, or  
by leave under  
3 & 4 W. 4, c.  
42, sect. 21.

(a)

WE are next to consider the practice in cases where the defendant admits that he has only a partial defence, but the plaintiff and defendant not agreeing upon the amount of the claim, the former *will not consent* to the common summons or rule for staying proceedings on payment of a named sum in full for the debt and costs; and thereupon it becomes advisable for the defendant, (unless it be *certain* that before the commencement of the action he made a *legal tender* that can be *safely pleaded* in bar,) (b) to pay money into Court, i. e. the amount of the sum which he is assured will cover the utmost claim, leaving the plaintiff at liberty to proceed for any further claim at his peril. At *common law*, and before the recent act 3 & 4 W. 4, c. 42, s. 21, the practice of a defendant's paying money into Court was confined to actions upon *contracts* for the recovery of a *debt* which was either certain in amount, or capable of being ascertained by ordinary computation, and without the exercise of any discretion or judgment by a jury. (c) And in a penal action, at the suit of a common informer, where the declaration contains several counts for different penalties, the defendant may as of right pay one or several penalties into Court, and leave the plaintiff to proceed at his peril for the residue. (d) But in an action for what was termed *general* or *uncertain damages*, whether claimed for the breach of a contract, (e) or for a breach

(a) See in general Tidd, 9th ed. 619 to 629; 2 Arch. K. B. 4th ed. 833 to 842.

(b) As to what is or not a legal tender, see *ante*, vol. i. 505 to 508. It is always *safer* to pay money into Court than to plead a tender, per Lord Tenterden, C. J. in *Leatherdale v. Sweetstone*, 3 Car. & P. 342.

(c) Tidd, 9th ed. 619; *Hallett v. E. I. Company*, 2 Burr. 1120.

(d) *Webb v. Punter*, 2 Stra. 1217; 2 Kenyon, 292; *Stack v. Eagle*, 2 Bla. 1032; Tidd, 541.

(e) *Hodges v. Lord Litchfield*, 3 M. & Scott, 201; 2 Dowl. 741, S. C.; but see *Smith v. King*, 3 M. & Scott, 799; 2 Dowl. 750, that, if the particulars state a *particular sum* as the extent of the *damages*, the full amount as stated may be paid into Court.



of duty by a sheriff under an execution, (f) or for a tort or in trover or trespass, (g) money was not allowed to be brought into Court; and one reason assigned was, that it would be hard in an action for an injury, thus uncertain in its consequences as to the amount of damages, to place the plaintiff in a situation of risk by his proceeding to trial in expectation of being able to prove facts sufficient to induce a jury to give in damages more than the sum paid into Court. So that, supposing the defendant were ever so well disposed in an action for the breach of a promise, as in an action against a tenant for bad husbandry, *to prevent further expenses by paying a sum even twice exceeding the real damages*, yet he could not do so, but must have incurred the expense of a trial or an inquiry; and the law still continues the same as to the excepted injuries to the *absolute or relative rights of persons*, subject nevertheless to this exception, viz. that if the plaintiff has delivered particulars of his demand, as in an action for dilapidations, limiting his claim to £50 or other fixed sum, then the Court has permitted that named sum to be paid into Court, leaving the plaintiff to proceed for further damages at his peril; (h) and there is another common law exception, viz. that in an action of ejectment for the forfeiture of a lease alleged to have been incurred by three breaches of covenant, viz. one non-payment of rent, and the others for assigning without license and neglecting to repair, the defendant may pay the rent into Court. (i) So in an action on a replevin bond against the sureties, the Court will stay the proceedings on their paying into Court the value of the goods distrained and double costs, and the costs of the application, or if that value exceed the amount of the rent due, then they will be relieved on payment of the rent and such costs. (k)

Perhaps one of the most valuable of the recent improvements in the law is, that introduced by the statute alluded to, which has very greatly extended the power of paying money into Court, provided in each particular case the leave of the Court or a judge be first obtained. This act, the 3 & 4 W. 4, c. 42,

The recent alteration and improvement enacted by 3 & 4 W. 4, c. 42, sect. 21, enabling a defendant, by leave of Court or judge, to pay money into Court in most personal actions. (l)

(f) *Woodgate v. Baldock*, 2 Dowl. 256; *Groombridge v. Fletcher*, id. 353.

(g) *Gibson v. Humphrey*, 2 Dowl. 68.

(h) *Smith v. King*, 3 M. & Scott, 799; 2 Dowl. 750.

(i) *Doe dem. Stanley v. Towgood*, 2 Dowl. 404.

(k) *Hunt v. Round*, 2 Dowl. 558.

(l) See valuable observations on this

act, and common law report, on which it was founded, in Bosanquet's Rules, 41, note 38. The prior common carriers' act, 11 Geo. 4, and 1 W. 4, c. 68, sect. 10, gave the defendant the power of paying money into Court, in an action for the loss of or injury to any goods delivered to be carried, *as of course*, and without leave of the Court or a judge.

CHAP. XX.  
I. PAYMENTS  
INTO COURT.

Enactment in  
3 & 4 W. 4, c.  
42, s. 21, de-  
fendant to be  
allowed to pay  
money into  
Court even in  
certain actions  
for torts by  
judge's order.

Salutary effect  
of this enact-  
ment.

sect. 21, enacts, "That it shall be lawful for the defendant, *"in all personal actions, (except actions for assault and battery, false imprisonment, libel, slander, malicious arrest or prosecution, criminal conversation, or debauching of the plaintiff's daughter or servant,)* by leave of any of the said superior Courts where such action is pending, or a judge of any of the said superior Courts, to pay into Court a sum of money by way of compensation or amends, in such manner and under such regulations as to the payment of costs and the form of pleading, as the said judges, or such eight or more of them as aforesaid, shall by any rules or orders by them to be from time to time made, order and direct."

This excellent enactment enables a defendant, in every personal action excepting those above enumerated, upon discovering that he has not a sufficient defence to the whole or a part of the claim, though for unascertained damages, by leave of a judge, to pay a sum into Court sufficient to cover the utmost damages, it is supposed the plaintiff might recover, and afterwards, if the plaintiff should proceed to trial upon the question of the sufficiency of the sum paid, he will do so at his peril as to the costs subsequent to the payment into Court. It is perhaps to be regretted that there are any exceptions, for if there were not, then many a trifling but expensive action for an assault or slander might be stayed by a defendant paying 5*l.* or other small sum into Court, rather than incur the trouble and expense of defending the action to trial. In all actions to which this statute extends, it will remove the difficulties that occurred in staying proceedings in actions for unliquidated damages, where the defendant admits that he has incurred liability, as by a seizure or temporary detention of property, which he is ready to give up, in which cases sometimes (though not always so,) a judge would stay the proceedings *on restoring* the property and paying costs. (m) Since the above statute a defendant, notwithstanding the pendency of the action, may return the deeds or goods, or offer to do so, and then obtain the leave of a judge to pay into Court and plead the payment of a sum sufficient to cover the utmost sum that a jury would afterwards give for the injury to the property and temporary detention, and the costs, after which the plaintiff would proceed at his peril.

(m) See cases, Tidd, 9th ed. 544, 545, 619 to 629; *Phillips v. Hayward*, 1 Harr. & Wol. 108; 3 Dowl. 362, S. C.; *Gib-*

*son v. Humphrey*, 2 Dowl. 68. See the next section as to staying proceedings on restoring deeds or goods.

Before this enactment, and consequently before the rules thereon were promulgated, the Reg. Gen. of Hil. Term, 2 W. 4, reg. 55, ordered, that "In all cases in which money may be paid into Court, leave to pay it may be obtained by a *side bar rule*," which assimilated the practice in that respect in all the Courts. (n)

CHAP. XX.  
I. PAYMENTS  
INTO COURT.

The recent general rules relating to payment of money into Court.

Reg. Gen. Hil. Term, 2 W. 4, reg. 56, ordered that, "On payment of money into Court, the defendant *shall undertake by the rule to pay the costs*, and in case of non-payment, to suffer the plaintiff either to move for an attachment, on a proper demand and service of the rule, or to sign final judgment for nominal damages." Which regulation also assimilated the practice in all the Courts, and enables a plaintiff, at his option, to proceed by attachment for non-payment of the costs, or to sign judgment for nominal damages, as *1s.*, and thereupon tax and issue execution for the costs. (o) It was recently held, that where the defendant had paid *1l. 3s. 7d.* into Court, and such undertaking had been omitted in the rule, the plaintiff had not, on that account, a right to put the defendant to the expense of proceeding to trial, especially as the defendant had offered to abide the decision of the Court upon the disputed question, whether the plaintiff was entitled to any costs. (p) But all discussion on this point is at rest, because Reg. Gen. Hil. Term, 4 W. 4, reg. 19, as to paying money into Court, and pleading the same, and stated in the next page, seems virtually to have annulled the above rule.

The Reg. 104 ordered, that "Where money is paid into Court in several actions which *are consolidated*, and the plaintiff without taxing costs proceeds to trial in one and fails, he shall be entitled to costs in the others up to the time of paying money into Court."

Next in order of time was the above act, 3 & 4 W. 4, c. 42, sect. 21, and afterwards were promulgated the general rules thereon as follows, viz. Reg. Gen. Hil. Term 4 W. 4, r. 17, ordered, "That when money is paid into Court such payment *shall be pleaded in all cases*, and as near as may be in the following form, *mutatis mutandis*.

The Reg. Gen. Hil. Term, 4 W. 4, relative to payments of money into Court.

Reg. 17. The payment of money into Court in all cases is to be pleaded specially in the form prescribed.

(n) See Tidd, 622; Jervis's Rules, 56, note (e).

(o) Jervis's Rules, 56, 57, note (f); Tidd, 626, 627. In 2 Arch. K. B. 4th ed. 837, note (a), it is suggested that this rule is virtually superseded by that of Hil. Term, 4 W. 4 reg. 19.

(p) Jones v. Owen, 2 Crom. & Jerv. 476.

(q) See observations on this rule and form of plea, Bosanquet's Rules, 41, 42, note 38 to 40; *id.* Precedents 97, 107, 122; and see forms of plea and replication, *Clark v. Nicholson*, 6 Car. & P. 712; 1 Gale, 21; 3 Dowl. 454, S. C. And see bad forms, *Sharman v. Stevenson*, 1 Gale, 74; 3 Dowl. 709; *Coates v. Stevenson*, 1 Gale, 75.

CHAP. XX.  
I. PAYMENTS  
INTO COURT.

Prescribed plea  
of payment into  
Court.

" C. D. } The — day of —  
" ats. }  
" A. B. } The defendant by — his attorney [or ' in per-  
son, &c. ' ] says that the plaintiff ought not further  
" to maintain his action, because the defendant now brings  
" into Court the sum of £—, ready to be paid to the plain-  
" tiff; and the defendant further says that the plaintiff has  
" not sustained damages, [or in actions of debt ' that he is  
" not indebted to the plaintiff ' ] to a greater amount than the  
" said sum, &c. in respect of the cause of action in the declara-  
" tion mentioned, and this he is ready to verify; wherefore he  
" prays judgment if the plaintiff ought *further to maintain his*  
" *action.*"

Reg. 18. No  
rule or order to  
pay money into  
Court to be ne-  
cessary except  
in cases under  
3 & 4 W. 4, c.  
42, s. 21.

Reg. 18 orders that " No rule or judge's order to pay money  
into Court shall be necessary *except* under the 3 & 4 W. 4,  
c. 42, s. 21; but the money shall be paid to the proper officer  
of each Court, who shall give *a receipt for the amount* in the  
margin of the plea, *and the said sum* shall be paid out to  
the plaintiff on demand."

Reg. 19. Pre-  
scribed replica-  
tion to plea of  
payment of mo-  
ney into Court.

Reg. 19 orders that " The plaintiff, after the delivery of a  
" *plea of payment of money into Court*, shall be at liberty to  
" *reply* to the same *by accepting* the sum so paid into Court in  
" full satisfaction and discharge of the cause of action in  
" respect of which it has been paid in; and he shall be at  
" liberty in that case to tax his costs of suit, and in case of  
" nonpayment thereof within forty-eight hours, to sign judg-  
" ment for his costs of suit so taxed; or *the plaintiff may reply*  
" *that he has sustained damages [or that the defendant is*  
" *indebted to him, as the case may be,] to a greater amount than*  
" *the said sum;* and in the event of an *issue thereon* being  
" found for the defendant, the defendant shall be entitled to  
" judgment and his costs of suit."

Decisions on  
form and requi-  
sites of plea of  
payment into  
Court.

Although we have seen that the Reg. Gen. Hil. T. 4 W. 4,  
r. 17, prescribes the forms of plea and replication, yet difficulties  
have arisen in framing the former: (r) thus, where in indebitatus  
assumpsit for money had and received, and on an account  
stated, the defendant, as it was considered, incorrectly pleaded  
first, as to 25*l.* parcel of the monies mentioned in the declaration  
payment of 25*l.* and concluded with a verification; and then as  
to the residue of the monies mentioned in the declaration  
pleaded non-assumpsit, concluding to the country, and the Court  
on demurrer held the plea insufficient, as not pleaded according  
to the rule; (s) and the plea of payment into Court should be

(r) See the cases, *ante*, 687, note (q).

(s) *Ante*, 687, 688; *Sharman v. Steven-*  
*son*, 1 Gale, 74; 3 Dowl. 709, S. C.;

and *Coates v. Stevens*, 1 Gale, 75; 3 Dowl.  
784, S. C.; see form of plea, *supra*, 688.

pleaded *last and as to the residue*; and the plea or pleas denying the other parts of the claim should be pleaded first. (t) The payment into Court *must be pleaded*, or otherwise the defendant will not be entitled to costs, although he has paid more than sufficient. (u)

CHAP. XX.  
I. PAYMENTS  
INTO COURT.

Before the late act, 3 & 4 W. 4. c. 42, sect. 21, the paying money into Court was considered an admission of the cause of action as laid, and in an action against several of a *joint liability*, and therefore, where in *indebitatus assumpsit* against several, on an alleged joint contract, if money be paid into Court generally the defendants are estopped from proving that some of them were not parties to the contract, even beyond the amount of the sum paid into Court. (v)

Consequences  
of paying money  
into Court.

If in an action for damages, as by a landlord against his tenant for the breach of an agreement for good husbandry, money has, by leave of the Court or a judge, been paid into Court, under the above statute and rules, the defendant cannot afterwards obtain leave to apply the sum as paid in under a plea of *tender*, for the statute does not alter the law in other respects so as to enable a defendant to plead a *tender*, excepting in actions for *money demands*. (x)

Where the plaintiff originally indorsed a larger claim on the writ than he could sustain, and afterwards the defendant paid into Court a less sum, being the real debt, and the plaintiff took it out, the Court will order that the plaintiff shall be allowed only the costs of his writ and no subsequent costs, the defendant having originally offered to pay the real debt and costs of writ; but the defendant should be prompt in his application. (y)

Where a defendant has been arrested for more than is due, there is an objection in that case to the payment of money into Court, viz. that if the plaintiff take that money out of Court, and forbear to proceed further, the case is not within the words of the 43 G. 3, c. 46, sect. 3, and consequently the defendant cannot apply for costs in respect of such arrest. (z)

The application to pay money into Court, when of course and independent of 3 & 4 W. 4, c. 42, sect. 2, should regularly

Time of pay-  
ment into Court  
and practical  
proceedings.

(t) *Sharman v. Stevenson*, 3 Dowl. 709; 1 Gale, 74, and *Coates v. Stevens*, 1 Gale, 75, S. P.; 3 Dowl. 784, S. C.

(u) *Adlard v. Booth*, 1 Bing. N. C. 693.

(v) *Ravenscroft v. Wise and others*, 2 Dowl. 676; 1 Crom. M. & Ros. 203, S. C.

(z) *Barrett v. Deale*, 9 Legal Observer, 108.

(y) *Hale v. Baker*, 2 Dowl. 125; *Elliston v. Robinson*, 2 Crom. & M. 343; 2 Dowl. 241, S. C. and *ante*, vol. iii. p. 281, note (n) and (m); and see other cases, Tidd, 9th ed. 622, 623, and 2 Arch. K.B. 4th ed. 838 to 840.

(z) *Rowe v. Rhodes*, 4 Tyrw. 219; 2 Dowl. 384, S. C.

CHAP. XX.  
I. PAYMENTS  
INTO COURT.

be made *before plea*; but it is frequently made, and in many cases expressly authorized, as in actions against a justice of peace, *after plea*, on obtaining a judge's order for that purpose; and the Courts have given a defendant leave to withdraw the general issue in order to bring money into Court and replead it on payment of costs, and this even after the granting a new trial. (a) So if enough has not been paid in the first instance, by leave a further sum may be paid. (b) The money may be, and frequently is, paid in specially on a particular count, so as to enable the defendant to recover the costs of defence as to the other counts, if abandoned or not proved by the plaintiff. (c)

When the money is to be paid into Court as *of course*, the plea of payment is to be first prepared, and a copy made; and we have seen that Reg. Gen. Hil. T. 4 W. 4, r. 18, directs that no rule or judge's order shall be necessary; (d) but the money shall be paid to the proper officer of each Court, who is to give a receipt for the money in the margin of the copy of the plea to be delivered to the plaintiff's attorney in due time, and to whom the money is to be paid on demand.

In cases where under the 3 & 4 W. 4, c. 42, sect. 21, the claim being unliquidated, actual leave of the Court or a judge is necessary, it may be advisable to make an *affidavit* of the facts and to apply to a judge by *summons* to be served as in ordinary occasions; and at the time of hearing, such affidavits and the *declaration* should be produced and the object of the application concisely stated. If the judge make an order it must be forthwith drawn up and a copy served on the plaintiff's attorney; the proper plea of payment, with other pleas when necessary, must then be prepared and signed by counsel, and taken with the money and rule or order permitting the payment into Court to the proper officer, (or in K. B. to the bankers of that Court, in Fleet Street,) and who will give the proper receipt for the money, and all these documents are then to be taken to the proper officer, who will write a receipt on the margin of the plea as before, and then the plea is to be delivered to the plaintiff's attorney. (e) One great utility in these alterations in the practice is, that the defendant need not now in any case as heretofore produce on the trial

(a) Tidd, 621, 622.

(b) 2 Arch. K.B. 4 ed. 836.

(c) *Early v. Bowman*, 1 Bar. & Adol.  
889; *Churchill v. Day*, 3 Mann. & Ry. 71.

(d) *Ante*, 688.

(e) As to the subsequent proceedings,  
see 2 Arch. K. B. 4 ed. 837.

the rule for paying the money into Court; for the replication must now admit such payment, and usually merely puts in issue whether or not he has sustained greater damages than the sum so paid.

CHAP. XX.  
I. PAYMENTS  
INTO COURT.

We have seen that the Courts in general, before the 3 & 4 W. 4, c. 42, s. 21, refused to permit money to be paid into Court in actions for unliquidated or uncertain damages; (f) though exceptions were sometimes made in favour of public officers who had erred in the performance of their duty, and in a few other cases. (g) So it was the *general* practice in an action of *trover* or *detinue* for *deeds or goods* to refuse to stay proceedings on the terms of the defendant's either bringing the deeds or goods into Court, as in the case of money, or of his delivering them up to the plaintiff and paying costs; especially if he insisted that they had been injured, or that he had sustained special damage by the detention; (h) saying, as to the former proposition, that they had no warehouse for the reception of goods. (h) And in an action against the sheriff by assignees of a bankrupt for seizing and selling the bankrupt's goods, the Court of Exchequer refused, on motion, to stay the proceedings on the sheriff's paying into Court the sum for which the goods sold, or *restoring them in specie*; there being a dispute about the value of the goods, and it being doubtful whether, by restoring them, the claimants would be placed in the same situation as before. (i)

II. OF RESTORING  
DEEDS, GOODS,  
&c. WITH  
COSTS.

The practice, however, has of late gradually changed in favour of defendants, in cases where they can return deeds or goods in their former state uninjured. Thus in a recent action of *trover* for several letters, the Court ordered the proceedings to be stayed, on the defendant delivering up to the plaintiff one of the letters addressed to him, and paying the costs of the action and application, if the plaintiff would accept the same in discharge of the action; but ordered, that if he would not accept that letter, and did not recover damages for the other letters, or should recover only nominal damages for that letter offered to be delivered up, he was to pay the costs of

(f) *Ante*, 684, 685.

(g) *Tidd*, 544, 545.

(h) *Tidd*, 544, 545; 3 *Bing.* 601; and see fully, *Earl v. Holderness*, 1 *Moore*

& *P.* 254; 4 *Bing.* 462, *S. C.*, where see a concise history of the practice.

(i) *Gibson v. Humphrey*, 2 *Dowl.* 68; *Crompt. & M.* 544, *S. C.*

CHAP. XX.  
II. RESTORING  
Goods, &c.

the action. (k) In a recent action of *detinue* for the counterpart of a lease and other things, it was held that the Court, on delivering up a portion of them, might either stay the proceedings, or put the plaintiff under terms if he insisted on proceeding, in order to prevent his obtaining an undue advantage; (l) and Patteson, J. observed, "In Tidd's Prac. 9th ed. 545, a manuscript case is mentioned where *trover* was brought by the assignees of a bankrupt for a steam engine, &c. and the Court made a special rule for staying the proceedings, on delivering to the plaintiffs a part of the goods for which the action was brought, and payment of costs up to that time, provided the plaintiffs would accept thereof in discharge of the action; or otherwise that the articles delivered should be struck out of the declaration, and the plaintiffs be subject to costs, unless they should obtain a verdict for the remainder of the goods, or prove a deterioration of the part given up. On the authority of that case, I think I may interfere in the manner prayed. The rule therefore will be in this form:—That the defendant shall be at liberty to deliver up the deed in question on payment of costs up to the time of such delivery; and that the proceedings in the action shall be stayed, provided the plaintiff will accept of such discharge of such action; otherwise such deed is to be struck out of the declaration, and the plaintiff shall be subject to the costs of the action, unless he obtains a verdict for some of the other deeds in the declaration mentioned, or damages beyond nominal damages for the detention of the deed in question. The defendant, however, at all events to pay the costs of this application, and not to plead *non detinet* as to the other deeds. As it appears he claims a lien upon them against the plaintiff, he must plead his lien, and so try upon the merits." The terms of the rules in these recent decisions are fully stated in the reports, and they may be readily applied in practice to cases as they arise. It would seem further that in all cases since the 3 & 4 W. 4, c. 42, s. 21, when a defendant has it in his power to restore deeds or goods in specie, he may do so or make a tender of all that he has no lien upon or claim to, and may thereupon by summons obtain leave to pay into Court a sum sufficient to cover all possible damages for the temporary detention and any injury, and a sum sufficient to cover any expense the plaintiffs might afterwards incur in loading and carrying the goods to his own pre-

(k) *Earl v. Holderness*, 1 Moore & P. 254; 4 Bing. 462, S. C.; ante, vol. iii. 281.

(l) *Phillips v. Hayward*, 3 Dowl. 362. But see the report of that case in 1 Harr.

& Wol. 108, S. C., from which report it would seem that the Court only interfered by consent. Note, the case of *Earl v. Holderness*, above stated, was not noticed in *Phillips v. Hayward*.



mises, and then plead the same with a plea of lien or other defence as to the residue of the deeds or goods; and thus *compel* a plaintiff to accept just terms, or proceed at his peril. (m)

CHAP. XX.  
II. RESTORING  
GOODS, &c.

We have seen that in a penal action for several penalties a defendant may as of course pay into Court one or more, and leave the plaintiff to proceed at his peril for the residue. But the proceeding we have here to mention is the practice of *compounding a penal action* on terms; and which can only be by *agreement* with the plaintiff, and with the approbation of the Court. That practice is principally regulated by 18 Eliz. c. 5, s. 3, which enacts that no composition shall be made until *after answer, i. e. plea*, and then only by leave of the Court; perhaps, therefore, as the defendant must *first plead*, this subject is not well arranged here. The only recent alteration in this branch of practice is that Reg. Gen. Hil. T. 2 W. 4, reg. 99, orders that "leave to compound a penal action shall not be given in cases where part of the penalty goes to the crown, unless *notice* shall have been given to the proper officer; but in other cases it may." (o) It has been recently decided that the Court cannot dispense with an *affidavit* that the defendant *has pleaded* before they give leave to compound. (p) But leave may be obtained even after verdict, and even after the defendant has been charged in execution, as on the ground of his poverty and utter inability to pay the full penalties and costs. (q)

III. OF COM-  
POUNDING  
PENAL AC-  
TIONS. (n)

(m) And see fully *Evans v. Lewis*, 3 Dowl. 819.  
(n) Tidd, 556 to 558; 2 Arch. K. B. 883.

(o) See prior practice, *Jervis's Rules*, 70, note (n); Tidd, 557, 558.  
(p) *Rea v. Collier*, 2 Dowl. 581.  
(q) 1 Stra. 167.

## CHAPTER XXI.

## OF THE PRACTICE AS TO PLEAS.

Introductory observations . . . . .	694	Of pleas in bar . . . . .	714
I. Instructions for plea . . . . .	695	Forms and requisites of pleas in bar in general..	ib.
II. What the duty of defendant's attorney as to plea and de- fence . . . . .	697	Form of a plea of non as- sumpsit, or other plea de- nying the whole or part of a declaration, and con- cluding to the country..	715
What defence or plea may be pleaded or advanced . . . . .	698	The like to part of the cause of action, and an- other plea to other part or residue . . . . .	ib.
Considerations whether to plead, or suffer judgment by default . . . . .	699	Commencement of a second plea to same matter . . . . .	ib.
Occasional conduct on behalf of a defendant collateral to pleading . . . . .	ib.	Formal parts of, in general	ib.
III. Time of pleading and of Im- parlance . . . . .	700	1. The title or date at top	716
Imparlances, how far abo- lished . . . . .	ib.	2. Marginal title of cause	ib.
Of suggestions on record in lieu of entry of imparlance or continuance . . . . .	ib.	3. Introduction or com- mencement of plea . . . . .	ib.
Usual times of pleading . . . . .	701	4. Body and general re- quisites . . . . .	718
After delivery of particu- lars . . . . .	702	5. Conclusion . . . . .	719
In cases of prisoners . . . . .	703	6. Signature of counsel..	720
Before what hour of night plea to be delivered . . . . .	ib.	Delivering of plea . . . . .	722
IV. Of obtaining further time to plead . . . . .	ib.	Of waiving or adding a plea, when . . . . .	ib.
In what cases time given to plead in bar, and what length of time, and on what terms . . . . .	704	Of pleading de novo to an amended declaration . . . . .	ib.
Order for time, how obtained	ib.	V. What plea may or must be pleaded . . . . .	723 to 731
Form of summons for time to plead . . . . .	ib.	What matters must be re- versed or pleaded, or when a special plea is necessary	723
Comprehensive form of or- der thereon . . . . .	705	Denial of character or right in which plaintiff sues or defendant is sued, must be pleaded specially . . . . .	ib.
Usual terms, meaning of those words in an order for time	ib.	The new rules and decisions relating to pleas . . . . .	724
Construction of the terms . . . . .	ib.	Of sham or false pleas . . . . .	729
Pleading usually . . . . .	706	Plea of judgment recovered	730
What such a plea or not	ib.	VII. Of pleading double or several pleas . . . . .	731 to 735
Special demurrer . . . . .	ib.	Of double pleas, when al- lowed, and how to ob- tain leave to plead the same . . . . .	731
Rejoining gratis . . . . .	708	Mode of obtaining leave, when necessary . . . . .	732
Taking short notice of trial . . . . .	709	Practice as respects a sum- mons, &c. to obtain leave to plead double . . . . .	733
Time in order, how construed	710	What double pleas allowed	734
How soon plaintiff may sign judgment for want of a plea	ib.	VIII. Of applications to set aside pleas . . . . .	735
V. Practice as to pleas . . . . .	ib.	IX. Of several defendants joining or separating in their plea . . . . .	ib.
Taking declaration out of of- fice when filed . . . . .	ib.		
Practice relating to pleas in abatement . . . . .	711		
Time of swearing the affida- vit in support of a plea in abatement, and of pleading such plea . . . . .	712		

CHAP. XXI. HAVING thus concisely examined the principal proceedings between declaration and plea, we have now to consider the practice relating to the defendant's plea or several pleas, and

which since the recent pleading rules of Hil. T. 4 W. 4, (requiring a *special* or *particular plea* in almost every action, excepting where by *statute* the *general issue* is permitted,) has become of increased practical importance, as more *distinctly* describing and *limiting* the precise defence on the face of the pleadings, and confining the issue and evidence to one or more single points. In actions of assumpsit and *debt on simple contract*, and in *actions on the case* in particular, the use of the general issue had become so absurdly and injuriously extended, that before the regulations alluded to, a plaintiff very frequently proceeded to trial without being apprized of the nature of the intended defence; nor could a Court or judge compel the defendant to state it; and it was consequently necessary on the one hand, that the plaintiff should come prepared to prove not only *every allegation* in his declaration and *every part* of his own case, but also on the other hand to *disprove* every possible ground of defence; and not until the trial was it discovered that the defence, perhaps, turned on a totally different and unanticipated point; and all the numerous witnesses and evidence, adduced on the part of the plaintiff at great expense, turned out wholly beside the real question or unnecessary. It will be found that the principal object of the *recent pleading rules* was to compel a defendant (at the peril of costs if unsuccessful) to *traverse* in particular any part of the declaration which he intends to dispute, and to *plead every ground of defence specially*, and *thereby prevent the plaintiff from being taken by surprise*; and further to cause the issue to be joined on a *single point*, thereby saving great expense in evidence, and putting an end to the introduction of several pleas, substantially stating the same ground of defence, varying only in description.

Another no inconsiderable advantage resulting from the adoption of a special plea is, that it limits the arduous and frequently perplexing duties of the judge at nisi prius, which, when a cause was tried upon a plea of general issue, were too multifarious, and such pleas properly refer to the Court in banc the legal sufficiency of the defence, which must now be stated with particularity on the record, and thus both parties retain the power of taking the opinion of the Court in banc, and afterwards of a Court of error.

I. The first practical consideration relates to the *instructions for the plea*, comprehending also the *entire defence*. In prior pages we have seen that a very serious professional duty is imposed upon a *plaintiff's* attorney, even before the commence-

CHAP. XXI.  
PRACTICE AS  
TO PLEAS.

ment of an action, to obtain the most explicit instructions to *sue*; (a) and again, before declaring, to prepare *written instructions* for the declaration, comprising at least the substance of the first instructions to sue, together with a statement of any subsequent material information that can be obtained. (b) We have seen, moreover, that it may be his duty to ascertain even from the *witnesses* themselves their precise evidence in proof of the instructions; for if from want of such inquiry the action fail, the attorney may be personally liable for the consequences, or at least he may not be able to recover his fees. (c) A *similar duty* and *liability* attach upon a *defendant's attorney* as regards *instructions* to *defend* and to *plead*, and some suggestions respecting these have already been made. (d) With respect to the *instructions to plead*, it is too generally the practice to forbear to make sufficient inquiries into the facts and grounds of defence until *after* the declaration has been delivered; and the consequence is, that the defendant being then entitled only to four or eight days time to plead, depending as we have seen on the venue and his residence from London, (e) it is frequently impracticable, especially if the defendant or his witnesses reside at a distance in the country, to obtain sufficient information and prepare the plea within the limited time; and thereupon it becomes necessary to *obtain further time* as presently stated; in which case in general prejudicial terms are imposed, such as the defendant's *pleading issuably*, (thereby precluding a defendant from pleading in abatement or demurring specially,) *rejoining gratis* and taking *short notice of trial*, the latter occasioning not unfrequently disastrous hurry in preparing for trial and procuring essential evidence. It is therefore advisable for a defendant's attorney, promptly after his client has been arrested or served with process, to inquire fully into the facts and evidence, and when the substance of the declaration can be anticipated, even to prepare the draft of the pleas. Experience has established the utility of this activity on the part of a defendant's attorney; and now that even in the most common actions of assumpsit and trover, special pleas stating new facts have become so frequently necessary, practitioners would soon discover the great utility of adopting this practice; and at all events avoid being under the terms of taking *short notice* either of trial or inquiry. Thus suppose an action on a bill of exchange or other contract has been

(a) *Ante*, vol. iii. 117 to 125.

(b) *Ante*, vol. iii. 429 to 431.

(c) Vol. iii. 117 to 125, 430.

(d) *Ante*, vol. iii. 121; and see a

table of questions to be put by a defendant's attorney to his client, *id.* 124, *see* (b).

(e) *Ante*, 499.

commenced, it is now necessary to *plead specially* and with particularity, either that the defendant received no *consideration* or any *illegality* in the consideration or contract on which it is founded; and it will not suffice to plead generally that the defendant received no consideration; but it must be pleaded affirmatively under what circumstance he became a party, as that he accepted the bill for the accommodation of the drawer, and that the latter indorsed the bill to a third party to get discounted, who had not discounted but had converted the bill to his own use; and that the plaintiff had notice of the facts when he became the holder. (f) It is therefore incumbent on the defendant's attorney to inquire fully into all the facts before he delivers any instructions to plead, and the investigation of such facts would frequently occupy much more time than is usually allowed for pleading, and the inquiry ought to precede instead of follow the declaration. Immediately the declaration has been delivered, it is advisable to analyze it, numbering each distinct allegation as 1, 2, 3, 4, 5, &c. in natural order, and then to inquire of the client the facts as to each allegation, and whether each be true and can be proved by the plaintiff, and how; and if not, then the evidence by which it can be disproved: and having thus gone through the whole declaration, then inquiry is to be made into any *new facts* or circumstances which it is supposed may constitute distinct answers or defences, and how each can be established in evidence, and the *witnesses* themselves should be examined.

II. A defendant's attorney should communicate *personally* with his client, and not merely by letter, or through the intervention of a clerk or *any third person*, and give him his best advice upon the proper course of defence to be adopted. (g) His duty to the Court, and indeed to himself, are so far paramount to the duty to his client, that he cannot be sued for not pleading a vexatious sham plea pursuant to his client's request; (h) nor perhaps for not moving the Court in respect of a supposed irregularity by which his client was not really prejudiced; (i) and where an attorney pleaded a false plea of set-off upon a recognizance, the Court on motion set aside such plea, and gave leave to the plaintiff to sign judgment, and made the attorney pay the costs, although it was sworn that the plea was pleaded in pursuance of the *express directions* of his client, (k)

II. EXTENT OF  
DUTY OF DE-  
FENDANT'S AT-  
TORNEY TO  
OBSERVE HIS  
INSTRUCTIONS  
AND WHAT TO  
PLEAD.

(f) See the notes to the Pleadings, Rules Hil. T. 4 W. 4, post, 724, &c.

(g) *Hopkinson v. Smith*, 1 Bing. 13; 7 Moore, 237; and see *In re Garbutt*, 9 Moore, 157, 2 Bing. 74; *Taylor v. Glass-*

*brook*, 3 Stark. 75.

(h) *Lee v. Ayrton*, 1 Peake, 119.

(i) *Godfrey v. Jay*, 3 Car. & P. 192; 6 Bing. 616, S. C.

(k) *Vincent v. Groome*, 1 Chitty's Rep. 182.

CHAP. XXI.  
PRACTICE AS  
TO PLEAS.

and as the insolvent act, 7 G. 4, c. 57, sect. 49, enacts, that if an insolvent praying his discharge shall have put any of his or her creditors to any unnecessary expense *by any vexatious or frivolous defence or delay to any suit for recovering any debt* or sum of money from him, the Court may direct his imprisonment as to that creditor's claim, to continue for not exceeding two years, it will obviously be advisable, where there is the least probability of the client becoming insolvent, to caution him against any plea or course of defence that might endanger him under that enactment. (k) If there be any reasonable doubt upon the propriety or expediency of any particular plea or line of defence, then an attorney, by acting under the opinion of counsel, will in general be sufficiently protected from personal liability, and however incorrect the opinion may turn out to have been, the attorney might even recover his fees. (l)

What defence  
or plea may be  
pleaded or ad-  
vanced.

The full instructions for the defence having been obtained, the next consideration is, *what defence* shall be advanced, as whether it shall only be *on the merits* in the common acceptance of that term, i. e. on the *moral justice* of the case, or whether a *legal objection* on account of some *illegality* in the consideration or contract, or want of formality and noncompliance with some legal requisite at common law, or under the statute against frauds, shall be taken; or lastly, whether a mere *technical objection*, principally connected with practice or the pleadings, shall or not be raised. As a general rule, undoubtedly an attorney ought to consult his client's wishes before he sets up a defence, which may in the sequel prejudice his character in the estimation even of a few. As regards *legal objections* and defences in general, however, the late Lord Tenterden declared that sitting in a Court of law, he should feel it his duty not to suffer an argument by counsel to a jury that the defence of *usury* or *gaming* is unjust or dishonourable, to prejudice a jury against such defence, still less to induce them to find a verdict contrary to the evidence. And in a late case in the House of Lords, the Lord Chancellor, speaking of *legal* or *technical objections*, and of the propriety or impropriety of a party taking advantage of them, and in particular of a *defect in the execution of a power*, said, (m) "Nothing can be more unjust than to "throw any imputation whatever against the gentleman who "has taken advantage of the law of the land as it is. He is "not bound to forego that advantage; he is not only not bound "to forego that advantage, but unless he be a person to whom

(k) And see *ante*, vol. iii. 125, in note.

(l) *Potts v. Sparrow*, 6 Car. & P. 749; *Godfrey v. Jay*, 6 Bing. 616; 1 Moor & P. 256; *Kemp v. Bart*, 1 Nev. & Man.

262; 4 Bar. & Adol. 424, S. C.; *ant.* vol. ii. 32, 33.

(m) *Cockerell and others v. Cholmley*, 1 Clark & Fin. 70, 71.

“ many thousands of pounds are a matter of no importance as regards either his own interests or the interest of his family, “ it would be a piece of romantic folly, in my opinion, for him “ to forego that advantage which the law of the land has given him. Many who have no occasion for money for their families, either from having enough of it themselves, or their families being well provided for, may afford to be *generous* “ to others; for it is pure *generosity* in the way to which I “ have referred; but no man is to be blamed for wanting the “ means to be thus generous. Is it possible to think of blaming any person merely because he is not guilty of an act of “ romantic generosity? an act which, in the circumstances of “ this respondent, who is stated to be a gentleman with a “ family, would, in all probability, have been an act of folly, “ disentitling him to praise, and probably subjecting him to “ censure.” It is to be observed, however, that in that very case the chancellor recommended the lords not to give the party who took the objection any costs. And every independent and honourable solicitor will remind his client, that whatever may almost of necessity be said in Courts of justice in upholding and giving effect to the prescribed law, still there may be a different opinion entertained by society of the moral propriety of many *legal* defences tending to defeat natural justice in the particular case, and the consideration of which will induce such solicitor to advise his client not to adopt such defence, and sometimes even to decline to conduct it.

Having obtained full instructions for the defence and plea, the first consideration will be whether it will be advisable to plead, or suffer judgment by default, at least in those actions where it is not permitted to pay money into Court under 3 & 4 W. 4, c. 42, s. 21, or when the defendant is not prepared to do so. In actions for torts, when the amount of the damages is uncertain and greatly in the discretion of a jury, as in an action for a libel, or slander, or criminal conversation, or debauching a daughter, although there may not strictly be any defence, yet it may be advisable to plead and try the action before one of the judges of the Courts at Westminster and a superior jury; principally in the hope that the judge's authority and moderating influence will deter the jury from giving (as a *sheriff's jury* will sometimes do) *outrageous damages*. But considerations of this nature, being mere matters of prudence, frequently depend on the particular circumstances of each case.

Considerations whether to plead or suffer judgment by default.

On the part of a defendant, supposing that an action is threatened or pending for the price of goods or for work and materials, and the defence is either to the whole or to reduce

Occasional conduct on behalf of a defendant collateral to pleading.

CHAP. XXI.  
PRACTICE AS  
TO PLEAS.

the claim, on the ground that the goods are not equal to the warranty, (n) or the work and materials improperly executed, or inferior; (o) then it may be advisable for the defendant to give a full written notice of such objection according to the facts, (p) and further to place the money sufficient to cover the whole of the just claim in a banker or third person's hands, and give notice that it is there ready to be paid over if the plaintiff will accept the same. Such notice and offer afterwards proved on the trial will probably incline a jury in favour of the defence, as being bona fide, and will at all events preclude any argument that the defence is merely for delay.

III. TIMES OF  
PLEADING AND  
OF IMPARLAN-  
CES HOW FAR  
ABOLISHED.

III. Before the uniformity of process act, 2 W. 4, c. 39, unless the plaintiff declared upwards of a certain number of days before the end of a term, the defendant, (provided he had duly appeared and perfected bail in a bailable action, but not otherwise, (q)) was entitled to an *imparlance*, i. e. could not be required with effect to plead before the next term, and sometimes even till a third term, and many ancient as well as modern rules and numerous decisions will be found on the subject of *imparlances*. And for some time after passing that act it was supposed that in some cases the right to an *imparlance* still subsisted; (r) but now upon conference between all the judges, it is settled, that as the statute sect. 11, enables a plaintiff to proceed as well in the vacations as in the terms, (excepting between the 10th of August, and 24th of October, (s)) and excepting a few other days, (t) in all *personal* actions *originally commenced* in one of the superior Courts the right to an *imparlance* in any such action is *virtually annulled*. (u) But as that act does not extend to real or mixed actions, such as *quare impedit* and *ejectment*, nor to actions of *replevin*, or other actions when removed from a County Court or other inferior Court, nor to proceedings on *scire facias*, there may still be occasion to refer to the ancient learning on the subject of *imparlances*. (x) Excepting therefore in those few cases, a defendant cannot claim an *imparlance*, but must plead within four or eight days, as shown in a prior page and as presently stated, or he must *obtain further time* by consent or by order of a judge.

Of suggestions

The Reg. Gen. Hil. T. 2 W. 4, reg. I. s. 109, ordered that

(n) See *Street v. Blay*, 2 B. & Ad. 456.

(o) *Basten v. Butter*, 7 East, 479.

(p) See form, *Basten v. Butter*, 7 East, 479; and *Street v. Blay*, 2 Bar. & Ad. 456.

(q) *Cook v. Allen*, 3 Tyrw. 378.

(r) *Whalley v. Barnett*, 3 Tyrw. 239;

*Edensor v. Hoffman*, 2 Crom. & J. 140.

(s) *Ante*, vol. iii. 103, 104; *Nurse v.*

*Geeting*, 3 Dowl. 157, 158; *Wigley v. Tomlins*, *id.* 7; 9 Legal Observer, 22, 226; Atherton on Rules, 107.

(t) *Trinder v. Smedley*, 3 Dowl. 87.

(u) *Supra*, note (s).

(x) *Tidd's Supp.* A. D. 1833, p. 127; and as to the previous law of *imparlance*, *Tidd*, 9th ed. 462.



it shall not be *necessary* that imparlances should be entered on any distinct roll; (y) and Reg. Gen. Hil. T. 4 W. 4, reg. 2, (the practice rules) direct, that "no entry of *continuances* by way of *imparlance*, *curia adeisari vult*, *vicecomes non misit breve*, or otherwise, shall be made upon any record or roll whatever, or in the *pleadings*, except the *jurata ponitur* in respectu, which is to be retained, provided that such regulation shall not alter or affect any existing rules of practice as to the *times* of proceeding in the cause, provided also that in all cases in which a plea *puis darrein continuance* is now by law pleadable in banc or at nisi prius the same defence may be pleaded with an allegation that the matter arose *after the last pleading* or the issuing of the jury process, as the case may be, provided also that no such plea shall be allowed unless accompanied by an affidavit that the matter thereof arose within eight days next before the pleading of such plea, or unless the Court or a judge shall otherwise order." Since this last rule, although there is not to be in personal actions any formal statement in pleading or otherwise of an *imparlance* or other continuance, and it would be untechnical to call any pleading after issue joined a plea *puis darrein continuance*, yet when since the last pleading or act in Court a death or change of the attorney or other event has occurred, which it may be necessary or prudent or convenient to suggest or state on the record, pursuant to the statute 8 & 9 W. 3, c. 11, sect. 7, it must still be stated at the head of the *next* pleading, whether declaration, plea, replication, &c. by some convenient and concise allegation, (z) as in the commencement of a plea, immediately after the date at the top, thus, "and the defendant saith that since the said plaintiff declared in this action and before this day, to wit, on, &c. the said G. H., (one of the plaintiffs,) died; and the defendant further says, that the said A. B., who hath survived the said G. H., ought not to have or maintain his aforesaid action thereof against him, because he says, &c.," (stating the matter of the plea as usual.) (z)

CHAP. XXI.  
PRACTICE AS  
TO PLEAS.

on the record in  
lieu of entry of  
imparlances or  
continuance.

Suggested state-  
ment of a death,  
&c. since last  
pleading.

In examining the requisites of the *notice to plead* we have necessarily anticipated much of this part of the subject. The *notice to plead* should require the defendant to plead within *four days* if the venue be laid in London or Middlesex, and

The usual times  
of pleading.

(y) Jervis's Rules, 72, note (g).

(z) See Chitty's Col. Stat. tit. Abatement, page 2, note (c), and another form there given; see a statement of the death

of a party after issuing the writ and before declaration, 2 Chitty on Pleading, 6th edit. page 15; 2 Dowl. 436.

CHAP. XXI.  
PRACTICE AS  
TO PLEAS.

the defendant resides within twenty miles of London; but within *eight days* if the venue be laid in any other county or the defendant resides above twenty miles from London; and which four or eight days are reckoned *exclusive* of the day of giving the notice, and *inclusive* of the last of the four or eight days; (a) but if the last of the four or eight days expire on a Sunday, Christmas-day, Good-Friday, or a day appointed for a public fast or thanksgiving, then the defendant has the whole of the next day to plead; (b) and if the four or eight days or any part of *enlarged* time expire between the 10th of August and the 24th of October, then the defendant is not obliged to plead until the like number of days have elapsed after the 24th of October. (c) We have also seen that judgment cannot be regularly signed for want of a plea until the *afternoon* of the fifth or ninth day; (d) and as in the Exchequer the office is not open as of course in the afternoon during the *vacations*, a defendant, pending a vacation, has full five or nine days, subject to the risk of the office being opened specially in the afternoon of the fifth or ninth day, as it may be, on paying an extra fee. (d)

Within such four or eight days, thus depending on venue and the residence of the defendant, he must plead *in bar*, (e) or take care before the expiration of the time to obtain an order for further time, or at least the first summons should be returnable before the time for pleading has expired, and he should regularly attend the same. And all pleas in *abatement* must be pleaded within *four days*, both inclusive, from the day of delivering the declaration, or if filed, of the notice of declaration; and the rule of Easter Term, 5 Ann. K. B. directs that after such four days such plea shall *not be received*, but may be treated as a nullity and judgment signed as for want of a plea; and if a plea in abatement to part, and in bar as to the residue, be delivered after the four days have elapsed, the whole may be treated as a nullity. (f) If however a notice to plead give more time than the defendant would be entitled to in respect of the venue or his residence, then we have seen that he may take the whole time so given by the plaintiff's own act to plead *in bar*. (g)

After delivery  
of particulars.

The Reg. Gen. Hil. T. 2 W. 4, reg. 48, orders that a de-

(a) *Ante*, 499 to 501. In K. B. Reg. Gen. Trin. 5 & 6 G. 2. In C. P. Reg. East. 3 G. 2.

(b) Reg. Gen. Hil. T. 2 W. 4, r. VIII.

(c) *Trinder v. Smedley*, 3 Dowl. 87.

(d) *Kemp v. Fyson*, 3 Dowl. 265.

(e) *Ante*, 499 to 501.

(f) *Ante*, 500, note (d); *Martindale v. Harding*, 1 Chitty's Rep. 716; *Lee v. Carlton*, 3 T. R. 642; *Macdonnell v. Macdonnell*, 3 Bos. & Pul. 174.

(g) *Ante*, 499.

fendant shall be allowed the same time for pleading *after the delivery of particulars* under a judge's order, which he had at the return of the summons: nevertheless judgment shall not be signed till the *afternoon* of the day after the delivery of the particulars unless otherwise ordered by the judge. This rule assimilated the practice of C. P. to that of K. B. and allows till the afternoon of the day after the delivery of particulars at all events. (h)

With respect to *prisoners* in actual custody the Reg. Gen. Prisoners. Trin. T. 3 W. 4, expressly orders that the defendant shall plead to the declaration, at the same time, in the same manner, and subject to the same rules, as in actions against defendants who are not in custody; and we have seen that it has been held that he must plead without a notice to plead. (i)

We have seen that Reg. Gen. Hil. T. 2 W. 4, reg. 50, Before what hour of night to be delivered. requires the service of all rules, orders, and motions, *before nine o'clock at night*, and imports, that if served after that hour the service shall not be deemed good; (k) and the particular Reg. Mich. T. 1 W. 4, reg. 9, in Exchequer is to the same effect. But it has been held that a plea delivered after nine o'clock in the evening and kept by the plaintiff cannot be treated as a nullity; and a judgment signed on that ground and no notice having been given to the defendant of the objection was set aside. (l)

IV. *Further time to plead may be obtained, not only in bar*, IV. OF OBTAIN- but in some cases by special leave even *in abatement* after the ING FURTHER TIME TO PLEAD. allowed time of four days; as where two actions had been vexatiously brought for the same cause, in which case the Court allowed the defendant to plead in abatement after the four days had elapsed; (m) and a plea of the nonjoinder of a co-contractor was also permitted after the four days, that also being considered a plea in abatement more to be favoured than those which constitute a mere formal objection. (n) However, when it is proposed to plead in abatement after the usual time, there should in general be a special application supported by an affidavit showing just ground for requesting the favour and swearing to a sufficient defence on the merits when practicable.

To plead in abatement.

(h) Jervis's Rules, 55, note (x); and Tidd, 598.

(i) *Clementson v. Williams*, 1 Bing. N. C. 356; ante, 498; 2 Dowl. 212.

(k) *Ante*, vol. iii. 110.

(l) *Horsley v. Purdon*, 2 Dowl. 228;

but see *ante*, 110, note (k).

(m) *Sowler v. Dunston*, 1 Man. & Ryl. 508, 510.

(n) *Id. ibid.*; 2 Arch. K. B. 4th ed. 545.

CHAP. XXI.  
PRACTICE AS  
TO PLEAS.

In what cases  
time given to  
plead in bar,  
and what length  
of time, and on  
what terms.

We have seen that the Courts have given further time to plead in bar in order to enable a defendant in the mean time to file a bill and obtain a discovery in equity, (o) and that in an action for words imputing murder or felony the Courts have given time to plead until after an expected trial of an indictment for such supposed felony. (p) In a recent case, where the master of a ship was served with process in an action on the eve of his departure with material witnesses on a foreign voyage, viz. to the whale fisheries, and a judge had made an order for *twelve months'* time to plead, on the ground that neither the defendant nor the witnesses would sooner return, the Court refused to rescind the order under the particular circumstances, though as a general practice the time might be unreasonable. (q) It would be advisable when any considerable time is prayed on behalf of a defendant to request that it be granted only on the terms that the death of the plaintiff if not also of himself shall not abate the suit, for otherwise the costs of action may be lost. (r)

How the time is  
calculated.

The day of the date of the order for time to plead is to be excluded since Reg. Gen. H. T. 2 W. 4, reg. VIII.; (s) and if a defendant obtain enlarged time for pleading previous to the 10th August, but which does not expire on or before that day, he is entitled to the remainder of the enlarged time after the 24th of October for the purpose of pleading. (t) Three months' time to plead are construed as lunar, not calendar, (u) and if the order be for time to plead *until* a named day, that day is to be included in the time to plead, and the defendant has the whole of that day in which to deliver his plea. (x) It was held that if a defendant, having obtained an order for enlarged time, file his plea before it was requisite to do so, he cannot rule the plaintiff to reply unless he have previously given the plaintiff notice of his having so filed his plea; (y) but as pleas must now be delivered such a point can scarcely arise.

Order for time  
how obtained.

*Time to plead may be obtained by motion and rule, or by*

(o) *Ante*, 628; *Whitter v. Gazelet*, 2 T. R. 683.

(p) *Ante*, 628, 629; *Sibson v. Nivin*, Barnes, 224; and see *Dicken v. Praed*, 4 Taunt. 825.

(q) *Hunt v. Barclay*, 1 Hodges' Rep. 103; 3 Dowl. 646; *same* terms ought to have been imposed, as providing for death, &c.

(r) See terms of allowing to a defendant a new trial, *Griffith v. Williams*, 1

*Crompt. & J.* 47; and *Calvert v. Tomlin*, 5 Bing. 1.

(s) That rule virtually annuls the decisions that both days are inclusive, in *Key v. Whitehead*, 2 Hen. Bl. 35; *Fremman v. Jackson*, 1 Bos. & P. 480.

(t) *Trinder v. Smedley*, 3 Dowl. 87.

(u) *Soper v. Curtis*, 2 Dowl. 237.

(x) *Dakins v. Wagner*, 3 Dowl. 535.

(y) *Gaudy v. Borrowdale*, 1 New Rep. 273.

summons and order of a judge; but the latter is now the constant practice, and a summons waives the necessity for a rule to plead.<sup>(2)</sup> When time to plead is given upon a first application, long before the sittings after term in a town cause, and long before the assizes in a country cause, it is not usual to impose any terms; and the plaintiff's attorney, before the time when the summons is returnable, indorses his consent to a few days time. But when an early trial might otherwise be lost, it is of course in the judge's order for time to impose terms which vary; sometimes the words of the order are generally "*on the usual terms*;" but more usually certain terms are specified, as "pleading issuably, rejoining gratis, and taking short notice of trial." But other terms may be added or those varied; and in an action against an executor or administrator the judge will frequently, at the instance of the plaintiff, impose the terms that the defendant shall not plead any judgment obtained by another creditor since the time for pleading expired; <sup>(a)</sup> and he may, as a condition, order that the defendant shall plead between 10th of August and 24th of October, notwithstanding the statute and rule. Full forms of summons and order are stated in the note. <sup>(b)</sup>

The words "*usual terms*" mean pleading issuably, rejoining gratis, and taking short notice of trial. <sup>(c)</sup> If a defendant have

"Usual terms," meaning of those words in an order for time.

(2) 3 Dowl. 579.

(a) Anonymous, 8 Mod. 308; *Hughes v. Pellett*, Barnes, 330.

B. } (b) Let the plaintiff's attorney or agent attend me at my chambers in  
v. } Serjeants' Inn to-morrow, [or "on —"] at — of the clock in the forenoon,  
D. } [or "afternoon"] to show cause why the defendant should not have a week's  
[or "month's"] time to plead. Dated this — day of —, A. D. 1835.

Summons for  
time to plead.

[Judge's signature.]

B. } Upon hearing the attorneys or agents on both sides I order that the de-  
agt. } fendant [without prejudice to any application to change the venue] have ["a  
D. } week" or "ten days" or "a month's"] further time to plead [after a deli-  
very of particulars]; he pleading ["if in abatement only nonjoinder of a contractor,"  
and rejoining issuably [to the merits,\*] rejoining gratis [or "rejoining gratis in two  
days,"†] and joining in demurrer gratis,‡ taking short notice of trial for the first sit-  
tings in the next term [or "for the assizes,"] or even two days' notice of the latter§ if  
necessary, and short notice of inquiry|| [and terms may be subtracted or added as  
agreed by the parties or ordered by the judge.] Dated this — day of —, A. D. 1835.

Comprehensive  
form of order  
thereon.

[Judge's signature.]

\* See *Holmes v. Grant*, 1 Gale, 59; 3 Dowl. 497.

† Suggested by Bayley, B. in *Clark v. Adams*, 2 Tyr. 756.

‡ Essential, as not being implied, *Jones v. Key*, 2 Cr. & M. 340; 4 Tyr. 238.

§ Per cur. in *Lawson v. Robinson*, 3 Tyr. 490, post.

|| Necessary as not implied, *Stevens v. Pell*, 2 Cr. & M. 421; 2 Tyrw. 267; 2 Dowl. 355.

(c) Tidd, 471; 1 Sellon, 807; 1 Arch. K. B., 4th ed. 239.

CHAP. XXI.  
PRACTICE AS  
TO PLEAS.

obtained an order for time *on the "usual terms"* he cannot afterwards move to change the venue; and therefore if it be intended to make that application care should be observed before being subjected to the *usual terms*, to have the order for time drawn up expressly without prejudice to an application to change the venue. (d)

Construction of  
the terms plead-  
ing *issuably*. (e)

The term "*issuably*," as here used, is of rather uncertain meaning; for it does not confine the defendant to a plea to be tried by a *jury*; and a *general demurrer*, where there is a substantial and not a *mere formal* defect in the declaration or other pleading, is certainly admissible, though it is to be decided upon by the *Court*. (f) Nor does it import that the defendant shall only plead "a plea in chief to the *merits*," or a *meritorious* plea; (g) for certainly a defendant under such terms may plead most pleas of *illegality*, as ease and favour to a bail bond, (h) and a plea of the statute of limitations is also admissible. (i) So that upon the whole it may be concluded that any *substantial* matter of fact or law that would *perpetually bar* the action may be pleaded or raised by demurrer by a defendant under such terms. In other words, as observed by Abbot, C. J., "where he has obtained time to plead on the "terms of pleading *issuably*, and by his pleading fails to bring "the *merits* (i. e. *legal merits*) of the case or some question of "fact or some question of *law* arising on the facts in issue, "he does not comply with the conditions of the order." (k)

A plea in abatement which does not *finally* decide on the rights of the parties, (l) or a plea of alien enemy, which is considered only a temporary bar during the war, (m) or a false plea of judgment recovered, (n) are certainly violations of the terms.

What such a  
plea or not.

Pleading *issuably*, however, does not mean that the *plaintiff* is to be permitted to have a double or other improper replication; and therefore where a defendant, being under such terms, demurred specially to the replication for duplicity, and thereupon the plaintiff signed judgment, the Court made absolute a rule for setting aside such judgment, and ordered the demurrer

(d) *Waring v. Holt*, 3 Price, 3; 2 M'Clel. & Y. 106, 202; *Bagnell v. Shipham*, 1 Crompt. & Jer. 377.

(e) See in general Tidd, 9th ed. 471.

(f) *Wright v. Russell*, 3 Wils. 530; 2 Bla. R. 923, S. C.; *Dewey v. Sopp*, 2 Stra. 1185.

(g) N. B. The definition in Tidd's Prac. 9th ed. 471, and in reported cases, must be understood *legal merits*; so that

a plea of gaming, usury, &c. is an *issuable* plea.

(h) *Doerden v. Holden*, 1 Burr. 605.

(i) *Rucker v. Hennay*, 4 East, 604.

(k) *Sawtell v. Gillard*, 5 Dowl. & R. 620.

(l) *Kilwick v. Maidman*, 1 Burr. 59.

(m) *Simeon v. Thompson*, 8 T. R. 71.

(n) *Heron v. Heron*, 1 Bla. R. 376.

to be argued; but then as the defendant ought not to have demurred *specially* without previous leave he was ordered to pay the costs of the motion. (o) If a defendant sued as administrator, being under terms of pleading issuably, plead the general issue and his own bankruptcy, which is obviously a bad plea, and no answer to the action, the plaintiff may sign judgment. (p)

In one case the Court of Exchequer thought that a *special* demurrer to a replication de injuria, on the ground that it put in issue too many facts, was a fair demurrer, and that the defendant, though under terms, was not precluded from so demurring; (q) but subsequently, upon that decision being cited, Bayley B. said "a *special* demurrer is not an issuable plea; " but if there are *good* causes (i. e. *semble* "*substantial*") the " Court will sometimes strike out the causes." (r) In a subsequent case, the defendant being under terms of pleading issuably, the plaintiff improperly replied double, upon which the defendant demurred specially for duplicity, and the plaintiff signed judgment, the Court said that it could not have been intended that the plaintiff should be allowed to reply double, and they therefore set aside the judgment, and ordered all the special causes of demurrer to be set aside, excepting that for duplicity, which they directed should be argued on the next paper day; but as the defendant ought not to have demurred specially without leave, the Court declared he must pay the costs of the rule. (s) Where the objection assigned specially as cause of demurrer is merely technical, and would have been aided by the statute 4 Ann. c. 16, s. 1, then certainly the assigning such technical objections seems obviously a violation of the intent of the order; but the mere specially assigning as a cause of demurrer a *substantial* defect, which would defeat the action on a judgment by default, or on motion in arrest of judgment, ought not to be so considered. Indeed as the practical rules of Hil. T. 4 W. 4, reg. 2, now require that the substantial objection shall be stated in the *margin* of *every* demurrer, whether general or special, it seems immaterial that it also be shown as cause at the conclusion of the demurrer itself. Upon the whole, if a declaration or a replication be so objectionable as to prejudice or embarrass the defendant, his safest course, where under terms of pleading issuably, is immediately to return it to the plaintiff's attorney, with a request that he

(o) *Gisborne v. Wyatt*, 1 Gale, 35; 3 Dowl. 505.

(r) *Nanney v. Kenrick*, 1 Dowl. 609;

(p) *Searle v. Bradshaw*, 2 Crom. & M. 148; 2 Dowl. 289.

*Berry v. Anderson*, 7 Term R. 530.

(s) *Gisborne v. Wyatt*, 3 Dowl. 505;

(q) *Langford v. Waghorn*, 7 Price, 1 Gale, 35.

CHAP. XXI.  
PRACTICE AS  
TO PLEAS.

will alter it, and if he refuse, then a summons should be promptly obtained in the alternative, either that the plaintiff shall amend, or the defendant have leave to demur specially.

In the King's Bench the terms pleading issuably extend throughout the suit; and therefore the defendant when under them cannot demur for want of form to the replication.<sup>(t)</sup> But in C. P. the condition has been considered confined to the plea, and that therefore the defendant may demur specially to the replication;<sup>(u)</sup> and therefore it may be advisable for a plaintiff to pray that an order, when obtained in C. P., may require the defendant to rejoin issuably; but even then the defendant may plead matter in abatement arising pending the action, unless expressly prohibited.<sup>(x)</sup>

If the plea, or one of several, be manifestly in violation of the prescribed terms, the plaintiff, after the time for pleading has elapsed, but not before, may treat the whole as a nullity, and sign judgment;<sup>(y)</sup> so if there be an unfounded or a mere technical demurrer to the whole, or to a part, and an issuable plea to the residue.<sup>(z)</sup> But if the plea be merely informal, the plaintiff may demur, though he cannot sign judgment;<sup>(a)</sup> and it is always recommended in cases of the least doubt to apply to the Court or judge for leave to sign judgment;<sup>(b)</sup> or rather immediately reply, if an issue can be readily taken upon a question of fact that it is known must be found in the plaintiff's favour.

Rejoining gratis.  
(c)

By the terms of "*rejoining gratis*" is meant not only the dispensation with the rule to rejoin, but also with the four days time given by it, or as has been well expressed, not only with the rule itself but its consequences;<sup>(d)</sup> the defendant's undertaking to rejoin *gratis* renders it incumbent on him to deliver to the plaintiff's attorney his rejoinder *within twenty-four hours after* it is demanded; and as the plaintiff may demand a rejoinder immediately after, or at the time he delivers his replication, the defendant in that case must, within twenty-four hours after he has received the replication, deliver his rejoinder.<sup>(e)</sup> But still a *demand* of rejoinder twenty-four hours before judgment will be indispensable.<sup>(f)</sup> If a defendant object to such terms he may, on praying time to plead, have the

(t) *Sawtell v. Gillard*, 5 Dowl. & R. 4th ed. 240.

(u) *Betts v. Applegarth*, 4 Bing. 267. (e) See in general, Tidd, 472.

(z) *Bryant v. Perring*, 5 Bing. 414. (d) 1 Arch. K. B. 4th ed. 240; *Wye v. Fisher*, 3 Bos. & P. 443.

(y) *Serle v. Bradshaw*, 2 Crom. & M. 148; *Waterfall v. Glode*, 3 Term R. 305; *Cuming v. Sharland*, 1 East, 411. (e) 1 Arch. K. B. 4th ed. 240, note (i); *Clarke v. Adams*, 2 Cr. & J. 683; 2 Tyr. 755; *Jones v. Key*, 2 Dowl. 265.

(z) *Id.*; *Sutton v. Waddelove*, Barnes, 314. (f) *Seaton v. Skay*, 1 Harr. & Well. 219; 3 Dowl. 537, S. C.; in the last report *non pros* is misprinted for *nil dicit*.

(a) *Thelluson v. Smith*, 5 T. R. 152.

(b) Tidd, 9th ed. 473; 1 Arch. K. B.



order varied, as "rejoining gratis in two days;" and this seems a desirable qualification. (f)

A defendant when under terms to "rejoin gratis" is not bound to join in demurrer within twenty-four hours after demand of such joinder, but is entitled to the usual four days rule; because a defendant may join issue to the country without the consideration that may be necessary before joining in demurrer. (g) The terms of joining in demurrer gratis should therefore be imposed on a defendant when the plaintiff apprehends that it may become necessary to demur, and join in demurrer in sufficient time to obtain judgment of a particular term, especially in Trinity Term. (g)

Taking short  
notice of trial.

The terms of "taking short notice of trial" import in a town cause that two days notice of trial, the one day inclusive the other exclusive, shall suffice, provided the intermediate day be not a Sunday; (h) but it is usual to give, and it would be as well in the order to provide that as much longer time shall be given as conveniently practicable. (i) If the terms be to take short notice of trial for the sittings in term, the defendant is not bound to take short notice of trial for the sittings after term. (k) In a country cause short notice of trial means four days notice, exclusive of an intermediate Sunday, (l) and to be given four days at least before the commission day, the one exclusive the other inclusive; (m) and the defendant's delay in delivering his rejoinder will not constitute any excuse for not giving such full four days notice; for it was incumbent on plaintiff's attorney, when before the judge on the summons for time to plead, to have saved the assizes, by stipulating that if the issue for trial was not raised in time to give the regular four days notice, then two days notice should be sufficient. (n) The defendant's being under terms to take short notice of trial does not entitle the plaintiff to give less than the usual notice of countermand; (o) and in which notice of countermand it has been supposed that even a Sunday may be reckoned, because

(f) Per Lord Lyndhurst, C. B. and Bayley, B. in *Clarke v. Adams*, 2 Tyr. 756.

(g) *Jones v. Key*, 4 Tyrw. 238; 2 Crompt. & M. 340; 2 Dowl. 265, S. C.

(h) *Grojean v. Manning*, 2 Tyr. 725; 2 Crompt. & Jerv. 635, S. C.; but note a case of continuance of notice of trial; see also *Butler v. Johnson*, Barnes, 301; *Prac. Reg.* 390; *Dax*, *Prac.* 74; *Price*, *Pr.* 276.

(i) *Semble*, Tidd, 9th ed. 472; *Price v. Simpson*, 1 Taunt. 343.

(k) *Abbott v. Abbott*, 7 Taunt. 452; 1 Moore, 160, S. C.; Tidd, 757; *Dax*,

*Pr.* 74.

(l) *Reg. Gen. Hil. T.* 2 W. 4, reg. 58; *Jervis's Rules*, 57, note (h); *Grojean v. Manning*, 2 Tyr. 725; 2 Crompt. & J. 635, S. C.

(m) R. E. 30 G. 3, *Reg. Gen. Hil.* 2 W. 4, r. VIII.; *Lawson v. Robinson*, 3 Tyr. 490; 3 *Term R.* 660; *Butler v. Johnson*, Barnes, 301.

(n) *Lawson v. Robinson*, 3 Tyr. 490; *Crompt. & M.* 499, S. C.; and see same principle, *King v. Jones*, *Crompt. & M.* 71.

(o) *King v. Jones*, 1 Cr. & M. 71; 1 Dowl. 640, S. C.

CHAP. XXI.  
PRACTICE AS  
TO PLEAS.

it requires no act to *be done* by the opponent, but suspends all proceedings; but he has to inform his witnesses, to prevent increase of expense, and for that purpose Sunday is not a proper day. (p)

When a defendant is under terms of taking short notice of trial he is not bound to take short notice of inquiry; and therefore a plaintiff's attorney should always endeavour to have that condition inserted in an order for time, and as in the antecedent note. (q)

Time in order  
how calculated.

The day of the date of the order, or the *first* day, is to be *excluded* in the computation of the time given; and if judgment be signed too soon, though the plea be irregular, it will be set aside. (r) So "seven days" time for pleading gives the *whole* of the seventh day to plead in, after excluding the day on which the order is made; (r) and an order for time *until* a named day includes that day. (s)

How soon plain-  
tiff may sign  
judgment as  
for want of a  
plea. (t)

If a defendant plead an irregular or insufficient plea before the original or enlarged time for pleading has expired, still the plaintiff cannot sign judgment until the whole time has expired; because the defendant might discover his mistake, and in due time deliver another perfect plea; and this, notwithstanding the Reg. Gen. Hil. T. 2 W. 4, s. 40, now prevents a defendant from waiving his plea without leave. (u) So if a plea in bar, requiring counsel's signature, be delivered without such signature, still the plaintiff must wait till the full time for pleading has expired; (x) and a plea *in bar* delivered after the time for pleading has expired, but before judgment signed, renders a judgment signed after notice of such plea irregular; and it will be set aside with costs, to be paid by plaintiff's attorney. (y)

V. Practice as  
to Pleas.  
Taking declara-  
tion out of  
office when  
filed.

Before the defendant can regularly plead, he must take the declaration, when it has been filed by the plaintiff, out of the office, and at the same time pay the fees at such office; (z) and if he plead without so doing, even having obtained a copy of the declaration from the plaintiff's attorney, the latter may

(p) Tidd, 735; but see *Grojean v. Manning*, 2 Tyr. 725; 2 Cromp. & J. 635.

(q) *Ante*, 705, (b); *Stevens v. Pell*, 2 Cromp. & M. 421; 4 Tyr. 267; 2 Dowl. 855, S. C.

(r) *Pepperell v. Burrell*, 1 Cr. M. & Ros. 372; 2 Dowl. 674; 4 Tyr. 811, S. C.

(s) *Ante*, 704, (x).

(t) See in general 1 Arch. K. B. 241,

and *ante*, 704.

(u) *Dakins v. Wagner*, 3 Dowl. 535.

(x) *Nolleken v. Scern*, 2 Crom. & J. 333; 1 Dowl. 321; *Pepperell v. Burrell*, 1 Crom. M. & Ros. 372; 2 Dowl. 674; *Macher v. Billing*, 3 Dowl. 246; 4 Tyr. 812.

(y) *Amphlett v. Semple*, 2 Tyrw. 312; 2 Crom. & J. 358.

(z) *White v. Dent*, 1 Bos. & Pul. 341; 1 Arch. K. B. 228.

treat the plea as a nullity, and sign judgment as for want of a plea, and without any previous demand. (z) However, as taking the declaration out of the office waives all objections to the process, (a) and any variance between the notice of the declaration and the declaration itself, (b) and also to the declaration having been filed conditionally instead of absolutely, (c) the defendant's attorney must, before he takes the declaration out of the office, well consider whether any objection is to be taken on account of either of these proceedings.

As pleas in abatement must be delivered within four days, both inclusive, after the delivery of the declaration, the practice relating to them first demands consideration. These are principally affected by the general acts 4 Ann. c. 16, s. 11, 9 G. 4, c. 14, s. 2, and 3 & 4 W. 4, c. 42, s. 8, 9, 10, 11 and 12. Pleas in abatement do not appear to have been scarcely noticed by any modern rule of Court. The 4 Ann. c. 16, s. 11, enacts "that *no dilatory plea* shall be received in any Court of record, unless the party offering such plea do by affidavit prove the truth thereof, or show some probable matter to the Court to induce them to believe that the fact of such dilatory plea is true." The 9 G. 4, c. 14, s. 2, enacts in effect that in a joint action a plea in abatement as to one defendant shall not prevent recovery against the other. The 3 & 4 W. 4, c. 42, s. 8, enacts, that no plea in abatement for the *nonjoinder* of any person as a co-defendant shall be allowed in any Court of law, unless it be stated in such plea that such person is resident within the jurisdiction of the Court, and unless the place of residence of such person shall be stated with convenient certainty in an affidavit verifying such plea. And section 9 enacts that to any plea in abatement in any Court of law of the nonjoinder of another person, the plaintiff may reply that such person has been discharged by bankruptcy or certificate, or under an act for the relief of insolvent debtors.

The 10th section contains a provision relating to a *fresh* action brought against all the persons named in a plea of nonjoinder in abatement, so as to prevent a total defeat on account of misjoinder in such fresh action. The 11th section enacts that *no plea in abatement for a misnomer* shall be allowed in any personal action, but directs that in any case where such a plea would heretofore have been available, there shall be a *summons*

(z) *Bond v. Smart*, 1 Chitty's Rep. 735; *Keeling v. Newton*, 1 Wils. 173.

(a) *Caswell v. Martin*, 2 Stra. 1072.

(b) *Robins v. Richards*, 1 Dowl. 578.

(c) 1 Arch. K. B. 229.

(d) See in general Tidd, 9th ed.; 2 Arch. K. B. 4th ed.; 1 Chitty on Pleading, 6th ed.

CHAP. XXI.  
PRACTICE AS  
TO PLEAS.

to compel the *plaintiff to amend his declaration at his costs*, by inserting the right name, founded on an *affidavit* thereof; and section 12 authorizes a plaintiff to use the same initials and contractions as have been used by a defendant in signing a bill or note or other written instrument.

The excellent effect of the 8th section is that a creditor may sue separately all the joint debtors in this country, without first outlawing those contracting parties who are abroad. The 11th section, it will be observed, only relates to the single instance of *misnomer*, so that it is still competent to a defendant to plead numerous other matters in abatement. In a late case, where the declaration described the plaintiff as Earl of Stirling, and the defendant pleaded in abatement that the plaintiff was not nor is Earl of Stirling, it was held that a replication that the plaintiff was and still is Earl of Stirling, concluding to the country, was bad on demurrer, for not showing *how* the plaintiff claimed that dignity, so as to *decide* the *mode* of trial. (e)

As each Court will take judicial notice who are attorneys enrolled in their *own* Court, but not of the privilege of an attorney or other officer to be sued in *another* Court, it seems to be clear that a plea by an attorney or other officer of privilege to be sued in his own Court, cannot be pleaded to an action depending in another Court, without an *affidavit* of its truth; (f) and if such a plea be not supported by an affidavit, the plaintiff may sign judgment. (f)

*Time of swearing the affidavit in support of a plea in abatement and of pleading such plea. (g)*

It has for a long time been supposed that a defendant may, in the King's Bench, whether in a town or country cause, prepare and swear to the truth of his subsequent plea in abatement, before the declaration was delivered, on the ground that if this were not permitted, especially in a country cause, or where the defendant resided at a great distance from the metropolis, it would be impracticable to obtain the affidavit in time to accompany the plea, which must be pleaded within four days, both inclusive, after the declaration. (h) But in more recent decisions this doctrine has been denied, and it would seem that an affidavit sworn at any time before, still less if sworn nine or eleven days before the declaration has been delivered, would not now be received, and the plaintiff might sign judgment if it were used; (i) but Bayley, B. suggested "that perhaps the Court

(e) *Earl Stirling v. Clayton*, 3 Tyrw. 154.

(f) *Davidson v. Chilman*, 1 Bing. N. C. 297; *Davidson v. Watkins*, 3 Dowl. 129.

(g) See in general Chitty's Sum. Prac. 128 to 131.

(h) *Baskett v. Barnard*, 4 M. & Sel. 332; *Lang v. Comber*, 4 East, 348; 11 East, 348; 13 East, 170; 2 Chitty's B. 7; but see decisions in next note.

(i) *Westerdale v. Kemp*, 1 Tyr. 260; *Johnson v. Popplewell*, 2 Crom. & J. 544.

"would give time for filing the affidavit of the truth, on the special ground that the party lived at a great distance, and that the declaration was filed so as to prevent the putting in a plea of nonjoinder, which may be and often is an honest plea." (k) And we have before seen that the Court or a judge will give time for pleading some pleas in abatement, such as nonjoinder or the pendency of a prior action for the same cause. (l) The affidavit of the truth of a plea in abatement must be scrupulously correct in the title and in all other respects; (m) and where, inadvertently, the affidavit stated that the *affidavit* (instead of plea) hereunto annexed is true, and the defendant signed judgment of non pros for not replying to his plea in abatement, the Court, considering the plea a nullity on account of such defect, and which could not be waived, set aside the judgment of non pros. (n) The other parts of the practice relative to pleas in abatement and proceedings thereon, and the requisites of pleas in abatement, (o) will be found sufficiently considered in the works referred to in the note, and the most recent precedents will be found collected in a work exclusively on the subject of pleading.

The Reg. Gen. Hil. T. 4 W. 4, reg. 1, requiring *every pleading* to be intituled of the day of the month and year when the same is pleaded, and shall bear no other time or date, extends as well to pleas in abatement as those in bar, so that a plea to the jurisdiction, or strictly in abatement, should be intituled of the *very day* on which it is delivered, (p) thus avoiding the difficulties that formerly frequently occurred as well respecting pleas in abatement as of tender.

Reg. Gen. Hil. T. 4 W. 4, reg. 10, also seems to be imperative that after the title and names of the parties in the margin a plea in abatement as well as in bar *shall* commence thus:

C. D. } The said defendant by — his attorney [or "in per-  
ats } son"] says that, &c.  
A. B. }

The form in the note of a plea in abatement and of the affidavit of its truth may assist in practice. (p)

(k) *Johnson v. Popplewell*, 2 Crom. & J. 546.

(l) *Ante*, 703; 1 Mann. & Ryl. 508, 510; Tidd's Sup.

(m) *Ante*, 538, &c. as to the requisites

of affidavits in general.

(n) *Garratt v. Hooper*, 1 Dowl. 28.

(o) Tidd, 9th ed. 463, 634 to 643; 2 Arch. K. B. 4th ed. 543 to 549; and

Chitty on Pleading, 6th ed.

(p) In the King's Bench [or "Common Pleas," or "Exchequer."]

Plea in abatement that the contracts were made jointly with another

C. D. } And the said C. D. by E. F. his attorney [or "in person"] prays judgment  
ats } of the said writ and declaration, because he says that the said several pro-  
A. B. } mises in the said declaration mentioned, were and each of them was made

CHAP. XXI.  
PRACTICE AS  
TO PLEAS.

Of pleas in *bar*.

To enable any person now to prepare pleas *in bar*, he must not only have a knowledge of *pleading*, but also of every branch of *law*; before the recent pleading rules most practitioners believed that in the actions of Assumpsit, Case, and Trover, the plea of "non-assumpsit" or "not guilty" *very generally* sufficed, and that under the same numerous special grounds of defence might be given in issue; but now the use of a plea of *general issue* is greatly limited, and in some cases, as in actions on a bill of exchange or promissory note, is entirely prohibited; and it has become necessary to state in the plea or pleas the exact ground of defence, though merely in the negative of a part of the declaration, as will be presently fully shown; the consequence is, that no prudent attorney, unless he have attained *very considerable knowledge* as well of law in general as of the present rules of pleading, will venture himself to *prepare* a plea or pleas; and great encouragement has been given to professed special pleaders more sedulously to study every part of their department. We shall here only take a very concise view of the *recent alterations and improvements*, *first*, as they affect the *form and general requisites* of a plea; *2ndly*, as regards what matters *may and must* be pleaded specially; and, *3dly*, when *several pleas* may be pleaded.

Forms and requisites of pleas in *bar* in general.

The recent statutes and rules have introduced some material alterations in the *forms* as well as *requisites* of pleas *in bar* in *general*, and still more as regards the use of *several pleas*, and which have a most extensive and beneficial influence upon the trial of the merits between the parties, and a general knowledge of which is essential to every practitioner, although he may not profess to prepare pleadings. Some of the rules relate merely to *form*, and were promulgated principally in order to save

person not joined as co-defendant.

jointly with one G. H., who is still living and residing at —, within the jurisdiction of this Court, and not by the said C. D. alone, and this he the said C. D. is ready to verify; wherefore inasmuch as the said G. H. is not named in the said writ or declaration together with the said C. D., he the said C. D. prays judgment of the said writ and declaration, and that the same may be quashed, &c. [*See other forms, Chitty on Pleadings, 6th ed.; add affidavit as follows.*]

[*Counsel's Signature.*]

Affidavit of the truth of such plea and of the residence of the party named therein.

In the King's Bench [or "Common Pleas," or "Exchequer."]

Between { A. B. Plaintiff,  
and  
C. D. Defendant.

C. D. of —, tailor, the defendant in this cause, maketh oath and saith that the plea hereunto annexed is true in substance and fact, and that the said G. H., named in the said plea, is now residing [or "the place of residence of the said G. H., &c. is now at this time"] at No. 10, in — Street, in the parish of — in the county of — and within the jurisdiction of this Court.  
Sworn, &c.

C. D.

proximity and consequent expense, and to preserve similarity in practice; but others, still more important, were introduced to *prevent surprise* on the opponent on the trial, and to secure a trial upon simple and distinct issues, in lieu of proceeding to trial on a mere general issue. The object of the rules will appear from the recital to the 5th rule of Reg. Gen. Hil. T. 4 W. 4, expressed in these terms: "And whereas by the *mode of pleading* hereinbefore prescribed *the several disputed facts material to the merits of the case will, before the trial, be brought to the notice of the respective parties more distinctly than heretofore*;" then prescribes the rules having that object, and some of which have been stated and their application to pleas in part examined in the chapter relating to declarations. (q)

Pleas in bar are to be considered with reference to their *forms* and their *requisites*. With respect to *form*, as regards,  
 1st, The title or date;  
 2dly, Marginal description of the parties to the cause;  
 3dly, The commencement;  
 4thly, The body;  
 5thly, The conclusion;  
 6thly, The variations when there are several pleas; and,  
 7thly, The signature of counsel. (r) The forms in the notes will illustrate.

(q) *Ante*, 482, 483.

(r) In the King's Bench.

On the — day of —, A. D. 1835.

C. D. }	The said defendant by Y. Z. his attorney [or "in person," or "by E. F. admitted by the Court here as guardian of the defendant to defend for him,	Form of plea of non-assumpsit or other plea denying the whole or part of a declaration, and concluding to country.
A. B. }	who is an infant under the age of twenty-one years,"] says that "he did not promise," [or if action against a party to a bill of exchange, say "he did not accept, or "draw" or "indorse"] the said bill of exchange [or deny any other part of the declaration, and then conclude to the country thus:] in manner and form as the plaintiff hath complained against him. And of this the defendant puts himself on the country, &c.	

C. D. }	The said defendant by Y. Z. his attorney [or "in person,"] as to so much of the first count of the declaration as relates to the beating and illtreating	Form of plea to a part of the cause of action, and another plea to other part or residue.
A. B. }	the said A. B. says that the plaintiff ought not to have or maintain his action thereof against the defendant, because he saith that, &c. [State the answer whether it consist of denial or of new matter, concluding the former to the country and the latter with a verification, and then state the plea or pleas to the other parts of the declaration thus:] And the defendant as to the residue of the said first count [or "as to the residue of the declaration,"] saith that the said plaintiff ought not to have or maintain his action thereof against the defendant, because he says that [stating the answer to such part of the declaration thus pleaded to—see a form which was considered defective and open to a special demurrer, Vere v. Goldborough, 1 Bing. N. C. 353.]	

And for a further plea in this behalf the defendant saith that, &c. [Then state the subject-matter of the second or subsequent plea the same as in a first plea. *The Reg. Gen. Hil. T. 4 W. 4, orders that it shall not be necessary to state in a second or other plea or avowry that it is pleaded by leave of the Court or according to the form of the statute, or to that effect, although it may be still necessary to obtain a rule.*]

Commencement of a second plea to same matter.

CHAP. XXI.  
PRACTICE AS  
TO PLEAS.1st. The title or  
date at top.

1. *The title or date at top.*—Reg. Gen. Hil. T. 4 W. 4, reg. 1, orders that “*Every pleading*, as well as the declaration, shall be intituled of the day of the month and year when the same is pleaded, and shall bear no other time or date, “unless otherwise specially ordered by the Court or a judge.”<sup>(s)</sup> But if that title be omitted or misstated, it is not ground even of special demurrer; and the Court ordered such a demurrer to be set aside with costs.<sup>(t)</sup> This accords with the decisions on the want of technical accuracy in the *commencement* of a declaration, which we have seen is not ground of demurrer, but is at most only an irregularity, to be taken advantage of by summons or motion, or rather, in the first instance, by application to the defendant’s attorney to correct the untechnical part of his plea.<sup>(u)</sup>

2nd. Marginal  
title of cause.

There is not any express regulation respecting the description of the parties in the margin of the plea, nor is any particularity essential, and if there were no margin, probably it would be considered that the plea was delivered in the pending action, when there was only one between the same parties. It has been suggested, that when the plea is by one of several defendants, the margin of the plea of a defendant pleading separately should be “*B. sued with C. and others*,” and the defendant pleading should be described throughout the plea by name as the said defendant B.<sup>(v)</sup>

3rd. Introduc-  
tion or com-  
mencement of  
plea.

With respect to the introduction or *commencement* of the plea the Reg. Gen. Hil. T. 4 W. 4, reg. 9, orders that “In a plea or subsequent pleading intended to be pleaded *in bar of the whole action generally*, it shall not be necessary to use any allegation of *actionem non*, or to the like effect, or any prayer of judgment; nor shall it be necessary in any replication or subsequent pleading intended to be pleaded in maintenance of the *whole action* to use any allegation of ‘*precludi non*,’ or to the like effect, or any prayer of judgment; and all pleas, replications, and subsequent pleadings pleaded without such formal parts as aforesaid, shall be taken, unless otherwise expressed, as pleaded respectively in bar of the whole action, or in maintenance of the *whole action*, provided that nothing herein contained shall extend to cases where an estoppel is pleaded.”

Reg. 10 orders that “No formal defence shall be required in a plea; and it shall commence as follows: ‘The said de-

<sup>(s)</sup> Jervis’s Rules, 98.<sup>(t)</sup> *Neal v. Richardson*, 2 Dowl. 89.<sup>(u)</sup> *Ante*, 466, as to declarations.<sup>(v)</sup> *Petersdorff’s Precedents*, 18.



“*defendant by — his attorney* [or ‘in person,’ &c.] *says that.*” Which rule gets rid of the technicalities respecting full and half defence.

CHAP. XXI.  
PRACTICE AS  
TO PLEAS.

Reg. 11 orders that “It shall not be necessary to state in a second or other plea or avowry, that it is pleaded *by leave of the Court*, or according to the *form of the statute*, or to that effect.”

Reg. 12 orders that “*No protestation* shall hereafter be made in any pleading; but either party shall be entitled to the same advantage in that or other actions as if a protestation had been made.”

Reg. 13 orders that “All *special traverses* or traverses with an inducement of affirmative matter, shall conclude to the country;” but provides “that this regulation shall not preclude the opposite party from pleading over to the inducement when the traverse is immaterial.”

On referring to the form subscribed in the 10th rule, and given in the note, (x) such rule directs that every plea *shall commence* “*The said defendant by — his attorney* [or “in person,”] *says that.*” And this rule puts an end to the distinctions between whole and half defence. (y) It seems that if the name of a person not authorized to act as an attorney in the Court where a plea is pleaded, be inserted, still the plea cannot on that account be treated as a nullity. (z) It is clear that a defendant, even at the suit of the crown, may plead and defend in person. (a)

It has been decided that the words *actionem non*, in the above ninth rule, is not essential in a plea pleaded separately to an *entire count*; the expression “*the whole action generally*,” in that rule meaning only the whole case stated in the declaration, or the whole case contained in the *count* to which the plea is pleaded. (b) And it has been observed that as the terms of the rule are that it shall not be *necessary* to commence with an *actionem non*, if the old form were unnecessarily continued, it would be no ground of demurrer or an irregularity. (c) A commencement of a plea thus “comes, &c.” “And the defendant by his attorney says that, &c.” was always sufficient, and the word *comes* was never considered part of the

(x) *Ante*, 715.

(y) Bosanquet's Rules, 37, note (32).

(z) *Hill v. Mills*, 2 Dowl. 696.

(a) *Attorney-General v. Carpenter*, 1 Tyr. Rep. 351.

(b) *Per* Lord Denman, C. J. in *Bird*

*v. Higginson*, 4 Nev. & Man. 505; 1 Har. & Wol. 61, S. C.; and see observations on the rule in *Vere v. Goldsborough*, 1 Bing. N. C. 353, *post*; and Bosanquet's Rules, 56, note 39.

(c) Bosanquet's Rules, 35, note 30.

CHAP. XXI.  
PRACTICE AS  
TO PLEAS.

plea, but merely *an entry* of the defendant's *appearing in person*, or by attorney. (d) The introductory part of the plea, when it is not intended to plead to the whole declaration, qualifies and shows to what part of the complaint the defendant is about to plead his answer; and in trespass and other actions this will frequently save the necessity for a new assignment. And Bayley, B. observed, "It is a clear rule in pleading, that a plea cannot be considered as justifying more than it *professes* to justify, and that you are to look to the *introductory part* of it to see what the plea professes to justify." (e) When the defendant pleads several pleas separately to several counts, as he may do without a rule to plead double, the commencement of each plea should properly state to which count or part of a count it is about to be pleaded. But if untechnically the pleas to a declaration on a bill of exchange and on an account stated run thus: "And the defendant, by J. S. his attorney, saith that he did not accept the said bill of exchange in the said declaration mentioned. And for a further plea saith that he did not account with the plaintiff as in the declaration is alleged:" it was held that the informality of omitting to confine each plea to the count to which it applied did not authorize the plaintiff to sign judgment; and the Court said the objection, if at all, should have been taken by special demurrer. (f)

Body of a plea  
in bar, and ge-  
neral requisites.

We have seen that *venue*, or place, is not to be repeated in any part of pleading after it has been once stated in the margin of the declaration, unless where local description may be essential, as in describing abutments and in averring performance; which sometimes must be shown to have been in a particular place. (g) A plea must not attempt to put in issue what is not disputed in the declaration, and if it do, the plaintiff may demur; (h) and a plea, averring that the defendant performed more than the plaintiff's declaration stated he had not performed, is bad. (h) On the other hand, if a plea profess in its commencement to be an answer to the whole of a count, but leaves unanswered any good part, the plaintiff will have judgment on demurrer; (i) and as well before as since the new rules of pleading the plea must either traverse or confess and avoid, and not both; (k) and therefore a plea, that the defendant was

(d) Wordsworth's Rules, 42, note (a).

(e) *Neville v. Cooper*, 2 Crom. & M. 331; and see *Crump v. Adney*, 3 Tyrw. 270.

(f) *Vere v. Goldborough*, 1 Bing. N. C. 353.

(g) Reg. Gen. Hil. T. 4 W. 4, reg. 8.

(h) *Bishton v. Evans*, 3 Dowl. 735; and 1 Gale, 76, S. C.

(i) *Crump v. Adney*, 3 Tyr. 279.

(k) *Gould v. Lasbury*, 1 Crom. M. & Ros. 254.

discharged by the order of the Insolvent Debtors Court from the causes of action in the declaration mentioned, *if any*, however usual in this and other pleas, is bad on special demurrer. If illegality or legal defect in the plaintiff's right of action be pleaded, the exact objection must be accurately and legally pleaded; and therefore to a declaration on a bail bond it should be pleaded that no affidavit of the plaintiff's cause of action was *made*; and if the plea be merely that no affidavit was *filed* the plaintiff may demur.<sup>(l)</sup> But although founded on a statute a plea need not, like a declaration thereon for a penalty, conclude *contra formam statuti*,<sup>(m)</sup> as a plea that the contract was made on a Sunday.<sup>(n)</sup>

There is a particular regulation relative to the requisites of a plea of *judgment recovered*, but which we will consider when observing upon *sham pleas*.<sup>(n)</sup>

As regards the *conclusion* of a plea the recent statutes and rules are silent; excepting that Reg. Gen. Hil. T. 4 W. 4, reg. 13, orders "that all special traverse or traverses with an "inducement of affirmative matter shall *conclude* to the coun- "try;" but provides that that regulation shall not preclude the opposite party from pleading over to the inducement when the traverse is immaterial; a subject more properly to be considered fully in a distinct work on pleading.<sup>(o)</sup> This rule has properly put an end to the continuance of the absurd practice of concluding a special traverse of any matter, as of a right of way or of common, with a *verification*, instead of to the coun- try; and notwithstanding there were already complete affirma- tive and negative allegations, constituting a perfect issue, and which, as observed by Mr. Serjeant Williams, rendered it wholly unnecessary to conclude with a verification, occasioning a useless repetition of the right in the rejoinder.<sup>(p)</sup> In all other re- spects the *conclusion* of a plea is governed by the pre-existing rules. And if a plea in bar have no conclusion either to the country or with a verification, the plaintiff may demur spe- cially;<sup>(q)</sup> and therefore a plea to a declaration on a bail bond, that no affidavit of the cause of action had been made, but having no conclusion, was held demurrable on that as well as on other

Conclusions of  
pleas in bar.

(l) *Knowles v. Stevens*, 1 Crom. M. & Ros.; 3 Dowl. 666.

(m) *Peate v. Dicken*, 1 Crom. M. & Ros. 422.

(n) Reg. Gen. Hil. T. 4 W. 4, reg. 8; Jervis's Rules, 89, note 9; and post, 730.

(o) See Chitty on Pleading, 6th ed.

(p) 1 Saunder's Rep. 103 b, 103 c.

(q) *Snow v. Stevens*, 2 Dowl. 664, in 1 Crom. M. & Ros. 26, called *Knowles v. Stevens*; and see *Bird v. Higginson*, 1 Harr. & Wol. 61; 4 Nev. & Man. 505, S. C.

CHAP. XXI.  
PRACTICE AS  
TO PLEAS.

grounds.(r) But Reg. Gen. Hil. T. 4 W. 4, r. 9, clearly provides that no prayer of judgment shall be essential to a plea in bar;(s) indeed that prayer never seems to have been necessary, at least in a plea in bar; because the Court will as of course, without any prayer, give the correct judgment.(t) It will be observed, however, that the prescribed form of a plea of payment of money into Court, (but which it will be observed is pleaded only to *part* of the action,) concludes with this prayer, "wherefore he prays judgment if the plaintiff ought *further* to "maintain his action."(u)

The conclusion of a plea, merely *denying* the whole or part of the facts stated in the declaration, or one count, concludes to the *country* thus: "*And of this the defendant puts himself upon the country.*" It has been usual at the end to add "&c."; but which as regards the defendant had better be omitted, as it may assist a plaintiff where he has neglected to add the similiter, (being "and the plaintiff doth the like,") and will supply the omission, and enable him to retain a verdict in his favour.(x) The conclusion with a *verification* varies in two respects. When new matter *of fact*, the existence of which is to be properly tried by a jury if denied, is pleaded, then the conclusion is, "*And this the defendant is ready to verify.*" But if the new matter pleaded be of record, then the conclusion is, "*And this the defendant is ready to verify by the record.*"

Signature of  
pleas.(y)

*By express rule 18 Car. 2, it was ordered "that no special pleas or demurrers in law in any cause here in Court shall be received by the clerk of the papers before such pleas or demurrers shall be signed with the proper hand of some counsel in that behalf retained;" the object of which rule was that no special pleas should be introduced on the files of the Court without being sanctioned with the actual approbation of counsel, testified by his signature.(z) It is desirable that such signature should not as at present be treated as a mere matter of form, and that it should be imperative on counsel, instead of receiving a fee for his signature as of course, actually to certify or be considered as certifying that he had in fact examined the plea with the facts, and approved of such*

(r) *Id. ibid.*

(s) *Ante*, 716.

(t) *Bird v. Higginson*, 1 Harr. & Wol. 61; 4 Nev. & M. 505, S. C.

(u) Reg. Gen. Hil. T. 4 W. 4, reg. 17.

(x) *Clarke v. Nicholson*, 6 Car. & P. 712; 1 Gale, 21; 3 Dowl. 454; 1 Chitty

on Pl. 5th ed. 631, 6th edit. *more fully*.

(y) See in general Tidd, 9th ed. 672; Archbold, K. B. 4th ed.; Arch. C. P.; Chitty on Pleading, 6th ed. for lists of the pleas which must or need not be signed by counsel.

(z) Per Bayley, J., *De Normandie v. Meyer*, 1 Chitty's Rep. 211.

plea with reference to the latter. It was formerly also requisite in the *other* Courts at Westminster that all *special* pleas should be signed by a *serjeant or counsel*, and thus to denote that in his judgment it was a proper plea, (a) and this even in a case where a defendant of right in other respects defended in person; (b) and in the Common Pleas it was considered that if a plea had been signed by a *serjeant*, it was necessary also that the pleading in answer, whether replication or joinder in demurrer, should be so signed; (c) and in the Exchequer it seems that *all* pleadings where the Crown is concerned must be signed by the attorney-general or may be treated as a nullity; (d) and in all the Courts, if a plea, requiring signature, be delivered unsigned, the plaintiff's attorney may, after waiting till the full time for pleading has expired, though not before, sign judgment as for want of a plea. (e)

The recent statutes and notes have introduced some important changes as regards the signature of pleadings, viz.—*first*, that as the Common Pleas is now an open Court, *any* counsel as well as a *serjeant* may sign any pleadings therein. (f) *Secondly*, Reg. Gen. Hil. T. 2 W. 4, reg. 107, orders that “it shall not be necessary that any pleadings which *conclude to the country be signed* by counsel;” (g) and Reg. Gen. Hil. T. 4 W. 4, reg. 4, directs that “to a *joinder in demurrer* no signature of a *serjeant* or other counsel shall be necessary, nor any fee allowed in respect thereof.” (h)

When counsel's signature is required, it must, by the terms of the rule, be in his own handwriting, though in practice his clerk frequently signs. His own signature should also distinctly appear at the foot of the plea and not by indorsement, for it is the counsel's signature at the bottom of the plea, like the signature at the foot of a will, that best denotes his approbation of the whole. (i)

The rule of Mich. Term, 1 W. 4, reg. 7, in the Exchequer, and now the General Practice Rules of Hil. Term, 4 W. 4, *Delivery of plea.*

(a) See in general Tidd, 9th ed. 672; Archbold, K. B. 4th ed.; Arch. C. P.; Chitty on Pleading, 6th ed. for lists of the pleas, which must or need not be signed by counsel.

(b) *Samuels v. Dunne*, 3 Taunt. 386; *De Normanville v. Meyer*, 1 Chitty's R. 209.

(c) *Brooker v. Sampson*, 2 Bos. & Pul. 336; *Simson v. Neal*, 2 Wils. 741; *Ellis v. Gower*, 1 Bos. & Pul. 469; *Pitcher v. Martin*, 3 Bos. & Pul. 171; Tidd, 693.

(d) *R. v. Wollett*, 3 Dowl. 694.

(e) *Pepperell v. Burrell*, 4 Tyr. 812; 1 Crompt. M. & Ros. 372; 2 Dowl. 321,

S. C.; *Macher v. Billing*, 4 Tyr. 812; 3 Dowl. 246, S. C.; *Hockley v. Sutton*, 2 Dowl. 700; *ante*, 710.

(f) *Power v. Fry or Isod*, 1 Bing. N. C. 304; 3 Dowl. 149.

(g) *Jervis's Rules*, 71, note (e); Tidd, 672, 673, 693.

(h) *Jervis's Rules*, 87, note (b). It may be questionable whether these rules are well founded: A similiter or joinder in demurrer may undoubtedly be readily framed, but it may require much knowledge to decide on their adoption.

(i) *Grant v. —*, 2 Chitty's R. 319.

CHAP. XXI.  
PRACTICE AS  
TO PLEAS.

reg. 1, direct that no demurrer nor *any pleading* subsequent to the declaration shall *in any case be filed* with any officer of the Court, but the same shall *always be delivered* between the parties, (k) which saves time and takes away the necessity for a search at any office before signing judgment. But the latter rule only extends to personal actions, and not to ejectment. (l) It was held that if a defendant file two pleas at several times on the same day, in order to mislead the plaintiff by the second plea, the plaintiff might sign judgment; (m) but probably now that Reg. Gen. Hil. Term, 2 W. 4, r. 46, precludes a defendant from changing his plea, without express leave of the Court or a judge, it would be held that the plea first delivered is that to be acted upon, and the second only a nullity. The plea must be delivered at length in its full perfect state; and where the defendant's attorney delivered a writing on a stamped paper, thus, "*The general issue*," which was objected to, and the plaintiff signed judgment by default, the Court refused to set such judgment aside without an affidavit of merits. (n)

Of waiving or  
adding a plea  
when.

Although the Reg. Gen. Hil. T. 2 W. 4, reg. 46, orders "that the defendant shall not waive his plea, without leave of the Court or a judge;" yet when justice requires, a plea may be withdrawn, and another substituted or added, and even after issue joined a plea may be added, as even a plea of a foreign statute of limitations. (o) That regulation, assimilating the practice of the King's Bench to that in the Common Pleas and Exchequer, put an end to the vexatious practice of pleading a sham plea and afterwards abandoning it at any time before the expiration of a rule to abide by the plea, which is no longer necessary. (p) Where a defendant obtained judgment on demurrer to his special justification covering the *whole* declaration, the Court permitted him to *withdraw* the general issue, but said that the application should have been at *chambers*. (q) But recently leave to add a plea of justification on the eve of the trial was refused; and after verdict for plaintiff on a plea of not guilty, the Court refused permission to add a plea of justification, and grant a new trial, on the ground of a mistake of the pleader. (r)

Of pleading, &c.

Although a defendant *may* plead de novo to a declaration,

(k) Jervis's Rules, 8, 87, note (a), where see prior decisions showing the former perplexing variations in practice.

(l) *Doe d. Williams v. Williams*, 4 Nev. & Man. 259.

(m) *Samuels v. Dunne*, 3 Taunt. 386.

(n) *Gibson v. Houseman*, 1 Chitty's Rep. 647, note (a).

(o) *Huber v. Steiner*, 2 Dowl. 781; 4 M. & Scott, 329.

(p) Jervis's Rules, 54, note (v); Tidd, 673, 674; Dax's Prac. 103; Chitty's Summary Prac. 136, 137.

(q) *Young v. Beck*, 3 Dowl. 804.

(r) *Kirby v. Simpson*, 3 Dowl. 791.

after it has been amended, this is a mere *liberty*, of which he need not avail himself, unless his former plea would be improper or insufficient to the new declaration. (g)

CHAP. XXI.  
PRACTICE AS  
TO PLEAS.

Of pleading de novo to an amended declaration.

VI. Of what plea may or must be pleaded.

What facts must be traversed or pleaded particularly, and when a special plea is necessary.

The principal object of the recent Pleading Rules, promulgated under the authority of 3 & 4 W. 4, c. 42, s. 1, is to *diminish the use of a general issue*, and to compel a defendant to state in his plea the *particular point* on which he rests his defence, instead of taking the plaintiff by surprise at the trial, by then, perhaps for the first time, advancing an unexpected ground of defence, and by this means also the judge and jury on the trial must have presented to their consideration a more distinct and less complex issue. The 1st section of that act, however, provides that no rule or order shall have the effect of depriving any person of the power of pleading the general issue, and giving the special matter in evidence in any cause wherein he was then or thereafter should be entitled to do so by any act of parliament; so that under the statute 21 Jac. 1, c. 12, s. 5, and very numerous other acts, justices of the peace, and almost every description of public officer, (r) *may still* plead the general issue and give most grounds of defence in evidence under it; that, however, is a mere liberty, of which it will frequently be advisable for a defendant not to avail himself, as attempted to be shown in another work. (s) And when a statute gives the general issue, the Court will not allow in addition to that plea a special plea. (t)

Cannot traverse the allegation in commencement of declaration of the writ by which defendant sued.

Denial of character or right in which plaintiff sues or defendant is sued, must be pleaded specially.

It seems to be a general rule that the defendant must plead to the substance or body of the declaration, and not to the commencement, and therefore a plea that the defendant was not detained in custody, as alleged in the commencement of the declaration, was considered to be frivolous and vexatious. (u)

The 21st rule of Reg. Gen. Hil. T. 4 W. 4, is an excellent *general* rule, extending to *all* actions and to all parts or stages of pleading, as well plea, replication and rejoinder, &c. It orders that "in all actions by and against assignees of a bankrupt or insolvent, or executors or administrators, or persons authorized by statute to sue or be sued as nominal parties, *the character* in which the plaintiff or defendant is stated on the record to sue or be sued, shall not in any case be considered as in issue, *unless specially denied.*" So that in an action by the assignees

(g) *Fagg v. Boosley*, 2 Dowl. 107.

(r) The Lord Chancellor and others, see *Dicas v. Lord Brougham*, 6 Car. & P. 249.

(s) See Chitty on Pleading, 6th ed. vol. i.; and see *Wisdom v. Hodson*, 3

Tyr. 817, note (a).

(t) *Neale v. M'Kensie*, 1 Cr. M. & R. 61; 2 Dowl. 702.

(u) *Rix v. Kingston*, ante, vol. iii. 394; 3 Dowl. 159.

**CHAP. XXI.**  
**PRACTICE AS**  
**TO PLEAS.**

of a bankrupt, (u) unless there be an express plea denying that they are assignees, they need not adduce any proof of that character; so unless there be a plea that the plaintiff is not executor, or not administrator, neither the probate nor the letters of administration need be proved or produced. (x) Indeed the issue joined on the pleadings will in general direct and limit the evidence to be adduced. (y) It has, however, been doubted whether, when a private company sues by their officer, though the defendant has not traversed the plaintiff's alleged character, yet it may be incumbent upon him at the trial to produce and prove the statute, which authorizes the company to sue in that officer's name, unless the act were declared public. (z) It should seem, however, on general principles and under the other rules about to be noticed, that every allegation in a declaration or plea which is not traversed, is impliedly admitted.

The Reg. Gen. Hil. T. 4 W. 4, in the next place prescribes the following rules of pleading applicable to each form of action. These rules have already given rise to very numerous decisions and some questionable points, and which will be found collected with the appropriate precedents in a distinct work on the subject of pleading. (a) We shall here only state the rules themselves, with a few of the decisions thereon.

**I. *Assumpsit.***

**I. Plea of non-assumpsit to put in issue only express contract or the facts from which contract implied.**

**I. In all actions of *assumpsit*, except on bills of exchange and promissory notes, the plea of non assumpsit shall operate only as a denial in fact of the *express contract* or *promise* alleged, (b) or of the *matters of fact* from which the contract or promise alleged may be *implied* by law.**

***Ex. gr.*** In an action on a warranty, the plea will operate as a denial of the fact of the warranty having been given upon the alleged *consideration*, but not of the breach; and in an action on a policy of insurance, of the subscription to the alleged policy by the defendant, but not of the interest, of the commencement of the risk, of the loss, or of the alleged compliance with warranties.

(u) *Inglis v. Spence*, 1 Crom. M. & R. 432; *Jones v. Brown*, 1 Bing. N. C. 484.

(x) Per Alderson, B. in *D'Aranda v. Houston*, 6 Car. & P. 512.

(y) And see *Dukes v. Gosling*, 3 Dowl. 619; and *Barnett v. Glossop*, 1 Bing. N. C. 633; 1 Hodges, 94; 3 Dowl. 625, S.C.

(z) Bosanquet's Rules, 45, note 44.

(a) See fully Chitty on Pleading, 6 ed.

(b) Non assumpsit puts in issue the fact of the defendant having signed or authorized the signing of his name to a

written instrument, and in effect the sufficiency of the stamp, because 23 G. 3, c. 58, s. 12, as to agreements, declares an unstamped instrument unavailable, and also prohibits the reading it in evidence. The want of a proper stamp is however sometimes pleaded. Bosanquet's Rules, 105. And see some valuable notes on those rules, Bosanquet's Rules, 46 to 63, and Chitty on Pleading, 6th edit. In the latter will be found every description of plea that can be required under these rules.



In actions against carriers and other bailees, for not delivering or not keeping goods safe, or not returning them on request, and in actions against agents for not accounting, the plea will operate as a denial of any express contract to the effect alleged in the declaration, and of such bailment or employment as would raise a promise in law to the effect alleged, but not of the breach.

In an action of *indebitatus assumpsit* for goods sold and delivered, the plea of *non assumpsit* will operate as a denial of the sale and delivery in *point of fact*; (b) in the like action for money had and received, it will operate as a denial both of the receipt of the money, and the existence of those facts which make such receipt by the defendant a receipt to the use of the plaintiff.

2. In all actions upon bills of exchange and promissory notes, the plea of *non assumpsit* shall be inadmissible. In such actions, therefore, a plea in denial must traverse some matter of fact, *e. g.*, the drawing, or making, or indorsing, or accepting, or presenting, or notice of dishonour of the bill or note.

3. In *every species of assumpsit*, all matters in confession and avoidance, including not only those by way of discharge, but those which show the transaction to be either void or voidable in point of law, (c) on the ground of fraud or otherwise, shall be specially pleaded. (d) *Ex. gr.* Infancy, coverture, release, payment, (e) performance, illegality of *consideration*, either by statute or common law, (f) drawing, indorsing, accepting, &c.,

(b) In *Edmunds v. Harris*, 4 Nev. & Man. 182, 6 Car. & P. 547, it was held that to *indebitatus assumpsit* for goods sold or work done, defendant must plead specially that the credit had not elapsed; but in *Taylor v. Hillary*, 1 Gale, 23; 3 Dowl. 461, S. C.; *Knapp v. Harden*, 1 Gale, 47; 6 Car. & P. 745, S. C.; and in *Gardner v. Alexander*, 3 Dowl. 146, the propriety of that decision was doubted. So it has been supposed, that to *assumpsit* for goods sold or work done, defendant must plead specially that the goods were of bad quality, or that the work was improper, so as to reduce the claim, *Cooper v. Whitehome*, 6 Car. & P. 545; *Roffey v. Smith*, 6 Car. & P. 662; but as the allegation in the declaration *indebitatus assumpsit* affirms that there is a debt for goods sold or work done, whatever shows that there was no such debt, as that the goods or work were insufficient, or the credit not expired, directly negatives such

allegation, and should therefore be admissible without a special plea. However, the safest course will be to plead specially, as in *Knapp v. Harden*, 1 Gale, 47; 6 Car. & P. 745, S. C.

(c) The bill not duly stamped, *Bosanquet's Rules*, 105; bill altered in a material respect, 4 Nev. & Man. 409; void in law, *Barnett v. Glossop*, 1 Bing. N. C. 33; 1 Hodges, 94; 3 Dowl. 625, S. C.; want of an assignment in writing of a copy-right, must be pleaded, and non-compliance with the requisites of statute against frauds, *Hawes v. Armstrong*, 1 Bing. N. C. 763; *Cleney v. Figgott*, 1 Harr. & Woll. 20.

(d) Puffing at auction, *Isely v. Grew*, 6 Car. & P. 671.

(e) Payment must be pleaded, *Linley v. Polden*, 3 Dowl. 780.

(f) *Polls v. Sparrow*, 1 Bing. N. C. 594; 3 Dowl. 630; *illegality*, *quære* distinction taken in *Bosanquet's Rules*, 51, note (49).

## CHAP. XXI. PRACTICE AS TO PLEAS.

In actions against carrier or bailee, not of breach.

In *indebitatus* for goods sold or money received, *non assumpsit* to put in issue only sale and delivery, and receipt of money to use of plaintiff.

2. *Non assumpsit* inadmissible in action on bill or note, but defendant must traverse, in particular, the drawing, making, indorsing, accepting, presenting, or notice of dishonour.

3. Matters in confession and avoidance, and in discharge, and defences in law, to be pleaded particularly, as infancy, coverture, release, payment, performance, illegality of consideration, &c.

CHAP. XXI.  
PRACTICE AS  
TO PLEAS.

bills or notes by way of accommodation; (f) set-off, (g) mutual credit, unseaworthiness, misrepresentation, concealment, deviation, and various other defences *must* be pleaded.

4. In declaration on policy the interest may be averred to have been in several, and proof of either shall suffice.

4. In actions on policies of assurance, the interest of the assured may be averred thus:—"That A., B., C., and D., or some or one of them, were or was interested, &c.;" and it may also be averred, "That the insurance was made for the use and benefit, and on the account of the person or persons so interested."

## II. In Covenant and Debt.

1. *Non est factum* to be considered as merely denying the execution of the deed, and all other defences must be specially stated.

2. *Nil debet* abolished.

3. Plea of "never indebted," to be admissible to the like extent as *non assumpsit*, but matters in avoidance to be specially pleaded.

1. In debt on specialty or covenant, the plea of *non est factum* shall operate as a denial of the execution of the deed in point of fact only; and all other defences shall be specially pleaded, including matters which make the deed absolutely void, as well as those which make it voidable.

2. The plea of "*nil debet*" shall not be allowed in any action.

3. In actions of debt on simple contract, other than on bills of exchange and promissory notes, the defendant may plead that "*he never was indebted in manner and form as in the declaration alleged*;" and such plea shall have the same operation as the plea of *non assumpsit* in *indebitatus assumpsit*, and

(f) A plea of *no consideration generally* for accepting or indorsing, without stating affirmatively *how* there was no consideration, and showing the facts why the defendant ought not to pay, and knowledge of them on the part of the plaintiff, is bad, first, because it amounts to the general issue, the law implying a consideration for an acceptance and indorsement, but principally because it does not confess and avoid, or state, as intended by the new rules, with particularity, the facts, which probably are more within the knowledge of the defendant than the plaintiff. The plaintiff may therefore demur to such a general plea, as in *Low v. Chifney*, 1 Bing. N. C. 267; *French v. Archer*, 3 Dowl. 130; *Stoughton v. Earl Kilmorey*, 1 Gale, 91; 3 Dowl. 705, 8. C.; *Easton v. Pratchett*, 6 Car. & P. 736; 1 Gale, 30; 3 Dowl. 472, S. C.; *Mills v. Oddy*, 3 Dowl. 730; 1 Gale, 92; 3 Car. & P. 728, S. C.; *Pearce v. Champneys*, 3 Dowl. 276; *Stein v. Yglesias*, 3 Dowl. 252; *Reynolds v. Joerny*, 3 Dowl. 453. And after demurrer to such a plea, leave to amend has been refused, without an affidavit of merits, *id. ibid.* and *Stoughton v. Kilmorey*, 3 Dowl. 706; 1 Gale, 91, 8. P. But as an issue on a general plea of no consideration found

for or against the defendant will be good after verdict, the plaintiff may safely take issue, either generally that there was a sufficient consideration, *Mills v. Oddy*, 6 Car. & P. 728; 3 Dowl. 730; 1 Gale, 92, S. C.; *Easton v. Pratchett*, 6 Car. & P. 736; 1 Gale, 30; 3 Dowl. 472; 1 Mood. & Rob. 379; (and defendant's counsel is to begin at the trial, *Mills v. Oddy*, 6 Car. & P. 728; *Homan v. Thompson*, *id.* 717, 8. P.); or the plaintiff may reply more specially, setting out a consideration under a videlicet, and yet concluding to the contrary, *Low v. Barrow*, 4 Nev. & Man. 366; 1 Harr. & Wol. 11. How to plead specially, and forms of sufficient pleas, or pleas that may be readily made sufficient, see *Stein v. Yglesias*, 1 Gale, 98; *Percival v. Frampton*, 3 Dowl. 748; *Heydon v. Thompson*, 1 Adol. & El. 210; *Bosanquet's Rules*, 104; *Byss v. Wylie*, 3 Dowl. 525; 1 Gale, 50; 1 Cromp. M. & Ros. 686, S. C.; *Bramah v. Baker*, 1 Hodges, 66; 1 Bing. N. C. 163; 3 Dowl. 392, S. C.

(g) Set off must now be pleaded, *Bosanquet's Rules*, 52, note 50; and see *Duncan v. Grant*, 1 Crom. M. & Ros. 283; 2 Dowl. 683; 4 Tyr. 218, S. C.

all matters in confession and avoidance shall be pleaded specially, as above directed in actions of *assumpsit*.

CHAP. XXI.  
PRACTICE AS  
TO PLEAS.

4. In other actions of debt, in which the plea of *nil debet* has been hitherto allowed, including those on bills of exchange and promissory notes, the defendant shall deny specifically some particular matter of fact alleged in the declaration, or plead specially in confession and avoidance.

4. In other actions of debt the plea to traverse a particular fact, and to state matter in avoidance,

### III. *Detinue*.

The plea of *non detinet* shall operate as a denial of the detention of the goods by the defendant, but not of the plaintiff's property therein, and no other defence than such denial shall be admissible under that plea.

*Non detinet* only to put in issue the fact of detention of the specified goods, and not plaintiff's property therein, or other ground of defence.

### IV. *In Case*.

1. In actions on the case, the plea of *not guilty* shall operate as a denial only of the breach of duty or *wrongful act* alleged to have been committed by the defendant, and not of the facts stated in the *inducement*; (h) and no other defence than such denial shall be admissible under that plea; all other pleas in denial shall take issue on some particular matter of fact alleged in the declaration. *Ex. gr.* In an action on the case, for a nuisance to the occupation of a house, by carrying on an offensive trade, the plea of not guilty will operate as a denial only that the defendant carried on the alleged trade in such a way as to be a nuisance to the occupation of the house, and will not operate as a denial of the plaintiff's occupation of the house. In an action on the case for obstructing a right of way, such plea will operate as a denial of the obstruction only, and not of the plaintiff's right of way; and in an action for converting the plaintiff's goods, the conversion only, and not the plaintiff's title to the goods. (i) In an action of slander of the plaintiff in his office, profession, or trade, the plea of not guilty will operate to the same extent precisely as at present in denial of speaking the words, of speaking them maliciously, and in the sense imputed, and with reference to the plaintiff's office, profession, or

1. Not guilty in case, only to put in issue the alleged wrongful act or omission, and not facts stated as inducement. Instances in elucidation of this rule.

(h) *Dukes v. Gosling*, 1 Bing. N. C. 588; 3 Dowl. 619, S. C. Not guilty does not put in issue the *inducement* as to plaintiff's right, though in some degree part of description of the injury, *Frankum v. Earl Falmouth*. 1 Harr. & Wol. 1; 4 Nev. & Man. 330; 6 Car. & P. 529, S. P.

(i) See pleas of property in defendant in trespass, *Wilton v. Edwards*, 6 Car. &

P. 677; plea that sale to plaintiff was fraudulent, 1 Mood. & R. 400; transfer for value and replication, 1 Hodges, 98; 1 Bing. N. C. 681; seizure under a *fi. fa.* and replication, 1 Bing. N. C. 721; seizure under four warrants, 1 Adol. & El. 264; tenancy in common, or partnership, must be pleaded, *Stancliffe v. Hardwick*, 3 Dowl. 762.

CHAP. XXI.  
PRACTICE AS  
TO PLEAS.

trade; but it will not operate as a denial of the fact of the plaintiff holding the office, or being of the profession or trade alleged. In actions for an escape, it will operate as a denial of the neglect or default of the sheriff or his officers, but not of the debt, judgment, or preliminary proceedings. In this form of action against a carrier, the plea of not guilty will operate as a denial of the loss or damage, but not of the receipt of the goods by the defendant, as a carrier for hire, or of the purpose for which they were received.

2. All matters in confession and avoidance to be pleaded specially.

2. All matters in confession and avoidance shall be pleaded specially, as in actions of *assumpsit*. (*k*)

### V. In Trespass.

1. A declaration in trespass to land, &c. must state the name or abutments, &c., or the defendant may demur.

1. In actions of trespass *quare clausum fregit*, the close or place in which, &c., must be designated in the declaration by name or abutments, or other description, in failure whereof the defendant may demur specially.

2. Not guilty to be a denial of the defendant's trespasses, but not of plaintiff's possession or right of possession, and which must be specially traversed.

2. In actions of trespass *quare clausum fregit*, the plea of not guilty shall operate as a denial that the defendant committed the trespass alleged (*l*) in the place mentioned, but not as a denial of the plaintiff's possession, or right of possession of that place, which, if intended to be denied, must be traversed specially.

3. Not guilty, to trespass *de bonis asportatis*, to be considered only a denial of taking, or merely damaging the goods, and not of plaintiff's property.

3. In actions of trespass *de bonis asportatis*, the plea of not guilty shall operate as a denial of the defendant having committed the trespass alleged (*l*) by taking or damaging the goods mentioned, (*l*) but not of the plaintiff's property therein.

4. Plea of right of way with carriages, cattle, and on foot, if traversed, shall be considered distributive, and the proof of either shall, *pro tanto*, entitle the defendant to a verdict, &c.

4. Where, in an action of trespass *quare clausum fregit*, the defendant pleads a right of way with carriages and cattle, and on foot, in the same plea, and issue is taken thereon, the plea shall be taken distributively; and if the right of way with cattle, or on foot only, shall be found by the jury, a verdict shall pass for the defendant in respect of such of the trespasses proved as shall be justified by the right of way so found, and for the plaintiff in respect of such of the trespasses as shall not be so justified.

5. So, in plea of right of common, if defendant do not prove a right for all kinds of cattle, he is to have a verdict *pro tanto*.

5. And where in an action of trespass *quare clausum fregit* the defendant pleads a right of common of pasture for divers kinds of cattle, *ex. gr.* horses, sheep, oxen, and cows, and issue is taken thereon, if a right of common for some particular kind of commonable cattle only be found by the jury, a verdict

(*k*) Therefore defendant's partnership with plaintiff must be pleaded in trover,

*Stancliffe v. Hardwick*, 3 Dowl. 762.

(*l*) *Pearcy v. Walter*, 6 Car. & P. 22.

shall pass for the defendant in respect of such of the trespasses proved, as shall be justified by the right of common so found, and for the plaintiff in respect of the trespasses which shall not be so justified.

CHAP. XXI.  
PRACTICE AS  
TO PLEAS.

6. And in all actions in which such right of way or common as aforesaid, or other similar right, is so pleaded, that the allegations as to the extent of the right are capable of being construed distributively, they shall be taken distributively.

6. In all actions the same rule to prevail as regards rights of way or common.

The recitals in ancient statutes,<sup>(n)</sup> and the confession of so eminent a pleader as Sanders in his reports,<sup>(o)</sup> that the Court had reprov'd him for pleading subtly on purpose to entrap the opponent and delude the Court, sufficiently establish historically that the science of special pleading has at all times occasionally been perverted and misapplied for the purpose of delay. The judges have also at all times testified their disapprobation and endeavoured to repress the practice. But they have been prevented from exercising any adequate restrictive powers by circumstances which may not be obvious to any common observer. By the common law a defendant has an unqualified right to plead any matter in bar of the action which he may think will constitute a defence, subject only to a demurrer if he be mistaken; and the statute 4 Ann. c. 16, only requires an affidavit in support of a plea *in abatement* and of a plea *puis darrein continuance*, and there is no authority for the Court or a judge requiring *any affidavit of the truth* of a plea *in bar*, unless the defendant by some accident has placed himself in a situation of being obliged to ask a favour, in which case just terms may be imposed. Occasionally, it is true, the judges have become indignant at the frequency of subtle false pleas, and have suffered judgment to be signed, and have sustained judgments signed for want of a plea, even without previous leave; but it will be found that according to the present practice, the instances in which a sham or false plea can be treated as a nullity are rare.<sup>(p)</sup> Nor indeed is there any reason for a strong exercise of power, if it exist, in

Of sham or false  
pleas. <sup>(m)</sup>

(m) See very fully 1 Chitty on Pleading, 5 edit. 574 to 578, and *most recently*, *id.* 6 edit.; Tidd, 564, 565, 473, and 1 Arch. K. B. 4th ed. 242 to 245. It will be observable from the cases collected in 1 & 2 Chitty's Rep. Index, tit. Pleading, that most of the cases relating to sham pleas occurred about that time.

(n) 32 Hen. 8, c. 30; 1 Bla. R. 270.

(o) 1 Sanders, 327 a.

(p) But if a sham plea of set-off on a recognizance in another Court be pleaded to one count, and non assumpsit to the others, the Courts have considered that a subtle plea requiring two distinct issues and trials, and gave the plaintiff leave to sign judgment, and made defendant's attorney pay costs, though he obeyed his instructions, *Vincent v. Ground*, 1 Chit. Rep. 182; *Munton v. Mockett*, *id.* 504;

CHAP. XXI.  
PRACTICE AS  
TO PLEAS.

setting aside any false plea at the present time ; for if a plea be false, the plaintiff may immediately reply and try the issue, and if there be a demurrer to the replication according to the usual course of sham pleading, the margin of such demurrer must, according to the Reg. Gen. Hil. T. 4 W. 4, reg. 1, state the cause or point of demurrer ; and according to the rule, if that be frivolous or unfounded, leave to sign judgment immediately, whether in term or vacation, may be obtained, (g) and an immediate execution issued after a writ of inquiry, which may be returnable in the vacation.

These observations may account for the silence in the recent rules respecting sham pleas, and the absence of any express rules upon the subject, which no doubt, upon consideration, were considered to have been rendered unnecessary by the numerous other regulations expediting proceedings during the vacation.

Judgment recovered.

There is, however, one express rule in almost the only case when it could be necessary, viz. relating to a *plea of judgment recovered*, which, as the time for producing the same could only be during the four terms, might otherwise, if put in issue, suspend the judgment for not producing the record until the *next term*, however notoriously false the plea might be. The practical Reg. Gen. Hil. Term, 4 W. 4, reg. 8, therefore ordered that the defendant, in the margin of a plea of judgment recovered, shall state the particulars by which it (i.e. the judgment) may be found on record, or plaintiff may sign judgment, and if a false statement be made, the plaintiff by leave also may sign judgment. The terms of the rule are thus : " Where a defendant " shall plead a plea of judgment recovered in *another Court*, he " shall in the margin of such plea state the date of such judgment ; and if such judgment shall be in a Court of record, " the number of the roll on which such proceedings are entered, if any, and in default of his so doing the plaintiff shall " be at liberty to sign judgment as for want of a plea ; and in " case the same be falsely stated by the defendant, the plaintiff, " on producing a certificate from the proper officer or person " having the custody of the records or proceedings of the " Court where such judgment is alleged to have been recovered, that there is no such record or entry of a judgment as " therein stated, shall be at liberty to sign judgment as for

and see several cases, *id.* 524 to 526, 564. So if a sham plea be so special as to render it necessary to consult counsel on replication, the Court permitted judgment,

*Shadbolt v. Berthoud*, 2 Chitty's R. 336. 5 B. & Ald. 370 ; 1 Bing. 330 ; 1 B. & Cres. 81.

(g) *Underhill v. Gurney*, 3 Deel. 65.

"want of a plea by leave of the Court or a judge." (r) The effect of this rule is to put an end to the utility of a *sham plea* of a judgment recovered in ordinary cases. But that rule does not extend to a plea by an executor or administrator of a judgment recovered against *him* by another creditor. (s)

CHAP. XXI.  
PRACTICE AS  
TO PLEAS.

Before the statute 4 Ann. c. 16, a defendant could only plead *one* plea. That statute enacted in sect. 4, "that it shall and may be lawful for any defendant or tenant in any action or suit, or for any plaintiff in replevin in any Court of record, (u) with the leave of the same Court, to plead as many several matters thereto as he shall think necessary for his defence;" and then sect. 5 provides that the defendant shall pay costs of the pleas found against him, unless the judge who tried the issue shall certify that there was reasonable ground for pleading such pleas. It will be observed, that the liberty of pleading *several pleas* (or *double* as it is technically termed) is thus qualified, by requiring the *previous leave of the Court*; and the spirit and object of that enactment seems to have been best observed in the Court of Common Pleas, where, until the recent regulation, it was the practice in most cases to obtain the *express leave* of the Court on a *motion and rule nisi*; but soon after the passing of the stat. 4 Ann. c. 16, it became almost a matter of course in the Court of King's Bench for a defendant to plead as many pleas as he desired on a motion signed by counsel for a rule; and it was not unusual for a plaintiff to apply to the Court to restrain the defendant from so doing excepting in very particular cases. By the *present practice* in most cases the *express* leave of a single judge at chambers to plead more than one plea must be obtained by summons and order, instead of troubling the Court in banc with applications of that nature, consuming more time than can be required on such questions, at least in the first instance; but the propriety of pleading such several pleas may afterwards be brought before the Court, who are still in all cases *supposed* to grant a *rule* pursuant to the statute.

VII. Of Several Pleas.

Of double pleas when allowed, and how to obtain leave to plead the same. (t)

The general pleading rules of Hil. T. 4 W. 4, reg. 5, in part before set forth, (v) qualifies or modifies the power of obtaining leave to plead double, so as to prevent an *unnecessary repetition* in a second or other plea of the *same ground of de-*

(r) See Jervis's Rules, 89, note (g).

(s) *Power v. Isod*, 1 Bing. N. C. 304; 3 Dowl. 140, S. C.

(t) See in general, 1 Chitty on Pleading, 5th edit. 592 to 599, and *id.* 6th edit.

(u) If in a Court not of record de-

fendant plead two pleas, as nil debet and a set-off, plaintiff may treat the latter plea as a nullity, and make up issue, and try on the other, *Chitty v. Dendy*, 1 Harr. & Wol. 169.

(v) *Ante*, 455 to 459.

CHAP. XXI.  
PRACTICE AS  
TO PLEAS.

*fence*, once already stated, by thus ordering: "nor shall several pleas, or avowries, or cognizances, be allowed unless a *distinct ground of answer or defence is intended to be established in respect of each.*" And in a subsequent part of the same rule it is ordered that "*pleas, avowries, and cognizances founded on one and the same principal matter, but varied in statement, description, or circumstances only, (and pleas in bar in replevin, are to be within the rule,) are not to be allowed.*" And then we have seen such rule is illustrated by several examples, with exceptions, which of themselves constitute parts of the rule; but it is provided that the examples are given as instances only of the applications of the rules to which they relate, and that the principles contained in the rules are not to be considered as restricted by the examples specified. (w)

The 6th and 7th rules then provide the remedy for the violations of this rule; but it will be observed that as there must always be *an order of a judge and rule antecedent* to the pleading double, it can *rarely* occur that an application to a judge to strike out a second or third plea, as a violation of the fifth rule, can take place; however, certainly such an application may be, and indeed has been made. (x) On the other hand, however, some double pleas seem to have been expressly sanctioned by express rule, even without *a summons or judge's order*, (y) as non assumpsit or nil debet, or non detinet, with or without a plea of tender as to a part, a plea of the statute of limitations, set-off, bankruptcy of the defendant, discharge under an insolvent act, plene administravit, plene administravit præter, infancy and coverture; any two or more of which pleas might by that rule be pleaded together *as of course* without leave; but still a *rule to plead double* must be drawn up in pursuance of the statute 4 Ann. c. 16, by the proper officer, upon production of the engrossment of the pleas, or a draft or copy thereof.

Mode of obtaining leave when necessary.

It may be considered absurd that the expense of a *rule* should still be required when *in fact* the *Court* does not interfere; but this is requisite as long as the statute 4 Ann. c. 16, sect. 4, requiring such rule, continues unrepealed; and under the act the Court in banc still has jurisdiction, and will interfere to prevent *several* pleas, when their use would be *unjust or vexatious*.

To save the expense of a motion and rule nisi the general

(w) *Ante*, 455 to 459.

(x) *Biggs v. Maxwell*, 3 Dowl. 497;

1 Hodges, 18.

(y) Reg. Gen. Trin. T. 1 W. 4, reg. 14



rule of Trinity Term, 1 W. 4, reg. 13, orders that *no rule* to show cause or *motion* shall be required in order to obtain a rule to plead several matters, or to make several avowries or cognizances; but that such rules shall be drawn up upon a *judge's order to be made upon a summons*, accompanied by a *short abstract* or statement of the intended pleas, avowries, or cognizances, (z) and then provides that *no summons or order shall be necessary* in the following cases, that is to say, where the plea of *non assumpsit* or *nil debet*, or *non detinet*, with or without a plea of tender as to a part, or plea of the statute of limitations, set-off, bankruptcy of the defendant, discharge under an insolvent act, *plene administravit*, *plene administravit præter*, infancy and coverture, or any two or more of such pleas, shall be pleaded together; but in all such cases *a rule shall be drawn up* by the proper officer upon the production of the engrossment of the pleas, or a draft or copy thereof.

CHAP. XXI.  
PRACTICE AS  
TO PLEAS.

In certain cases  
no summons  
necessary.

The Reg. Gen. Hil. Term, 2 W. 4, r. 34, however, orders that if a party shall plead several pleas, avowries, or cognizances, *without a rule* for that purpose, the opposite party shall be at liberty to sign judgment. (a)

A summons to plead several matters is a stay of proceedings, if it be returnable before or at the time the judgment office opens on the day after the time for pleading expires; (b) but then the defendant's attorney must carefully attend the *first* summons. It would seem that there is a peculiarity regarding a summons for leave to plead several pleas distinguishing it from other summons, which in their very nature in general render it pro-

Practice as re-  
spects a sum-  
mons, &c. to  
obtain leave to  
plead double.

(s) James, Esq., } Let the plaintiff's attorney, or agent, attend me at my cham-  
ber in Serjeants' Inn to-morrow, at 11 of the clock in the fore-  
noon, to show cause why the defendant should not be at li-  
berty to plead the several matters specified in the abstract or  
statement annexed [or "subscribed," according to the fact.] Dated the 13th day of  
May, 1835. J. Vaughan.

#### Abstract of Pleas.

1. Non assumpsit.
2. That defendant hath indemnified.
3. That the action and recovery against the present plaintiff was not in respect of the seizure of the goods, but for damage and loss after seizure.
4. That present plaintiff was damaged of his own wrong.

#### Judge's Indorsement on Summons on hearing both Parties.

"Take an order to plead the first and  
"second pleas, and either the third or  
"fourth, but not both.

J. Patteson,  
May 14, 1835.

Take a week,  
J. Patteson.

(a) Jervis's Rules, 51, note (i); and see an instance, *Hockley v. Sutton*, 2 Dowl. 700. Before that rule plaintiff could not in K. B., though he might in C. P. treat as a nullity double pleas

pleaded by a defendant, without having obtained a rule; but must have applied to the Court to set aside all but one; 1 Bos. & Pul. 415; Tidd, 658.

(b) *Wells v. Secret*, 2 Dowl. 447.

CHAP. XXI.  
PRACTICE AS  
TO PLEAS.

per that both parties should attend; viz. that as on principle a defendant ought not to be required to disclose to the defendant his grounds of defence, (c) so on that ground a summons for leave to plead several matters may, it is said, be heard by the judge in private in the absence of the plaintiff or his attorney, (d) so that the latter may not ascertain the particulars of the defence. (d) In general, however, the practice is otherwise, and a summons is obtained similar to the form in the note, (e) stating an abstract of the pleas at the foot, and a copy is to be served on the plaintiff's attorney as other summons; and at the time of hearing before a judge a fair copy of the draft of the plea, with the declaration, is to be produced; and in some cases it will be advisable to have an *affidavit* of the facts, stating that there is a good defence on the *merits*. In cases also where from particular circumstances it would be unjust that the defendant should plead several pleas, an *affidavit* of those facts might be desirable in *opposition* to the summons. (f) The *judge's order* should be forthwith drawn up and served, for otherwise it may be treated as a nullity; (g) and the *rule* for pleading several matters must also be drawn up, or the pleas may be treated as nullities, and judgment signed as by default; (h) indeed the Reg. Gen. Hil. Term, 2 W. 4, r. 34, is express upon that requisite. (i)

What double  
pleas allowed.  
(j)

With the exception of the instances of several pleas that are to be allowed enumerated in the Reg. Gen. Trin. T. 1 W. 4, reg. 13, (k) the injunction that two or more pleas of the *same subject-matter of defence*, varied only in *statement*, &c. as expressed in Reg. Gen. Hil. T. 4 W. 4, reg. 5, it will be found that the like *discretionary* jurisdiction is now transferred to a single judge at chambers, which, by the terms of 4 Ann. c. 16, s. 4, was vested in the *Court in banc*; and the discretion of a single judge in allowing *several* pleas is to be influenced by the same principles that before governed the *Courts*; and no new rule or qualification, except as above, has been introduced, and therefore the decisions collected in prior works of practice will still continue to be applicable. The objection that the proposed pleas are *inconsistent with each other* (unless the re-

(c) *Southgate v. Crowley*, 1 Hodges, 5.

(d) *Leuchart v. Cooper*, 1 Hodges, 18.

(e) See note (s), ante, 733.

(f) *Semble*, see an instance, *Biggs v. Maxwell*, 3 Dowl. 497.

(g) *Ante*, 566.

(h) *Hockley v. Sutton*, 2 Dowl. 700.

(i) *Ante*, 733, n. (a).

(j) See in general 1 Chitty on Pleading, 5th ed. 592 to 599.

(k) *Ante*, 732, 733, and confined to non assumpsit, nil debet, and non detinet, with statute of limitations, set-off, bankruptcy, discharge under insolvent act, plene administravit, plene administravit propter, infancy, and coverture.

pugnancy would appear by some act or matter of record, as where the payment of money *into Court* is pleaded, or a tender) has no weight; and upon a summons to show cause why the plaintiff should not be at liberty to strike out certain pleas because they were inconsistent with each other, Williams, J. said, "The fact of inconsistency in the pleas with each other is no objection to them. A defendant may have several defences to an action, each good in itself, but inconsistent with each other. It would be very hard upon him if he were not permitted to plead them all. The rule is much more strict as to plaintiffs, who are only allowed one count to each cause of action. The reason however there is different." (l) And in another case the defendant was allowed to plead to *indebitatus assumpsit* for work and labour, first, non-assumpsit to the whole; and, secondly, that the demand arose out of an illegal wager as to the price of tallow; and Bosanquet, J. said, "The word '*inconsistent*' was studiously kept out of the rules, for the subject was discussed; and it was felt that there might be cases in which pleas might be inconsistent with each other, and sustain substantially different defences; and the object had in view was to prevent the *same* defence being pleaded in *different forms*." (m) So, notwithstanding the 5th rule of Hil. T. 4 W. 4, prohibiting more than one plea of the same subject-matter, the Court, in an action of trover, permitted several pleas, viz. 1. The general issue, not guilty; 2. A lien by custom; 3. A lien by agreement; 4. Another plea of lien by custom, somewhat varied; and, 5. Another varying plea of lien by custom; and Tindal, C. J. said the plaintiff could suffer no loss, for if the judge on the trial should be of opinion that no distinct subject-matter of defence was *bonâ fide* intended to be established in respect of each plea then allowed by the Court, he might certify that the defendant should not recover any costs on the issues arising out of such plea. (n) So in another case the defendant was, on application to the Court in banc, although a judge at chambers had refused the same, allowed to plead, 1. As to 12*l.* the bankruptcy of the defendant; 2. As to 23*l.* payment; 3. As to 1*l.* 2*s.* 6*d.* accord and satisfaction; and, 4. As to the demand, except 24*l.* 2*s.* 6*d.*; the general issue, that he never owed the amount; the Court thinking that upon the explained circumstances all such pleas were

(l) *Williams v. Small*, 3 Dowl. 504.(n) *Leachart v. Cooper*, 1 Bing. N. C.(m) *Duer v. Triebner*, 1 Bing. N. C. 509; 1 Hodges, 16; 3 Dowl. 413, and *quere*.

CHAP. XXI.  
PRACTICE AS  
TO PLEAS.

reasonable. (o) So assignees of a bankrupt, sued as assignees of a lease, may plead, 1. That the term did not vest in them; and, 2. That they abandoned it, the latter being a special mode of denying that the term vested, that would not be admissible in evidence under the first plea. (p)

But the Court will not allow several pleas when one of them on the face of the record would establish that the other is untrue. Therefore in assumpsit for goods sold and delivered the Court refused to allow the defendant to plead non-assumpsit to the *whole* and a tender to part; nor to plead, 1. Non-assumpsit; 2. Payment as to part; 3. As to part that the goods were warranted with a sample; 4. As to part that the goods were warranted of a merchantable quality; and, 5. As to part that they were warranted to be one ton weight of black lead; and the Court said the first must be disallowed, because it was contradicted by the plea of payment as to a part; and the fourth, founded on the implied warranty in law, must also be disallowed, for it was rendered needless by the third. (q) Nor will the Court suffer *several* pleas to stand contrary to the admissions of the defendant and the justice of the case, and where the plaintiff might incur difficulty or expense in making out his strict right, as frequently has occurred in actions of covenant by a reversioner claiming by a long derivative title. (r) And where a defendant may by statute, as 11 Geo. 2, c. 19, s. 21, plead the general issue, and under it give in evidence the special matter, the Court will not give him leave, in addition to the general issue, to plead a special plea, but put him to his election to abandon the general issue or to plead only special

(o) *Hart v. Bell*, 1 Hodges, 6.

(p) *Thompson v. Bradbury*, 3 Dowl. 147.

(q) *Steel v. Sturry*, 3 Dowl. 135.

(r) In C. P. in *White v. Parker*, A. D. 1835, covenant by plaintiff, as a fourth assignee of a lessee, against the defendant, as assignee of the lessor, a reversioner in fee, on lessor's covenant to pay out-going valuation of trees in a nursery-ground, and showing plaintiff's derivative title, and that a valuation had been made by the defendant's authority, the defendant, by leave of a judge, pleaded non est factum, and traversed every stage of plaintiff's derivative title, and the conveyance of reversion to the defendant, and denial of there being any trees, and of defendant's authority to make the valuation, or that any valuation was made. But the Court of C. P. on affidavit that the plaintiffs, as assignees, had frequently paid rent

to the lessor and the defendant also, struck out the plea of non est factum of the lease and all the traverses of plaintiff's title, but permitted the defendant's pleas denying the conveyance to him, and the subsequent pleas to stand.

Again, in *Craigh v. Struck*, K. B. 25th February, 1830, where several pleas in covenant traversing the plaintiff's derivative title, as well as pleas denying the breaches of covenant, on affidavit by the plaintiff that the defendant had allowed and paid rent to the plaintiff, on motion to the Court Mr. Justice Bayley ordered the rule to plead the several pleas to be rescinded, and the pleas to be confined to the breaches of covenant.

And see in general that the Court will not allow an unjustly embarrassing plea to be pleaded with others, 15 East, 255; 3 Bing. 635; 1 Moore & P. 343; 4 Bing. 525; 5 Bing. 42; 6 Bing. 197.

pleas. (s) So where a defendant by the neglect of her attorney had omitted to plead in time, and judgment by default had been signed but set aside on an affidavit of merits, he was not allowed afterwards to plead several matters; one of such pleas being that the plaintiff, an attorney, had not delivered a signed bill, and another, that he had not obtained his certificate; Parke, B. saying she ought not to be let in to plead such pleas after judgment had been set aside on an affidavit of merits. (t)

VIII. If a plea be *frivolous, or tender an immaterial issue*, the plaintiff may apply to a judge to set it aside; (u) and it is in general advisable to do so rather than to demur and lose time in arguing the objection. (u) So if a plea has been pleaded contrary to implied good faith, as if after a judgment for want of plea has been set aside on an affidavit of merits, and the defendant has been let in to plead, and, contrary to the spirit of such permission, he plead a technical objection foreign to the merits, as if to an action by an attorney to recover the amount of his bill of costs for business done for the defendant, the latter plead that the plaintiff was not certificated, or that he had not delivered his signed bill a month, the Court will on motion set aside such pleas. (x) We have also seen that if two or more pleas of the *same subject-matter or ground of defence* have been pleaded in contravention of Reg. Gen. Hil. T. 4 W. 4, reg. 5, a distinct application may be made to a single judge at chambers to strike out all but one; (y) and if a *single* judge should inadvertently give leave to plead several pleas, the defendant may (we have seen) apply to the Court and have the rule to plead double rescinded. (z)

VIII. Of applications to set aside pleas.

IX. The rules of law with respect to pleas by *several defendants*, constitute an important part of the science of pleading, and will be found fully considered in a work devoted entirely to that subject. (a) We can here only notice some points of *practical* importance. Sometimes the several defendants do not act in concert, and not unfrequently one suspects that the other defendant is in collusion with the plaintiff. In any case where perfect confidence does not prevail the defendants should defend and plead separately. Indeed if there be several defendants

IX. Of several defendants joining or separating in their pleas.

(s) *Neale v. McKensie*, 1 Crom. M. & R. 61; 2 Dowl. 702; 4 Tyr. 670, S. C.

(t) *Biggs v. Maxwell*, 3 Dowl. 497.

(u) *Rix v. Kingston*, 3 Dowl. 159.

(z) See note (t) *supra*.—The reader is requested to excuse this inadvertent repetition.—*Nanney v. Kenrick*, 1 Dowl. 616;

*Holmes v. Grant*, 1 Gale, 59; 3 Dowl. 497.

(y) *Ante*, vol. iii. 455 to 459, 475; and see proceedings to strike out a second count, *ante*, 455 to 459.

(z) *Ante*, 455 to 459, 736, note (r).

(a) 1 Chit. on Pleading, 5 ed. 596 to 599.

CHAP. XXI.  
PRACTICE AS  
TO PLEAS.

---

they must plead separately, or only one counsel will be allowed to address the jury upon the trial on the behalf of all, though even then several counsel may appear, and each may cross-examine witnesses for every defendant. (b) In a case of importance, and when one of several defendants desires to employ a separate attorney, he should do so, and appear and plead, and deliver a brief or briefs separately; in which case the counsel retained for him separately will have a right to address the jury and cross-examine witnesses, and in general sustain a separate defence. (b) But if several defendants substantially employ the same attorney, who *virtually* conducts all the defences, then, although *nominally* several attorneys be employed, *double* charges in taxation will not be allowed. (c)

- 
- (b) *Bishop v. Bryant*, 6 Car. & P. 485.    2 Dowl. 334; 2 Crom. & M. 416, S. C.;  
(c) *Nanny v. Primrose and another*,    *Starling v. Cress and others*, 3 Dowl. 722.

## CHAPTER XXII.

OF DISCONTINUING;—OF THE REPLICATION, REJOINDER, AND  
SUBSEQUENT PLEADINGS BETWEEN PLEA AND DELIVERY OF  
ISSUE;—OF PLEAS OF MATTER OF DEFENCE THAT HAS ARISEN  
PENDING THE ACTION;—AND OF SPECIAL CASES AFTER ISSUE  
AND BEFORE TRIAL.

I. Of Discontinuing .....	739	arising pending Action ....	749
II. Of Replications.....	741	V. Of Special Cases for the opinion	
III. Of Rejoinders, &c.....	746	of Court .....	750
IV. Of Pleas of Matter of Defence			

THE recent alterations in practice as regards discontinuing, CHAP. XXII.  
and respecting replications, rejoinders, and subsequent plead- Outline of sub-  
ings, are, comparatively with those relating to declarations and ject.  
pleas, but few; and after noticing them, and adding a few  
observations, it must suffice to refer to prior works on the  
practice of *discontinuing* and *requisites* of those parts of plead-  
ing, (a) and the practical modes of conducting them, (b)

If upon receiving the defendant's plea the plaintiff be advised  
that he has no sufficient answer, he may, to avoid an increase  
of costs, *discontinue his action*, although he may do so at much  
later stages, and even after a trial and rule obtained to enter a  
nonsuit or new trial. (c) But as perhaps the defendant may  
not press on the action, a plaintiff need not take any step to  
discontinue until the defendant has actually ruled him to reply,  
when he must reply, or suffer a non-pros, or discontinue; and  
even then there may be cases where it will be advisable to  
reply rather than to submit to the payment of costs, which still  
perhaps the defendant may not press for. However, when it is  
certain that the defendant will proceed for a judgment of non-  
pros, or of judgment as in case of a nonsuit, and the action  
cannot be sustained, or the defendant be so insolvent as to  
render it inexpedient to incur more costs, the least expensive  
course may be to discontinue; previously however should be

I. OF DISCON-  
TINUING.

(a) 1 Chitty on Pleading, 5 edit. 609  
to 691; and see the great additions in  
6 edit.

(b) Tidd, 9 edit. 676 to 694; 1 Arch.  
K. B. 255 to 258.

(c) See in general Tidd, 9 edit. 678,  
679; 2 Arch. K. B. 4 ed. 897; and see  
*Paterson v. Powell*, 3 M. & Scott, 195;  
2 Dowl. 738.

CHAP. XXII.  
I. Of Discon-  
tinuing.

considered the consequences of such *primâ facie* admission that the action is not sustainable, in case an action for a malicious arrest should be brought, and which might be encouraged by the plaintiff's early admission that he would not prosecute his claim. The only material recent alteration in the practice relating to *discontinuing* is, that Reg. Gen. Hil. T. 2 W. 4, reg. 6, orders that "Now in all the Courts at Westminster, to "entitle a plaintiff to discontinue after plea pleaded, it shall "not be necessary to obtain the defendant's consent, but the "rule *shall contain an undertaking* on the part of the plaintiff "to pay the costs, and a consent that if they are not paid "within four days after taxation, defendant shall be at liberty "to sign a non-pros." The rule to discontinue is now absolute in the first instance, (d) whilst before it was a rule to show cause in the Common Pleas, unless the defendant would consent to a rule in the Treasury Chamber in term time, or before a judge in vacation; but the necessity for which is now dispensed with, and the provision for a judgment of non-pros, thus better securing the payment of costs, is new. (e) Cases may occur in which upon a special affidavit and motion the plaintiff may obtain leave to discontinue *without paying costs*, though it is laid down generally that costs must be paid. (f) Where, however, proceedings had been commenced on a bill of exchange against the drawer, and also against the acceptor of a bill of exchange, and the former paid the debt and costs of the action against himself, and the bill was thereupon delivered up to him, and notice given to the acceptor that proceedings against him were abandoned, it was held that the plaintiff must pay the acceptor's costs of defence, as he disputed his acceptance; and a judge's order for staying proceedings without costs was set aside. (g) But where a defence was carried on in the name of a person not an attorney of the Court in which the action was brought, the plaintiff was allowed at a late stage in the cause to discontinue without costs, on payment only of sums, if any, advanced by the defendant to such attorney. (h) Where a plaintiff served a rule to discontinue after

(d) Tidd, 685.

(e) Jervis's Rules, 71, note (d). In 2 Arch. K. B. 4 ed. 899, it is supposed that an *attachment* for non-payment of such costs could not be obtained; but *semble*, that upon a rule as now drawn up it would be otherwise, as it must contain an *undertaking* to pay.

(f) See 8 Eliz. c. 2, s. 2; Comb. 299; 2 Arch. K. B. 4 ed. 897, 898. If a defendant have become bankrupt or insol-

vent pending an action, though seemingly solvent when it is commenced, that may be an answer to a rule nisi for judgment, as in case of a nonsuit, for not trying; and the same principle would extend to permit a plaintiff to discontinue without costs in such a case.

(g) *Lewis v. Dalrymple*, 3 Dowl. 435.

(h) *Paterson v. Powell*, 2 Dowl. 758; 3 M. & Scott, 195, S. C.



having given a peremptory undertaking to try at the sittings after term, and the costs were taxed, but not paid, it was held that the defendant was bound to sign judgment of non-pros under the rule, and was not justified in taking the more circuitous course of moving for judgment as in case of a nonsuit. (i)

CHAP. XXII.  
II. REPLICATIONS.

As it is in general the interest of the plaintiff to expedite his suit as much as practicable, it is incumbent on his attorney to obtain instructions for the replication immediately he has even intimation what will be the pleas. If the pleas merely contain denials of the whole or parts of the declaration, and properly conclude to the country, then probably the plaintiff will merely have to add what is technically termed the *similiter*, i. e. "*And the plaintiff doth the like;*" and then the plaintiff's attorney may immediately deliver the issue (the nature of which will presently be considered) with notice of trial, or he may delay so doing until ruled by the defendant to enter the issue. But if the plea or pleas state any new matter, as has become very frequent since the new pleading rules of Hil. T. 4 W. 4, then further and more precise instructions may be necessary in addition to the instructions recommended to be obtained before the commencement of the action, (l) and before the declaration. (m) If the defendant should truly plead payment of part before the commencement of the action, and which the plaintiff ought properly to have admitted in his declaration according to the suggestions before noticed; (n) then it may be necessary to enter a *nolli prosequi* as to so much of the demand as was satisfied by such payment; because if the plaintiff were to reply denying such payment, then on proof of the payment he would have to pay the costs of that issue which must be found against him. (o) But if, admitting such payment, the plaintiff really had a claim for the same kind of debt as that stated in the declaration, and to which the payment does not refer, then the plaintiff must *new assign* that he sued for such other debt, and thus avoid the effect of the plea: hence in each case inquiry into the precise facts may be essential before replication; but

II. REPLICATIONS. (k)

(i) *Cooper v. Holloway*, 1 Hodges, R. 76.

(k) As to the requisites and forms of replications, see in general 1 Chitty on Pleading, 5 edit. 609 to 691, and 6 edit. more fully; and as to the practice, see Tidd, 9 edit. 676 to 694; 1 Arch. K. B.

255 to 258, and the few following subsequent rules and decisions.

(l) *Ante*, vol. iii. 117 to 125.

(m) *Ante*, vol. iii. 429.

(n) *Ante*, 472, and Bosanquet's Rules, 51, note 48, 85, note (x), 87, 102, note (x).

(o) Bosanquet's Rules, 102, note (x).

CHAP. XXII.  
II. REPLICATIONS.

---

in general in practice the replication is considered too much of course, and many practitioners do not sufficiently exert themselves to inquire into the facts, which may very materially affect the form and substance of the replication. In general, when the pleas distinctly state *new facts*, a very minute inquiry into them, and consideration which of several answers to the pleas shall be adopted, may be essential before the counsel or pleader is instructed to prepare the replications; and the safest and most expeditious course will be to consult him in the first instance, what further inquiries into facts may in each particular case be essential, unless the earlier instructions have been so ably framed as to anticipate every inquiry throughout the action; thus we will suppose a declaration on a bill of exchange at the suit of a remote indorsee against the acceptor, and that the defendant has pleaded usury, the replication may be either a denial of the usury, or may be that the plaintiff is an indorsee for value without notice, but not both; hence it may be necessary to ascertain whether there was any usurious contract as described that can be proved; and if there be any risk of that objection being proved, then whether the evidence will establish that the plaintiff or an intermediate indorsee received the bill for value and without notice and before it was due. It is of no avail to instruct counsel to prepare the replication before the precise state of facts has been ascertained, and no time should be lost in the inquiry.

Recent regulation affecting the form and requisites of replications and subsequent pleadings.

There are but few recent regulations respecting either the form or requisites of replications or the practical proceedings relating to them, for the principal objects in view have been the improvements in shortening *declarations*, especially in preventing the use of more than one count, and in putting an end to the too general use of the *general issue*, and requiring most matters to be *pleaded specially*, so as to apprise the plaintiff of the intended defence, and cause a specific, certain, and limited issue to be joined and tried by a jury, and by requiring a *sufficient ground of demurrer*, or at least an arguable ground, to be stated in the margin of every demurrer, or in default thereof enabling the plaintiff to obtain a speedy judgment. It is to be regretted that some ameliorations have not as yet been extended to replications. There are however a *few improvements* in the forms of replications and in the practice respecting them which may be thus enumerated:—

1st. As regards the *title* of a replication, it is to be of the

very day when it is pleaded. (p) 2ndly. *Venue* is not to be repeated excepting when local description is necessary. (q) 3rdly. The *commencements* and *conclusions* may be more concise than heretofore; and the provision that the allegation "*precludi non*" and prayer of judgment is not *necessary* when the replication applies to the *whole* cause of action, (r) except when an estoppel is pleaded. 4thly. *Protestations*, formerly occurring more frequently in replications than other pleadings, are abolished. (s) 5thly. All traverses are to conclude to the country, and not as heretofore was too frequently the case with a verification. (t) 6thly. There are prescribed forms or outlines of replications to a plea of payment of money into Court. (u) 7thly. Reg. Gen. Hil. Term, 2 W. 4, reg. 107, directs that it shall not be necessary that any pleadings which conclude to the country be *signed by counsel*. (x) 8thly. We have seen that by Reg. Gen. Hil. Term, 4 W. 4, reg. 1, *all pleadings*, of course including replications, shall be *delivered* and not filed. (y)

CHAP. XXII.  
II. REPLI-  
CATIONS.

A *proper conclusion* to a replication may be so important that if there be not on the face of the record of *nisi prius* an issue substantially joined between the parties the judge may refuse to try the cause; as where there was a plea of no consideration to a declaration on a bill by drawer against acceptor

Consequence of  
no similiter or  
perfect issue  
joined.

(p) By 1st general rule of Hil. T. 4 W. 4, "Every pleading shall be intitled of Title.  
"the day of the month and year when the same was pleaded, and shall bear no other  
"time or date."

(q) By 8th general rule of Hil. T. 4 W. 4, "No *venue* shall be stated in any Venue.  
"pleading, provided that in cases where local description is now required such  
"local description shall be given."

(r) The 9th general rule of Hil. T. 4 W. 4, orders that "It shall not be *necessary* Precludi non  
"in any replication or subsequent pleading intended to be pleaded in maintenance and prayer of  
"of the whole action, to use any allegation of '*precludi non*,' or to the like effect, or judgment when  
"any *prayer of judgment*; and all replications and subsequent pleadings pleaded unnecessary.  
"without such formal parts as aforesaid shall be taken, unless otherwise expressed, as  
"pleaded in maintenance of the whole action, provided that nothing herein contained  
"shall extend to cases where an estoppel is pleaded."

(s) By 12th general rule of Hil. T. 4 W. 4, "No *protestation* shall hereafter be Protestation.  
"made in any pleading; but either party shall be entitled to the same advantage in  
"that or other actions as if a *protestation* had been made."

(t) By 13th general rule, 4 W. 4, "All special traverses with an inducement of Special traver-  
"affirmative matter shall conclude to the country, provided that this regulation shall ses.  
"not preclude the opposite party from pleading over to the inducement when the  
"traverse is immaterial."

(u) By 19th general rule of Hil. T. 4 W. 4, "The plaintiff, after the delivery of Replication to a  
"a plea of payment of money into Court, shall be at liberty to reply to the same by plea of payment  
"accepting the sum so paid into Court in full satisfaction and discharge of the cause of money into  
"of action in respect of which it has been paid in, and he shall be at liberty in Court.  
"that case to tax his costs of suit, and in case of nonpayment thereof within forty-  
"eight hours to sign judgment for his costs of suit so taxed; or the plaintiff may reply  
"that he had sustained damages,' (or, 'that the defendant is indebted to him,'  
"as the case may be) to a greater amount than the said sum; and in the event of an  
"issue thereon being found for the defendant, the defendant shall be entitled to  
"judgment and his costs of suit."

(x) Jervis's Rules, 71, note (c).

(y) Reg. Mich. T. 1 W. 4, reg. 7; Exchequer Reg. Gen. Hil. T. 4 W. 4, reg. 1.

CHAP. XXII.  
II. REPLICATIONS.

and there was no replication in the record, the learned judge refused to try the cause, but struck it out of the paper, though he said if the plaintiff had replied and concluded with—"And 'this he prays may be inquired of by the country, &c.'" perhaps the "&c." might be supposed to imply a *similiter*; (z) and in a subsequent case a learned judge acted upon the last suggestion. (a)

When the defendant's plea has concluded to the country, and the plaintiff is not desirous to proceed expeditiously to trial, he may, whether or not ruled to reply, deliver a replication, consisting of what is technically called the *similiter*, viz. "And the plaintiff doth the like." And when the plaintiff's replication concludes to the country he may then deliver it in that state. But in both these cases we shall find, when considering the issue, that instead of the plaintiff's delivering the *similiter* in the first case, or his replication in the second case separately, he may add the *similiter* for the defendant, and make up the entire issue, and give notice of trial, so as to expedite the proceedings when he is ready and anxious to try.

Subscribed will be found the ordinary commencements and conclusions of replications since these new regulations. (b)

Reg. Gen. Hil.  
T. 2 W. 4, reg.  
108, dispensing  
with the rule to  
rejoin.

Formerly, although the plaintiff's replication concluded to the country it was necessary for him in the Common Pleas, be-

(x) *Rowlinson v. Roantra*, 6 Car. & P. 551; and see *Wordsworth v. Brown*, 3 Dowl. 698. *v. Nicholson*, 6 Car. & P. 712; 1 Gak. 21; 3 Dowl. 454, S. C.; 1 Chitty on Pleadings, 5th ed. 631.

(a) *Swain v. Lewis*, 3 Dowl. 700; *Clark*

(b) In the K. B. [or "C. P." or "Exchequer of Pleas."] On the day of in the year of our Lord 1835.

1. Commencement.

A. B. }  
v. } The plaintiff as to the first plea of the defendant says, that—  
C. D. }

2. *Similiter*.

A. B. }  
v. } The plaintiff as to the first plea of the defendant whereof he hath put  
C. D. } himself upon the country doth the like.

3. To part of cause of action.

A. B. } The plaintiff as to the (second) plea of the defendant says that he the  
v. } plaintiff, by reason of any thing by the defendant in that plea alleged.

4. Conclusion to the country.

C. D. } ought not to be barred from maintaining his action thereof against him the defendant, because he says that—

5. Do, with a verification.

And this he the plaintiff prays may be inquired of by the country, &c.

6. Do, with a verification to part of the cause of action in assumption with prayer of judgment.

And this he the plaintiff is ready to verify.

And this he the plaintiff is ready to verify, wherefore he prays judgment, and his damages by him sustained on occasion of the nonperformance of the promises in the said (second count or) plea mentioned to be adjudged to him.

fore he could make up the issue or give notice of trial, to give the defendant a four-days' rule to rejoin, though the practice was more expeditious in K. B.; (c) and now, by Reg. Gen. Hil. Term, 2 W. 4, reg. 108, it was ordered, "that in all special pleadings where the plaintiff takes issue on the defendant's pleading, or *traverses* the same or *demurs*, so that the defendant is not let in to allege any *new* matter, the plaintiff may proceed without giving a rule to rejoin." This regulation, preventing in many cases the necessity for a *four-day rule*, tends to expedite the cause, and save useless expense, and the plaintiff may, when his replication concludes to the country, immediately add the *similiter* and make up the issue, and give notice of trial.

In all other respects replications are to be framed as heretofore, and the rules enumerated in another work will be found to be still applicable. (d) All the recent decisions relative to those former rules, with new forms, will be found collected in the sixth edition of that work. It is however proper to observe, that the spirit of conciseness introduced by the new pleading rules should be extended to replications in all cases besides those thus expressly provided for; as for instance, in denying a prescriptive or other right of way or of common, or other rights stated in a plea, it is not necessary to repeat every word of the description of the right in the plea, but the replication may concisely deny the right by alleging "that the defendant was not nor is entitled to such way or such common of pasture as in the plea alleged," and this the plaintiff prays may be inquired of by the country, &c. (e)

Other requisites of replications.

Supposing that the plaintiff is reluctant to proceed, and the defendant is certain that the action is not sustainable, (f) he may at any time, even immediately after he has duly pleaded, rule the plaintiff to reply, which expires in four days, exclusive of the day when a copy thereof was served, (g) and Sunday or a holiday, unless the last, is to be reckoned as one of such days. (h) Before the defendant could sign judgment of non

Of compelling the plaintiff to reply or submit to non pros.

(c) Tidd, 718; Jervis's Rules, 71, note (f).

(d) 1 Chitty on Pleading, 5 edit. 609 to 691.

(e) And see a form, Bosanquet's Rules, 126.

(f) See the observations, *post*, 785, as to motions for judgment in case of a non-suit very frequently occasioning a reco-

very against a defendant, which otherwise might never have occurred, and for the same reason a rule to reply should never be given, unless it be certain that the plaintiff cannot recover.

(g) Tidd, 676; Imp. C. P. S42; Selton, 368; Dax Pr. 61; Price Pr. 244.

(h) Reg. Trin. 1 Geo. 2, Tidd, 676.

CHAP. XXII.  
II. REPLI-  
CATIONS.

pros against the plaintiff, the Reg. Gen. Trin. T. 1 W. 4, required a *demand in writing* four days before judgment could be signed; but that rule was shortly afterwards annulled by Reg. Gen. Hil. Term 2 W. 4, reg. 54, presently stated. The Reg. Gen. Hil. Term, 2 W. 4, reg. 53, orders, that "a rule to reply" *"may be given at any time whenever the office is open."* Before which rule the practice varied in the different Courts, and could only be given within a limited number of days after each term, but now it may be given at any time in the vacation, unless during the excepted days in the long vacation and close holidays. (i)

Formerly it sufficed to *enter* in the proper office a rule to reply, and it was not necessary to serve it, but then a demand of replication was required; now a copy of the rule must be *actually served*, and a demand of replication is expressly dispensed with, as the service of the rule to reply operates as a sufficient demand. (k) The Reg. Gen. Hil. T. 2 W. 4, reg. 54, orders, "that the *service* of a rule to reply or plead any "subsequent pleading, shall be deemed a sufficient demand "of a replication or such other subsequent pleading," since which rule no demand of a replication or rejoinder, surrejoinder or rebutter, is necessary.

If upon being thus ruled, the plaintiff be not ready to reply within the four days, he may from time to time take out summonses and obtain an order for such further time as the judge shall think fit. (l)

III. REJOIN-  
DERS, SURRE-  
JOINDERS,  
REBUTTERS,  
AND SURRE-  
BUTTERS.

The General Rules of Hil. T. 4 W. 4, reg. 1, 8, 9, 12 and 13, which we have just seen regulate the title of a replication, the omission of venue, the commencement and conclusion, the omission of protestation, and the direction that all traverses shall conclude to the country, *equally apply to rejoinders, surrejoinders, rebutters and surrebutters*, and no pleading in any stage that concludes to the country need be signed by counsel; (m) and it is scarcely necessary to repeat that all these must now be *delivered* and not filed. (n) Whenever the pleading in any stage, and however denominated, introduces *new matter*, it should *conclude* with a *verification*, in order that the opponent

(i) Jervis's Rules, 56, note (c).

(k) Per Tindal, C. J. in *Pound v. Lewis*,  
2 Dowl. 744; 3 M. & Scott, 210, S. C.

(l) Tidd, 676; Impey's C. P. 342.

(m) Reg. Gen. Hil. T. 2 W. 4, reg.  
107, ante, 743.

(n) Reg. Gen. Hil. T. 4 W. 4, reg. 1.

may have an opportunity of demurring or answering it, as he may be advised; but if the pleading merely *deny matter previously pleaded* by the opponent, although by a formal traverse, it must, according to the Reg. Gen. Hil. T. 4 W. 4, conclude to the country; and the form of such conclusion by a *defendant* is, "*And of this the defendant puts himself upon the country.*" And by a plaintiff, "*And this he prays may be inquired of by the country;*" and upon either of these the *similiter* is to be added in these words, "And the plaintiff (or the defendant) doth the like;" whereupon an *issue* (consisting of an affirmative and negative of some *fact*), is said to be completely joined. The next step is to have all the pleadings on each side fairly copied continuously, commencing with a statement of the time of issuing the first writ, and concluding with an award of the venire in the form stated in a subsequent chapter; and such issue may be indorsed with a proper *notice of trial* to the defendant, or such notice may be given upon a separate paper. The *nisi prius record* is then to be engrossed and *duly entered for trial*, and the *jury* are to be *summoned* to try the existence of the fact or facts disputed in the issue.

CHAP. XXII.  
III. OF RE-  
JOINDERS, &c.

*Rejoinders* are governed by the same rules as pleas, with this additional quality, that a rejoinder must not *depart* from, but adhere to the same ground of defence as that advanced by the plea, (o) and the Courts have no power to permit *two* rejoinders, as they may severally plead under the statute of Ann. (p) When a defendant is under the terms of *pleading* issuably, he must in K. B. also *rejoin* issuably, (q) though we have seen that the terms *rejoining gratis* (in general dispensing with the necessity for a four-days' rule to rejoin, and rendering it incumbent to rejoin within twenty-four hours after demand,) (r) does not extend to a joinder in demurrer. (s) The formal parts of rejoinders in the notes will show the practical application of the above rules. (t)

Rejoinders, re-  
quisites and  
forms of. (o)

(o) See in general 1 Chitty on Pleading, 5th edit. 689, 690.

(p) *Dunn v. Vacher*, 2 Stra. 908.

(q) *Ante*, 708.

(r) *Jones v. Key*, 2 Dowl. 266; *Clark*

*v. Adams*, 2 Crom. & Jer. 683; 2 Tyr. 755.

(s) *Jones v. Key*, 2 Crom. & M. 340; 4 Tyr. 238; 2 Dowl. 266.

(t) In the K. B. [or "C. P." or "Exch."]

C. D. } On the — day of —, in the year of our Lord 1835.  
ats. } The defendant, as to the replication of the plaintiff to the (first) plea of  
A. B. } the defendant, says that —

1. Commence-  
ment of rejoinder to the whole  
cause of action.

CHAP. XXII.  
IV. OF PLEAD-  
ING MATTER  
THAT HAS  
ARISEN PEND-  
ING THE AC-  
TION.

Matters in *abatement* or in *bar* arising *pending an action*, whether before or after issue joined, were always *pleadable*, subject to some restrictions; as if a feme sole plaintiff marry pending an action, or the plaintiff release the action, or the defendant become bankrupt and obtain his certificate, either of these matters are pleadable, the first in *abatement* the latter in *bar*. If the matter arose before issue joined, and before any continuances were entered on the record, they were pleaded as to the *further* maintenance of the suit, and if after then, they were termed pleas *puis darrein continuance*. (u) The Reg. Gen. Hil. T. 4 W. 4, reg. 2, having abolished the entry of continuances except the juratur ponitur in respectu, it therefore became necessary to introduce new rules respecting pleas of matter arising pending an action, and they are no longer to be termed pleas *puis darrein continuance*; thus the same rule orders, "that in all cases in which no entry of continuances, by way of imparlance, *curiâ advisari vult, vicecomes non nisi breve*, or otherwise, shall be made upon any record or roll whatever, or in the pleadings, except the juratur ponitur in respectu, which is to be retained; provided that such regulation shall not alter or affect any existing rules of practice as to the *times* of proceeding in the cause; and provided also, that in all cases in which a plea *puis darrein continuance* is now by law pleadable in *banc* or at *nisi prius*, the same defence may be pleaded with an allegation that the matter arose 'after the last pleading or the issuing of the jury process,' as the case may be. Provided also, that no such plea shall be allowed unless accompanied by an *affidavit* that the matter thereof arose *within eight days* next before the pleading of such pleas, or unless the Court or a judge shall otherwise order."

2. Commence-  
ment of rejoinder to part of  
the cause of action.

3. Conclusion  
to the country.

4. Conclusion  
with a verification to whole  
cause of action.

5. Conclusion  
with verification  
to part of cause  
of action, with  
a prayer of  
judgment.

C. D. } The defendant as to the replication of the plaintiff to the (second) pleas.  
A. B. } of the defendant, says that the defendant ought not, by reason of any thing  
by him in that replication alleged, to maintain his action thereof against  
him the defendant, because he says that—

And of this he the defendant puts himself upon the country, &c.

And this he is ready to verify.

And this he the defendant is ready to verify, wherefore he prays judgment if the plaintiff as to the said (second) count of the declaration ought to maintain his action thereof against him: the defendant.

(u) As to those pleas in general, see 1 and 6 edit. more fully; and see forms of Chitty on Pleading, 5 edit. 695 to 700, pleas, 3 ed. 1238 to 1245.



This regulation, requiring the plea with an affidavit, that the subject-matter of the plea arose *within eight days* of the day on which it is pleaded, in addition to the former requisite of an affidavit of the truth of the plea, will render it essential for a practitioner to be very expeditious in his proceedings when any matter of defence arises pending the suit. However, under the concluding terms of the rule, and with analogy to prior decisions, when it may be just that effect should be given to any new ground of defence that has recently arisen, as in the case of bankruptcy and certificate pending an action, it is probable that further time, on due application, would be granted. (x) A plea of this nature, containing new matter, must necessarily conclude with a verification, and must be signed by counsel, and have the prescribed affidavit annexed, and be *delivered* as all other pleadings in the ordinary course of an action. In all respects, where not expressly or impliedly affected by the above rule, it would seem that the prior rules and decisions relative to pleas puis darrein continuance will be still applicable. (y) The form of the plea of matter that has arisen *before* the issuing of jury process may be as suggested in the note. (z)

(x) *Willoughby v. Wilkins*, 2 Smith's 698.  
R. 396; 1 Chitty on Pleading, 5th edit. (y) As to these see references *supra*.

(z) In the K. B. [or "C. P." or "Exchequer."]  
C. D. } On the — day of —, in the year of our Lord 1835. Plea after last  
ats. } And now at this day comes the said C. D., by his attorney aforesaid, pleading in  
A. B. } and saith that the said A. B. ought not further to maintain his action band.  
against him the said C. D., because he saith that *after the pleading of the last pleading in this suit*, that is to say, after the said — day of —, 1835, on which the said plaintiff [or "defendant"] pleaded his said plea [or "replication" or "rejoinder, &c."] and before this day, and within eight days now last past, to wit, on the — day of —, A. D. 1835, [here state the subject-matter of the plea;] and this he the said C. D. is ready to verify, wherefore he prays judgment if the said A. B. ought further to maintain his action thereof against him, &c. [Signature of Counsel.]  
Add an affidavit of the truth of the above plea, and that the matter thereof arose within eight days, as follows:—

In the K. B. [or "C. P." or "Exchequer."]

Between { A. B. Plaintiff,  
and  
C. D. Defendant. Affidavit of truth of plea.

C. D. of —, butcher, the defendant in this cause, maketh oath and saith, that the plea hereunto annexed is true in substance and fact, and that the matter thereof arose within eight days now last past.

Sworn, &c.

(Signed) C. D.

CHAP. XXII.  
V. OF SPECIAL  
CASES FOR THE  
OPINION OF THE  
COURT. (a)

3 & 4 W. 4, c.  
42, s. 25. Power  
to state a Spe-  
cial Case with-  
out proceeding  
to trial.

V. Immediately that all the pleadings have terminated in an *issue* or *issues*, the parties may, if they can agree upon a *statement of the facts*, obtain the decision of the Court in which the action is depending, under the excellent enactment in 3 & 4 W. 4, c. 42, sect. 25, without incurring the expense of a trial. That act enacts "that it shall be lawful for the parties in any *action* or *information after issue joined*, by consent and by *order of any of the judges* of the said superior Courts, to *state the facts of the case in the form of a special case for the opinion of the Court*, and to agree that a judgment shall be entered for the plaintiff or defendant by confession, or of *nolle prosequi*, immediately after the decision of the case, or otherwise as the Court may think fit; and that judgment shall be entered accordingly." This enactment is quite new, for before it a special case could only be stated *after a trial at law*, upon facts then proved, or by authority of a Court of equity;—a jurisdiction already partially considered. (b) Excepting indeed that sometimes the Court, upon argument of a special rule, would direct the facts to be stated in a special case, so as to be more distinctly before the Court; and in the meantime the rule nisi was enlarged. Before this enactment any arrangement or agreement between parties to a suit to obtain the decision of the Court, otherwise than by *due course of practice*, was considered irregular, and censurable. (c) And where an attorney, although without any corrupt or unworthy motive, prepared a *special case*, in order to obtain the opinion of the Court upon a will of the testator, and suggested facts which had no foundation, it was held that he was guilty of a contempt, and he was fined in 30*l.* for his offence. (d)

It will be observed that the above statute expressly requires that the *issue shall have been joined before a case can be stated*; and this because until then the parties have not formally agreed upon the *point* to be disputed between them. (e) When the parties have agreed upon the facts, so as to be certain that no dispute can arise upon the terms of the special case, *the order of a single judge at chambers* may be obtained as upon consent for the statement of the case, so as to secure the due performance by the plaintiff and defendant of the

(a) See in general 2 Arch. K. B., 4th ed. 540, &c.; and T. Clitty's Forms, 350 to 353; and the observations of Tindal, C. J. on this act, in *Gibbens v. Buisson*, 1 Bing. N. C. 291.

(b) *Ante*, vol. ii. 350, 351.

(c) 9 East, 381.

(d) *In re Elsom*, 3 Bar. & Cress. 597; 5 Dowl. & R. 389. Parties by agreement to try a question cannot try it under an inappropriate form of action, 9 East, 381.

(e) Jervis's Rules, 205, note (r).

terms according to the statute. (f) And then the case is to be prepared in substance the same as heretofore after a trial; and unless the particular language of the pleadings be important, a very concise statement of them will suffice, (g) and the agreed facts will constitute the most important parts of the instances. The case is then to be signed by counsel on each side; and the rest of the proceedings will be the same as on other special cases. Copies of the special case are to be delivered to each of the judges, the same as demurrer books, and the other proceedings are much the same as upon a demurrer.

There does not however appear to be any power in the above statute of turning the case into a special verdict, so as to carry the question into a Court of Error; and therefore in a case of great importance, or where either party acts as a trustee, or represents a public body, it may be advisable to proceed to trial even upon agreed facts, and then to agree to a special case, with liberty for either party to turn the case into a special verdict, so as to obtain the opinion of a Court of Error. (h)

CHAP. XXII.  
V. OF SPECIAL  
CASES FOR THE  
OPINION OF  
THE COURT.

(f) See form of order, T. Chitty's Forms, 350, 351, 352.

(g) *Id. ibid.*; and see form of such special cases in *Gibbens v. Buisson*, 1 Bing. N. C. 283; *Shepherd and others v.*

*Keatley*, 1 Cr. M. & Ros. 117. But the pleadings may be very important, see observation of Alderson, B. *id.* 128.

(h) *Archb. of Canterbury v. Robertson*, 3 Dowl. 78.

## CHAPTER XXIII.

## OF DEMURRERS, AND RECENTLY IMPROVED PRACTICE RESPECTING THEM.

I. Of demurrers in general, and when or not proper or advisable .....	752	Improvements in the practice relating to demurrers .....	756
II. The recent rules respecting demurrers .....	755	IV. Proceedings on argument ..	761
III. Summary of the recent im-		V. Of withdrawing demurrer or amending.....	761
		VI. Of costs .....	762

CHAP. XXIII.  
OF DEMUR-  
RERS.

I. Of demurrer, in general, and when or not proper or advisable.

WHEN a declaration, plea, replication, or subsequent pleading is defective *upon the face of it*, (or with reference to the *prior pleading in the same action*, as in the instance of a *departure*,) but never merely in respect of an *extrinsic fact* or objection, the opponent *may demur* (unless he be under such terms of pleading issuably as to preclude him from taking a mere technical objection.) (a) And here must be constantly kept in view the distinctions between those defects which consist in the non-observance of a rule of *practice* and those which are deviations from the *principles or rules of pleading*; the former are only *irregularities*, to be objected to on summons or motion, and only the latter can be objected to by *demurrer*. Thus we have seen that the rule Hil. T. 4 W. 4, reg. 1, prescribes that declarations and all pleadings shall be *intituled* of the day when they are in fact pleaded; (b) and that Reg. Gen. Mich. Term, 3 W. 4, reg. 15, orders that declarations shall have one of the commencements thereby prescribed; (c) and Reg. Gen. Hil. T. 4 W. 4, reg. 8, orders that neither declarations nor subsequent pleading shall repeat the *venue* in the body; and yet if a declaration or plea (d) have no date or title, or an improper date, or a declaration have an improper commencement, or improperly repeat the venue in the body, (e) neither of those defects can be objected to by *demurrer*; but after requiring the opponent to amend the objectionable part, the only proceeding is by summons by a judge to compel the amendment, or to set aside the proceeding for *irregularity*.

However obnoxious to suitors, all technical objections that occasion increased trouble, expense, and delay may be, it is es-

(a) *Ante*, 706, as to pleading issuably.

(b) *Ante*, 463, 464.

(c) *Marshall v. Thomas*, 3 Moore & Scott, 98; 9 Bing. 678.

(d) *Neal v. Richardson*, 3 Dowl. 89.

(e) *Fisher v. Snow*, 3 Dowl. 71. *Townsend v. Gurney*, *id.* 168.

CHAP. XXIII.  
I. OF DEMUR-  
RERS.

essential that *demurrers*, not only on account of *substantial* but even of mere *technical defects*, should be tolerated and given effect to; because if the latter were overlooked pleadings would soon be in a *state of confusion and uncertainty*, and it would be scarcely possible to know what ground of action or what defence the party pleading has intended to state. On this ground the Courts have sometimes even ordered a plaintiff to amend his *inartificial pleading* at his own expense, although at the same time they have pronounced that the defect was not demurrable. (f) The principal statute for the amendment of the law, 4 Ann. c. 16, sect. 1, at the same time that it aids most technical objections, unless they be *specially assigned as causes of demurrer*, advert to numerous technical defects that continue to be grounds of special demurrer, if so particularly pointed out.

When the facts of a case are as advantageously pleaded as they would be proved on a trial, then, supposing that they do not disclose a sufficient ground of action, it may be advisable for the opponent to demur; because if a defendant admit such facts, but deny that the legal result is in favour of the plaintiff, then it is advisable to demur unless the defence be merely for time, because the argument and judgment would settle the substantial rights of the parties, without incurring the useless expense of a trial; and even in a court of equity, in that view, a demurrer is encouraged when it would bring the substantial question between the parties to a speedier conclusion; and on that account costs are not given in that Court to a party who has omitted to demur when he ought to have adopted that course. (g) On the other hand, however, as respects demurrers, Lord Coke advises a party never to rely upon a *point of law* when the *facts* are in his favour; and that therefore a party who knows that an issue joined on facts must be found in his favour, should never demur. (h) As an instance in favour of a demurrer, we will suppose a declaration on a contract relating to a sale of land or against a guarantee, and that the defendant has *pleaded* that there was no sufficient signed written contract, the plaintiff should reply, stating there was a sufficient contract as required by the statute, and *then set out such contract verbatim* in his replication. In this case the best course for all parties will be to demur, upon which the legal

(f) 1 Bos. & Pul. 366

(g) *Jones v. Davids*, 4 Russell, 277.

(h) See the observations of Tindal, C. J. in *Bramah v. Roberts*, 1 Bing. N. C.

483, referring to Lord Coke's observations in *Butler v. Baker's case*, 3 Coke, 25.

CHAP. XXIII.  
I. OF DEMUR-  
RERS.

sufficiency of the contract may be fully discussed and determined without incurring the expense of a useless trial upon facts not disputed. (i)

Sometimes, as where if an objection to pleading on the part of a defendant be suffered to pass unnoticed, he would gain some important advantage on the trial, or the *plaintiff* be otherwise prejudiced, it may be essential that the plaintiff should require him to amend, and if he decline, then a demurrer may be indispensable; but in general, as a demurrer operates in delay of a plaintiff, it is not advisable for *him* to demur; and sometimes pleadings have been drawn on the part of a defendant purposely to induce the plaintiff to demur, by which means the proceedings against the defendant have been suspended during the ensuing vacation. In general, therefore, when a plaintiff can safely take an *issue in fact* on the defendant's pleas, he should do so in preference to a demurrer.

It is principally on behalf of a *defendant* and for the mere purpose of delay that demurrers take place; and the practice has been for a defendant first to plead some intricate or new invented sham or false plea, requiring consideration and time to prepare a proper replication; and then, although there were no well founded objection to the replication, the course before the late rule was to demur, upon which some time was occupied in drawing the joinder and in endeavouring to obtain the judgment of the Court. It will be found that the recent rule relating to demurrers is particularly salutary for the prevention of delay, by compelling the party demurring to *point out in the margin of his demurrer some point* on which he intends to rely in support of his demurrer, and if such marginal point be omitted, or if the objection be frivolous, i. e. *manifestly untenable*, the Court or even a single judge may in term or vacation give leave to sign judgment as for want of a plea. (k) So that now if a defendant demur for delay and neglect to state any ground of demurrer in the margin, or state one that is insufficient, a plaintiff may, by leave of a judge, in vacation, immediately obtain judgment by default, a regulation which has in a great measure put an end to sham or unfounded demurrers merely for the purpose of delay; and where the party demurring has strictly complied with the rule, yet if the point raised

(i) *Hewes v. Armstrong*, 1 Bing. N. C. 761.

(k) From *Underhill v. Harvey*, 3 Dowl. 493, it seems that though a judge at chambers has refused to treat a demurrer as frivolous (as that a declaration at the

suit of a surviving partner did not aver the death of the partner) a motion may afterwards be successfully made to the Court, though they gave leave to withdraw the demurrer.

*be simple* and not likely to occupy much of the time or consideration of the Court, they will, when the demurrer is late in the term, authorize it to be set down for argument even on the last day of term, and will not permit the defendant to withdraw his demurrer and plead the general issue, when it would be too late for the plaintiff to try at the sittings after term. (l)

CHAP. XXIII.  
I. OF DEMUR-  
RERS.

It would be beyond the object of this work to enter into a full consideration of demurrers, which involve a knowledge of the whole science of pleading as well in substance as in form. We shall here only notice in regular order the recent improvements in the *practice* relating to demurrers. These have been principally effected by the *pleading* rules of Hil. Term, 4 W. 4, reg. 14, prescribing a concise form of demurrer and joinder, and by the practice rules of Hil. Term, 4 W. 4, reg. 1, 2, 3, 4, 5, 6, & 7. (m)

II. The recent  
rules respecting  
demurrers.

(l) *Wilson v. Tucker*, 3 Tyr. 938; 2 Dowl. 83.

(m) Reg. Gen. pleading Hil. Term, 4 W. 4, reg. 14, orders that "The form of a demurrer shall be as follows:—  
" C. D. } In the ——— On the ——— day of ———, A. D. 1835.  
" ats. }  
" A. B. } The said defendant by ——— his attorney [or 'in person, &c.' 'or  
" plaintiff' ] says that the declaration [or 'plea,' &c.] is not sufficient in law."

Concise form of  
a general demur-  
rer prescribed.

The special causes are usually thus introduced at the conclusion of the general demurrer:—

"And the defendant [or 'plaintiff'] according to the statute in such case made and provided, states and shows to the Court here the following causes of demurrer to the declaration [or 'first count of the declaration,' or 'plea,' &c.] that is to say, that [here state the particular causes and conclude thus:] And also that the declaration [or 'first count,' or 'plea,'] is in other respects uncertain, informal, and insufficient," &c.

Form of special  
demurrer.

The form of a joinder in demurrer shall be as follows:—

" A. B. } In the ——— On the ——— day of ———, A. D. 1835.  
" ats. }  
" C. D. } The said plaintiff [or 'defendant'] says that the declaration [or 'plea,'  
" &c.] is sufficient in law."

Prescribed form  
of joinder in  
demurrer.

The practice rules, Reg. Gen. Hil. Term, 4 W. 4, order as follows:—

1. No demurrer nor any pleading subsequent to the declaration shall in any case be filed with any officer of the Court, but the same shall always be delivered between the parties. Demurrers, &c. to be delivered.

2. In the margin of every demurrer, before it is signed by counsel, some matter of law intended to be argued shall be stated, and if any demurrer shall be delivered without such statement, or with a frivolous statement, it may be set aside as irregular by the Court or a judge, and leave may be given to sign judgment as for want of a plea. Provided that the party demurring may at the time of the argument insist upon any further matters of law of which notice shall have been given to the Court in the usual way. In margin of demurrer a tenable objection to be stated before signed by counsel. But on argument other points may be urged.

3. No rule for joinder in demurrer shall be required, but the party demurring may demand a joinder in demurrer, and the opposite party shall be bound within four days after such demand to deliver the same, otherwise judgment. No rule to join in demurrer requisite.

CHAP. XXIII.  
I. OF DEMUR-  
RERS.

III. Summary  
of the recent  
improvements  
in the practice  
relating to de-  
murrers, &c.

The *recent improvements* in the practice relative to demurrers may be thus enumerated :

1st. A demurrer is to be intituled as all other pleadings of the *very day* on which it is pleaded, i. e. delivered.

2nd. It should be framed in the above concise form prescribed by the pleading rules of Hil. Term, 4 W. 4, reg. 14, thereby avoiding the great verbosity to be found in the previous forms: (n)

3rd. Every demurrer must, before it is signed by counsel, have stated, in the margin at least, one *arguable objection*; the expression in the rule is, that if the objection be omitted or be *frivolous*, then on application to the Court or a judge it may be set aside as irregular and leave given to sign judgment as for want of a plea. The term "*frivolous*" has been construed to mean *untenable*, and probably any point so questionable as to bear argument would be construed not to be frivolous; and where in an action at the suit of two plaintiffs the declaration inadvertently stated the defendant to be indebted to the *plaintiff*, (using the singular instead of the plural,) and the margin of the demurrer stated that to be ground of objection, the

No signature of counsel to a joinder in demurrer. The issue or demurrer book not to be made up by officer of Court.

No rule for a concilium; but demurrer, &c. to be set down for argument, and notice thereof given. Prescribing due delivery of demurrer books, special cases, and special verdicts to the judges.

4. To a joinder in demurrer no signature of a serjeant or other counsel shall be necessary, nor any fee allowed in respect thereof.

5. The issue or demurrer book shall on all occasions be made up by the suitor, his attorney, or agent, as the case may be, and not as heretofore by any officer of the Court.

6. No motion or rule for a concilium shall be required, but demurrers, as well as all special cases and special verdicts, shall be set down for argument at the request of either party with the clerk of the rules in the King's Bench and Exchequer and a secondary in the Common Pleas, upon payment of a fee of one shilling, and notice thereof shall be given *forthwith* by such party to the opposite party.

7. Four clear days before the day appointed for argument the plaintiff shall deliver copies of the demurrer book, special case, or special verdict, to the Lord Chief Justice of the King's Bench, or Common Pleas, or Lord Chief Baron, as the case may be, and the senior judge of the Court in which the action is brought; and the defendants shall deliver copies to the other two judges of the Court next in seniority, and in default thereof by either party the other party may on the day following deliver such copies as ought to have been so delivered by the party making default, and the party making default shall not be heard until he shall have paid for such copies, or deposited with the clerk of the rules in the King's Bench and Exchequer, or the secondary in the Common Pleas, as the case may be, a sufficient sum to pay for such copies.

The concluding part of Reg. Gen. Hil. T. 2 W. 4, reg. 59, orders that "in all cases" when the *defendant demurs* to the plaintiff's declaration, replication, or other subsequent pleading, the defendant's attorney, or the defendant, if he plead in person, "shall be obliged to accept notice of executing a writ of inquiry on the back of the joinder in demurrer; and in case the defendant pleads a plea in bar, or rejoinder, &c. to which the plaintiff demurs, the defendant's attorney, or the defendant, if he plead in person, shall be obliged to accept such notice of executing a writ of inquiry" on the back of such demurrer. (\*)

(\*) Jervis's Rules, 58, n. (e).

(n) *Ante*, 755, note (m).



Court refused a rule for setting aside such demurrer. (o) So where to a declaration *in debt* on a promissory note there was a demurrer, and the margin stated the objection to be that it did not appear that the note was for value received, the Court refused to set aside the demurrer as frivolous, it being considered an arguable point whether an action of debt is sustainable unless it appear that the note contains those words. (p) The point must also be so stated as to communicate the ground on which the objection is founded, and not be as general as a general demurrer itself is; and therefore if the marginal point of demurrer to a plea of justification or excuse of a libel be "that the matters disclosed in the plea contain *no justification in law to the libel*," this is *too general*; but the Court discharged the rule for setting aside the demurrer, upon the plaintiff undertaking to amend the marginal note, the costs to be costs in the cause, and if the plaintiff did not comply, then the defendant to be at liberty to sign judgment. (q)

It is stated that a majority of the judges have recently considered, that although the rule in *words* includes *every* demurrer, yet it only extends to *general* demurrers, and not to *special* demurrers, where the cause or ground of objection is stated in the demurrer itself; at least that it suffices to refer in the margin of a special demurrer to the causes of the demurrer stated in the body of it. (r) And the rule requiring a marginal statement does not extend to a demurrer to any proceedings where the King is concerned. (s) And although when the marginal statement is improperly omitted, the opponent may apply to set it aside for irregularity, yet if he neglect to do so, the omission affords no objection on the *argument* of the demurrer on any point not stated in the margin. (t) Reg. Gen. Hil. T. 4 W. 4, reg. 9, contains a regulation affecting writs of error, requiring a written notice of some particular ground of error intended to be argued, and power for the Court or a judge, upon summons, to order execution to issue, if he think the objection frivolous; (u) and under that rule it was held, that where the Court had previously granted a rule nisi for arresting the judgment, and which rule was afterwards discharged without discussion, the same objections might be stated in the margin of the assignment of errors, and having been sanctioned in the

(o) *Tyndall v. Ullesherne*, 3 Dowl. 2;  
*Kinnear v. Keane*, 3 Dowl. 154.

(p) *Creswell v. Crisp*, 2 Dowl. 635;  
*Lyons v. Cohen*, 3 Dowl. 243.

(q) *Ross v. Robeson*, 1 Gale, 102; 3  
Dowl. 779.

(r) 2 Arch. K. B. 4th ed. 550, *sed*  
*quære*.

(s) *The King v. Wollett*, 3 Dowl. 694.

(t) *Lacey v. Umbers*, 3 Dowl. 732.

(u) *Robinson v. Day*, 2 Dowl. 501.

CHAP. XXIII. first instance with the approbation of the Court in granting the rule nisi, could not be deemed frivolous. (x)

I. OF DEMUR-  
RERS.

If the defendant be under terms of *pleading issuably*, he should not demur *specially*, even to a double replication, without leave; (y) but which he would probably obtain in case the plaintiff should refuse to amend his replication on request. (z) When not under such terms, it may be advisable to assign specially even substantial objections. We have in a prior page suggested some objections to a demurrer on a mere technical ground. (a)

4. Every *demurrer*, whether general or special, must be *signed* by a serjeant or counsel. (b)

5. The Practical Reg. Gen. Hil. Term, 4 W. 4, reg. 1, directs that no demurrer shall be filed, but shall be *delivered*.

6. The Practical Reg. Gen. 4 W. 4, reg. 3, directs that there shall not be any rule to join in demurrer, but merely a demand; and after waiting four days, if the joinder be not delivered, the party who demurred may sign judgment.

7. The Pleading Reg. Gen. Hil. Term, reg. 14, we have seen, prescribes a very concise form of joinder in demurrer. If demurrer books be delivered by a plaintiff without a proper joinder, the Court will not hear the argument; and if the defendant appear by counsel to argue the demurrer, he will not be entitled to any costs. (c)

8. Reg. Gen. Hil. T. 4 W. 4, reg. 4, orders, that a joinder in demurrer need *not be signed*, nor shall any fee in respect of any such signature be allowed.

9. Reg. Gen. Hil. T. 2 W. 4, reg. 44, orders, that if a defendant, after craving oyer of a deed, omit to insert it at the head of his plea, the plaintiff, in making up the issue, or *demurrer book*, may insert it for him; but the costs of such insertion shall be in the discretion of the taxing officer. (d)

10. We have seen that the Reg. Gen. Hil. T. 3 W. 4, reg. 59, (e) enables a plaintiff to expedite the suit by *indorsing* on *his joinder* in demurrer a *notice of inquiry*, and when the plaintiff demurs, he is authorized to give notice of inquiry on the back of the demurrer book, so that in the event of judgment for the plaintiff on demurrer, the execution of the inquiry is greatly expedited. (f)

(x) *Gardner v. Williams*, 3 Dowl. 796.

(y) *Gisborne v. Wyatt*, 1 Gale, 35; 3 Dowl. 505, S. C.; ante, 706, 7.

(z) *Id. ibid.*

(a) *Ante*, vol. iii. 77, 78.

(b) Reg. Easter Term, 18 Car. 2, K.B.

(c) *Howorth v. Hubbersty*, 5 Dowl. 457.

(d) *Jervis's Rules*, 54, note (i).

(e) *Ante*, 756, in note.

(f) *Jervis's Rules*, 58, note (i).

11. The demurrer book is to be made up by the suitor, and not as heretofore, by any officer of the Court, Reg. Gen. Hil. T. 4 W. 4, reg. 5. CHAP. XXIII.  
I. OF DEMUR-  
RERS.

12. In making up the demurrer-book, all the pleadings upon which an issue *in fact* has been joined, or unnecessary to be stated as regards the demurrer, are to be omitted. (g)

13. The Reg. Easter T. 18 Car. 2, ordered, that the copies of the pleadings in the demurrer-books delivered to the judges shall state the names of the counsel who signed each pleading, as well on behalf of the plaintiff as of the defendant.

14. By Reg. Gen. Hil. T. 48 G. 3, in C. P., (h) the objections intended to be relied upon before the delivery of the demurrer books to the judges, are to be stated in the margin by the party demurring; and if each party intend to take objections to the pleadings of the other, each should take care that the points intended to be made *on both sides* be stated in the margin of all the four demurrer-books, (i) or at least each party should deliver a statement of his objections, and the day of argument should be set down on the outside of each book. (k) In King's Bench, Reg. Easter T. 2 Jac. 2, and Hil. T. 38 G. 3, require that the objections intended to be insisted upon be marked by the party demurring in the margin of the books he delivers, and he should on the same day leave a copy of such grounds of demurrer with the two judges to whom he does not deliver books. (l) It would considerably facilitate the progress of business and relieve the judges frequently from trouble, if the respective counsel would agree upon a statement of the objections intended to be argued on *both sides*, as in C. P., and even add references to the authorities proposed to be cited, and to deliver such statement signed by them with all the demurrer books. (m)

15. No motion or rule for a consilium is to be given as heretofore; but the party wishing to expedite the argument and determination of the demurrer, is, according to Reg. Gen. Hil. T. 4 W. 4, r. 6, to set down the demurrer for argument with

(g) 4 Tyr. 311; *Jones v. Roberts*, 2 Dowl. 374; Reg. Hil. T. 1828, K. B.; 7 Bar. & Cres. 642; Reg. Hil. T. 8 & 9 G. 4, C. P.; 4 Bing. 549; 1 Moore & P. 401; Reg. Mich. T. 9 G. 4, Exchequer; Dax's Pr. 71.

(h) 1 Taunt. 203; *Clarke v. Davis*, 7 Taunt. 72.

(i) *Clarke v. Davis*, 7 Taunt. 72. In *Darling v. Gurney*, 2 Dowl. 104, it was considered that in the Exchequer, unless

an objection to previous pleadings not demurred to be noticed in margin of demurrer-book, the defendant cannot avail himself of it in argument of the demurrer, unless it would be ground of error.

(k) Barnes, 164; Tidd, 739.

(l) *Appleton v. Binks*, 1 Smith, 361; Tidd, 728.

(m) See Chitty's Summary Practice, 144 to 148.

CHAP. XXIII. the clerk of the rules in K. B. and Exchequer, or secondary in  
 I. OF DEMUR- C. P., upon paying 1s., and he is forthwith to give notice  
 RERS. thereof to the opposite party.

16. The Reg. Gen. Hil. T. 4 W. 4, reg. 7, contains explicit directions respecting the delivery of the copies of the demurrer-books to the judges four clear days before the day appointed for argument; and if one side neglect to deliver his demurrer-books to the judges, the other side should do so for him, and then he will be entitled to judgment, but otherwise the case will be struck out; (n) and a party seeking to make his opponent pay the costs of copies of demurrer-books, pursuant to the above-mentioned rule, must deliver them on the day after the time for his opponent's delivering of them expires, (o) and if he delay such delivery until the second day after, he will not be entitled to costs before argument, though he may have delivered all the copies in time for argument. (o) Before the rule Hil. T. 4 W. 4, it was held in the Court of Exchequer that it was too late to deliver paper books on Saturday evening for an argument on a Monday morning, and the case was therefore struck out and ordered to be put in the next paper. (p)

IV. PROCEED-  
 INGS ON  
 ARGUMENT. (q)

On argument, we have seen that unless the objection, even to prior pleadings, as well as the pleading demurred to, be stated in the margin of the *demurrer-book*, neither party will be permitted to avail himself of it, (r) at least there are express rules to that effect in K. B. and C. P., and the same practice prevails in the Exchequer, though if the defect be so substantial as to constitute ground of error, the Court will sometimes permit an amendment. (r) The rule requiring the margin of the *demurrer* to state an arguable objection, does not supersede the prior rule or practice requiring the demurrer-book to state all the objections on each side, which must be carefully observed. But it is not a sufficient objection to a demurrer being argued, that the point intended to be raised was not stated in the margin of the *demurrer*, for that rule only enables the opposite party to apply to set aside the demurrer. (s)

(n) *Abraham v. Cook*, 3 Dowl. 215; 9 Legal Observer, 237.

(o) *Fisher v. Snow*, 3 Dowl. 27.

(p) *Darker v. Darker*, 2 Dowl. 88; and see *Britten v. Britten*, 2 Dowl. 239.

(q) See suggested new arrangement in Exchequer as to two distinct lists, one for

demurrer-books intended to be argued, and another of those not to be argued, *Harvey v. King*, 3 Dowl. 750.

(r) *Ante*, 756; *Darling v. Gurary*, 2 Dowl. 104.

(s) *Lacey v. Umbers*, 3 Dowl. 732.

In general, if the Court intimate that a party had better amend, but his counsel decline and persist in arguing the point, and the Court are about to give judgment against him, leave to amend will not afterwards be given, unless indeed on behalf of a defendant, when he produces a very distinct affidavit of a good defence on *the merits*; at the same time the Court *may*, and sometimes will, give leave to amend even after judgment.<sup>(t)</sup> And where a defendant, to a declaration on a bill, pleaded that to the knowledge of the holder, it was negotiated by fraud, and the plaintiff replied that he had notice of the fraud, and that the bill was indorsed to him for a good consideration, without stating what in particular, the Court, after argument, having decided that the replication was sufficient, refused the defendant permission to withdraw his demurrer and rejoin, even on the terms of paying the amount of the bill into Court.<sup>(u)</sup> Hence in general, when counsel in support of a demurrer have a strong intimation that the judgment will probably be against him, it is most prudent not to endanger his client's interest by persisting in arguing the case; and if it be intimated that the pleadings demurred to cannot be sustained, the counsel retained to argue in support of them should pray leave to amend, if they be capable of amendment as regards the facts.<sup>(x)</sup> In a recent case, the Court allowed a defendant to amend his plea after judgment on demurrer, upon an affidavit that material facts had come to his knowledge after such judgment, though it was insisted that it was always incumbent on a party to apply to amend it at the time of argument and before judgment.<sup>(y)</sup>

Where a defendant pleaded a frivolous demurrer so late in the term that there was not sufficient time to set it down for argument, and a motion was made to set it aside, the Court would only let the defendant in to plead on an affidavit of merits, and paying the costs of the demurrer and of the application.<sup>(z)</sup> And in another case, where a demurrer was frivolous, and a motion was made to set it aside, the Court granted a rule for that purpose to be absolute, unless cause was shown *on a particular day*.<sup>(a)</sup> When a rule of that nature is granted, it should be drawn up on reading the pleadings.<sup>(b)</sup> In a re-

CHAP. XXIII.  
I. OF DEMUR-  
RERS.

V. OF WITH-  
DRAWING DE-  
MURRER, OR  
AMENDING  
UPON THE  
COURT'S INTI-  
MATION.

(t) Per Tindal, C. J. in *Bramah v. Roberts*, 1 Bing. N. C. 483.

(u) *Id. ibid.*

(z) In cases of this nature, the principal attorney should attend the Court at the time a demurrer is likely to be brought on for argument, so as to be in communication with his counsel, when it

may become necessary to act upon a doubtful course of proceeding.

(y) *Atkinson v. Baynham*, 1 Bing. N. C. 740.

(z) *Underhill v. Hurney*, 3 Dowl. 493.

(a) *Kinnear v. Keane*, 3 Dowl. 134.

(b) *Heworth v. Hubbersty*, 3 Dowl. 453.

CHAP. XXIII.  
I. OF DEMUR-  
RERS.

---

cent case in the Exchequer, that Court intimated the intention to introduce a new rule in that Court, and that in future there should be two lists of demurrers, viz. one of those intended to be argued, and the other of those not to be argued; and that with regard to the latter, the necessity for delivering paper books should not apply, and by which expedient the useless expense of delivering four demurrer books would be saved, except when the case is really to be argued. (c)

VI. OF COSTS  
OF DEMURRER,  
&c.

17. The 3 & 4 W. 4, c. 42, sect. 34, enacts, "that where judgment shall be given either for or against a plaintiff or demandant, or for or against a defendant or tenant, upon *any demurrer joined, in any action whatever, the party in whose favour such judgment shall be given, shall also have judgment to recover his costs in that behalf.*" This very general and comprehensive enactment prevents the recurrence of many previous doubts and difficulties, (d) and constitutes a strong inducement for a defendant to demur when his ground is quite secure, and even for a plaintiff to demur to a plea when he is advised that the decision must be in his favour.

---

(c) *Harvey v. King*, 3 Dowl. 730.

(d) *Micklam v. Bala*, 8 Bar. & Cres. 642; *Forbes v. Gregory*, 1 Dowl. 679.

## CHAPTER XXIV.

## OF THE ISSUE AND NOTICE OF TRIAL.

I. OF THE ISSUE, &c. ....	763	To whom to be given ....	778
General observations relating to .....	ib.	Of continuing notice of trial .....	779
Who to make up the issue .....	764	Of countermanning notice of trial .....	780
Time of making up and delivering the issue....	ib.	Of fresh notice of trial, when necessary .....	781
Form of the issue .....	765	Conduct of defendant's attorney, when an insufficient issue or notice of trial has been served ..	ib.
Trial of issues and suggestions before the sheriff..	770	III. OF MOTIONS FOR COSTS OF DAY FOR PLAINTIFF NOT TRYING .....	782
Of the defendant's returning the issue when defective .....	ib.	IV. OF MOTIONS FOR JUDGMENT AS IN CASE OF NON-SUIT .....	784
Of the defendant's ruling the plaintiff to enter the issue .....	771	In general .....	ib.
Of the plaintiff's entering the issue .....	772	Reasons for and against that proceeding ....	785
II. OF NOTICE OF TRIAL, &c. 773		The practice as to time of moving, &c. ....	786
When requisite .....	ib.	What a sufficient excuse .....	791
Time of giving it .....	ib.	What not .....	792
Time to be thereby given to defendant .....	775	Of peremptory undertakings .....	793
What in general ....	ib.	Of enlarging same ....	794
What short notice of trial .....	776		
Form of notice of trial....	777		

NOTWITHSTANDING each party to an action has delivered to his opponent fair and complete copies of his pleadings, so that the plaintiff and defendant must be in possession of all that has been pleaded on each side, yet by the long established practice of the Courts, before either can proceed to trial there must be *made up and delivered* to the opponent an entire copy of all the pleadings in consecutive order, called *The Issue*; and, moreover, a copy of such issue, or an incipitur thereof, must be *entered on* what is termed an *issue roll*, before the record of nisi prius can be signed, sealed, or passed by the proper officer of the Court, and, consequently, before any cause can be tried; proceedings, more especially when the pleadings are lengthy, that considerably increase the expense of an action, and in that view might be spared. (a) The rule of Mich. Term, 5 Ann. recites that such entries of the issues had been neglected by attorneys, to *the great damage and loss of their clients*; but the rules of Mich. T. A. D. 1654, Easter T. 5 W. & M. and Hil. T. 11 G. 1, in C. P. more candidly assign another reason, viz. that the neglect of attorneys to enter the issues "*greatly defrauded the officers of the Court of their just and due fees.*"

CHAP. XXIV.  
ISSUE AND NOTICE OF TRIAL.

General observations relative to an issue.

(a) Reg. Mich. T. 5 Ann. K. B.; Reg. Easter T. 5 W. & M. C. P.

CHAP. XXIV.  
ISSUE AND NOTICE OF TRIAL.

It is obvious that a distinct *record* of *nisi prius*, stating all the pleadings, is indispensable, so that the judge and jury may see upon the face of a duly authenticated document what is the question to be tried; and perhaps it may be desirable, (except as regards expense,) that an *issue*, containing all the pleadings, should be delivered by the party about to try the cause to his opponent, so that the exact state of the pleadings to be tried may be certain; or that if there be any variance or other imperfection in such supposed copy of the pleadings, the latter may forthwith be returned and amended; and it may also be convenient that, to prevent future disputes, an exact copy of such issue be entered and kept by a public officer; so that the loss of any part of the previously detached pleadings may not, after the issue has been accepted and retained, constitute any ground of discussion. The issue, however, is so far mere matter of form, that a notice of trial may be delivered by a plaintiff with a *replication*, or other subsequent pleading concluding to the country, even *before the issue has been formally joined.* (b)

Who to make  
 up the issue.

The general practice rules of Hil. T. 4 W. 4, reg. 5, orders that "the issue or demurrer book shall on all occasions be made up by the suitor, his attorney or agent, and not, as heretofore, by any officer of the Court;" which rule assimilates the practice of K. B. to that in C. P., and saves the great expense, when the clerk of the papers in K. B. received 8d. per folio of seventy-two words each for the whole paper book, and 4d. per folio for all pleadings subsequent to the declaration. (c) The issue is in general prepared by the *plaintiff's attorney*; but when the *defendant* is desirous of expediting the suit (as very generally occurs in actions of replevin) his attorney may make up the issue. (d)

Time of making  
 up and deliver-  
 ing the issue.

As the *issue* is a transcript of *all* the pleadings, concluding with an affirmative and negative, or *e converso*, it will follow that in general the issue should not be made up until after it is certain that *all* the pleadings have already stated an affirmative and negative. But in order to expedite proceedings on the behalf of a plaintiff a modern rule enables a plaintiff to expedite the trial, and to make up and deliver the issue even before the defendant has himself joined in any issue; for the effect of Reg. Gen. Hil. T. 2 W. 4, r. 108, is, that if the defendant's

(b) Reg. Gen. Hil. T. 2 W. 4, reg. 59;  
 Jervis's Rules, 57, 58, note (i).

(c) Jervis's Rules, 87, note (d).  
 (d) Tidd, 9th ed. 734.



pleadings conclude to the country the *plaintiff may immediately* make up the issue, adding the similiter; or if the defendant's pleadings conclude with a verification, and the plaintiff intend to traverse them, concluding his replication or surrejoinder to the country, he may, instead of delivering his *pleading* to the defendant's attorney, at once make up the issue, entering his replication or surrejoinder in it, and adding the similiter; and the same if some of the defendant's pleadings conclude to the country, and some with a verification; (e) but this is a privilege confined to *plaintiffs*; for a *defendant*, after a pleading of his concluding to the country, cannot thus add a similiter *for the plaintiff*, but must rule him to reply or surrejoin, &c. and proceed to *non pros* the plaintiff; and in no case can a defendant deliver the issue, unless on the part of the plaintiff an issue has been actually joined, or his similiter been by him delivered. The right of a plaintiff to serve a notice of trial immediately after or at the time he delivers his replication, under the Reg. Gen. Hil. Term, 2 W. 4, reg. 59, will be presently considered.

CHAP. XXIV  
ISSUE AND NO-  
TICE OF TRIAL.

Before the 11 G. 4 & 1 W. 4, c. 70, (so materially affecting the distinction between terms and vacations,) and the uniformity of process act, 2 W. 4, c. 39, the forms of issues varied according to the process with which the action had been commenced; but since the process in *personal actions* has been so much simplified, a new general comprehensive form of issue became essential; and, to save trouble and prevent mistakes, the judges, by Reg. Gen. Hil. T. 4 W. 4, in schedule, prescribed several forms; viz. 1st, of an *issue* to be tried before one of the judges; 2ndly, of a nisi prius record; 3dly, of a judgment for the plaintiff in assumpsit; 4thly, of an issue to be tried before a sheriff or judge of an inferior court of record, where the action is for debt not exceeding 20*l.*; 5thly, of a writ of trial before a sheriff or such judge; 6thly, of an indorsement of a verdict on the latter; 7thly, of an indorsement of a nonsuit on the same; and 8thly, the form of a judgment for the plaintiff after trial before the sheriff. And the same rule in a schedule enjoins that "*issues, judgments, and other proceedings in actions commenced by process under 2 W. 4, c. 39, shall be in the several forms in the schedule hereunto annexed, or to the like effect mutatis mutandis; provided, that in case of non-compliance, the Court or a judge may give leave to amend.*" The prescribed

The form of an  
issue. (f)

(e) 1 Arch. C. P. [83.]

(f) As to requisites of an issue be-

fore the recent rule, see *Dickinson v. Reynolds*, 2 Crompt. & Mee, 474.

CHAP. XXIV.  
ISSUE AND NO-  
TICE OF TRIAL.

Observations on  
such form.

form of issue is stated in the subscribed note; (g) but it is necessary to add a few other directions and observations.

If, since this rule came into operation, the issue be delivered in the old form, *i. e.* in the Exchequer, stating the plaintiff to be debtor to the king, the proper course is to return such issue to the party who delivered it, with a request that he correct it; and if he refuse, then the Court will grant a rule nisi for setting it aside for irregularity. (h) It will be observed that the prescribed form of issue, in the first place, requires the name of the Court to be stated at the top, and also the date of the declaration; and if the latter be omitted, a rule nisi for setting aside the issue, and notice of trial indorsed thereon, may be obtained. (i) No memorandum is in any case to be introduced as heretofore; (k) indeed it seems, from the language of the prescribed form, to have been intended that an issue shall commence with a copy of the declaration verbatim (as heretofore was the form of an issue in C. P.); but with this very important addition, that after stating that the defendant has been summoned or arrested to answer the plaintiff, it is essential in an issue to state the date of the first writ, so as to show on the face of the issue the exact time when the action was commenced; and which will afterwards be copied verbatim into the record of nisi prius, and thus avoid all doubt or discussion on the trial at what time the action was commenced; and this is effected by the statement, that the defendant was summoned [*or "arrested"*] "by virtue of a writ issued on the — day of —, A. D. 1835, out of the Court, &c." If on the trial it should appear in evidence that the cause of action arose after such date of the writ, the objection would now con-

Form of an issue in the King's Bench, Common Pleas, or Exchequer.

(g) In the King's Bench, [*or "Common Pleas," or "Exchequer."*]

The — day of —, in the year of our Lord 1835.  
[*Venus.*] A. B., by E. F. his attorney, [*or "in his own proper person," or "by E. F., who is admitted by the Court here to prosecute for the said A. B., who is an infant within the age of twenty-one years, as the next friend of the said A. B., as the case may be"*] complains of C. D., who has been summoned to answer the said A. B. [*or "arrested" or "detained in custody,"*] by virtue [*or "served with a copy," as the case may be,*] of a writ issued on the — day of —, in the year of our Lord 18—, [N. B. *To be the date of the first writ in the action.*] out of the Court of our lord the king before the king himself at Westminster [*or "out of the Court of our lord the king before his justices at Westminster," or "out of the Court of our lord the king before the barons of his Exchequer at Westminster," as the case may be;*] for that [*copy the declaration from these words to the end, and the plea and subsequent pleadings to the joinder of issue*] thereupon the sheriff is commanded that he cause to come here on the — day of —, twelve, &c., by whom, &c., and who neither, &c., to recognise, &c., because as well, &c.

\* This is always to be the date of the declaration.

(h) *Hart v. Dally*, 3 Dowl. 257.  
(i) *Ball v. Hamlet*, 3 Dowl. 188.

(k) *Hart v. Dally*, 3 Dowl. 257.

stitute a ground of nonsuit.<sup>(l)</sup> But where the record in an action for slander stated that the writ issued on the 4th of June, and that the words were uttered on the 27th of June, it was held that this discrepancy in the record, *after verdict*, was no ground for arresting the judgment; because the day laid in the declaration was not material; and after verdict it must be presumed, that on the trial the evidence was of slanderous words, used before the date of the writ.<sup>(m)</sup> It has been decided not to be necessary to state the form of action named in the writ, as whether it was "on promises," or "in debt," &c.;<sup>(n)</sup> and as after pleading to a declaration it would be too late to object that it varied from the form of action stated in the writ, it seems to follow that even if such variance appear on the face of the issue or record it would constitute no available objection.

CHAP. XXIV.  
ISSUE AND NOTICE OF TRIAL.

The prescribed form imports that all the several pleadings shall be faithfully copied to the *end* of the joinder of issue; and as the *title* of the date of a plea, replication, &c., constitutes part of each, it should seem that the date of each should appear upon the face of the issue, and afterwards of the record; and where there has been a special plea or replication signed by counsel, the Reg. Easter T. 18 Car. 2, in K. B., directs that the names of such counsel shall, in all copies of the pleadings, be written under the same; and each part of pleading should in the issue commence a fresh paragraph.<sup>(o)</sup> If the plaintiff has mislaid any part of the pleadings, he may, after a civil application to the defendant, and his refusal, upon summons, compel him to give him a copy of any pleading in his possession, so as to enable him to make up the issue accurately.<sup>(p)</sup>

Reg. Gen. Hil. T. 2 W. 4, r. 44, orders, "that if a defendant, after craving *oyer* of a deed, omit to insert it at the head of his plea, *the plaintiff, on making up the issue* or demurrer-book, may, if he think fit, *insert it* for him; but the costs of such insertion are to be in the discretion of the taxing officer;"<sup>(q)</sup> so that it will be imprudent to set forth the bond or deed in an issue unless the pleader be confident that some advantage to the plaintiff will ensue.

As the necessity for any entry or statement of any *impar-*

(l) *Ante*, vol. iii. 204, 205.

(m) *Steward v. Layton*, 3 Dowl. 430.

(n) *Ball v. Hamlet*, 3 Dowl. 188; and see *ante*, 467 to 470.

(o) *Aaron v. Chaundry*, 2 Bar. & Cres.

562; 4 Dowl. & R. 41, S. C.

(p) *Dunsley v. Westbourn*, 1 Strange, 414.

(q) *Jervis's Rules*, 54, note (t).

CHAP. XXIV.  
ISSUE AND NOTICE OF TRIAL.

*lance* or *continuance* from one term to another on a separate roll, or otherwise, has been expressly abolished, (r) and such entry has been prohibited by a subsequent rule, (s) and imparlances we have seen are in effect virtually abolished, (t) issues do not now, as heretofore, contain any statement of what has occurred between the different successive pleadings; excepting that when it may be necessary or advisable to state a death, or change of attorney, or other event that has occurred pending the action, it may be introduced by way of concise suggestion in the manner before noticed. (u) Thus the statute 8 & 9 W. 3, c. 11, sect. 7, enacts, that if there be two or more plaintiffs or defendants, and one or more of them should *die*, if the cause of action shall survive to the surviving plaintiff, or against the surviving defendant, the writ or action shall not be thereby abated; *but such death being suggested on the record*, the action shall proceed. It seems that if such death occur *before* issue joined, it should be stated therein at the head of the pleading that first afterwards occurred; and if between issue and before trial, then the death should regularly be stated in the *nisi prius* record; or the judge might refuse to try the cause, on the ground that, for want of the suggestion, the witnesses would be punishable for perjury. (v) It has been supposed that the suggestion of death may be made *at any time* on the judgment roll; (x) but the safest course is to state the new occurrence at the earliest opportunity, and to give the opponent a copy of the statement, that he may have an opportunity of objecting to it, if he have any ground. (y) So whenever it may be advisable in a *local action* under 3 & 4 W. 4, c. 42, sect. 22, or otherwise, to try the action in another county, a judge may grant permission to enter a suggestion upon the issue with a *nient dedire*, that it is proper to try in such county; and which suggestion is usually entered in the issue, immediately after the end of the pleadings and the award of *venire*. (z)

Great care must be observed, before the issue is delivered to the opponent, to examine the whole, to ascertain whether the pleadings are not only correct in themselves but also in relation to each other; viz. that *every part* of the declara-

(r) Reg. Gen. Hil. T. 2 W. 4, reg. 109.

(s) Reg. Gen. Hil. T. 4 W. 4, reg. 2.

(t) *Ante*, 706.

(u) See a form suggested in context, *ante*, 701; and Chitty on Pleading, 6th edit. Index, "Suggestion."

(v) *Rex v. Cohen*, 1 Starkie's Rep.

511, cited in *Price v. James*, 2 Dowl. 435; and see a form of suggestion in record of *nisi prius*, Chitty's Col. Stat. 1, note (e).

(x) *Far v. Dean*, 1 Barr. 368.

(y) *Brocas v. London*, 1 Stra. 235.

(z) See 1 Arch. K. B. 4th ed. 259, 260.

tion is *covered* by the pleas, for if not, judgment by default *pro tanto* should be signed, and the venire awarded, as well to assess the damages as regards the part unanswered as to try the issues joined, for otherwise there may be a fatal discontinuance; and as to the *issues* care must be observed to see that they are *perfectly* joined; for although we have seen that an &c. after the words in a plea, that the defendant puts himself upon the country, *may* supply the want of a *similiter*, yet unless there be an express or implied *similiter*, the issue is not sufficiently joined; and if the record of nisi prius continue the defect, then the judge may refuse to try the cause.(a) Another consequence also follows, that if the defendant even inadvertently move for judgment as in the case of a nonsuit, on the erroneous ground that the plaintiff has not in due time tried the issues *joined*, and it appear that, from the want of a *similiter*, *no issue* has in strictness been joined, his rule will be discharged with costs.(b)

The term "*issue*" is the proper name for the copy of the pleadings, without regard to the number of counts, pleas, or allegations in the record; and therefore an indictment for perjury on the trial of "an issue" may suffice, although there be several pleas and distinct issues.(c) And Reg. Gen. Hil. T. 4 W. 4, reg. 16, orders that "no fees shall be charged in respect of more than *one issue* by any officers of the Court, or of any judge at the assizes, or any other officer, in any action of *assumpsit*, or in any action of debt on "simple contract, or in any action on the case." And yet we have seen that, as regards costs, if a declaration contain several counts, and the general issue be pleaded to the whole, such plea creates as many issues as there are counts; so that the plaintiff must pay the costs of those on which he does not succeed, although they exceed the costs of the issues found for him.(d)

The prescribed form concludes with what has been termed the *award of the venire*, stating that the sheriff *is* commanded that he cause the jury to come on some day in Court to try the issue, though the issue is never delivered or shown to the sheriff, nor does he in practice receive any jury process till a subsequent time; so that the only apparent utility of this part of the form seems to be to denote the intention to proceed to

CHAP. XXIV.  
ISSUE AND NOTICE OF TRIAL.

(a) *Ante*, 768, n. (v), *Gilmore v. Mellon*, 3 Dowl. 652; *Brown v. Kennedy*, *id.* 639.  
(b) *Post*, 786, 787.  
(c) 2 Stark. Rep. 521; but see Peake

Rep. 57.  
(d) *Cox v. Thomas*, 2 Crom. & Jerv. 498; *ante*, vol. iii. 476 to 479.

**CH P. XXIV.** trial. When the venue is in a county palatine, instead of the award of the venire, a special award of a mittimus to the justices there concludes the issue. (d)

It is usual to *indorse* the *notice of trial* upon the back of the issue, and deliver the same together; but if the defendant have ruled the plaintiff to enter the issue, and the plaintiff do not wish immediately to proceed to trial, he may and should deliver the issue separately; and at any subsequent time, when ready or obliged to proceed to trial, then, to prevent judgment as in case of nonsuit, he may deliver the notice of trial on a separate paper.

Trial of issues  
before a sheriff,  
&c.

The statute 3 & 4 W. 4, c. 42, contains enactments, enabling the Courts or a judge to direct the trial of an issue for a debt not exceeding 20*l.*, and of suggestions of breaches in actions of debt under 8 & 9 W. 4, c. 11, sect. 8, before the sheriff or a judge of an inferior court of record; and the Reg. Gen. Hil. T. 4 W. 4, we have seen, prescribes forms relative to those proceedings; but it will be more convenient to consider them separately.

Of a defendant's  
examining and  
returning is-  
sue. (e)

It is advisable for a defendant's attorney immediately, or at least *within twenty-four hours* after an issue has been delivered to him, whether or not indorsed with a notice of trial, to examine the same, so as to ascertain whether it has been made up in the form prescribed by Reg. Gen. Hil. T. 4 W. 4, schedule, No. I.; stating the date of the writ, and particularly whether it faithfully sets forth every part of the previous pleadings, with names of counsel as originally delivered, or as amended by competent authority, and with the proper award of venire; for sometimes attempts are made on the part of a plaintiff to set forth the pleadings in an amended form, and more advantageously for him. If there be any variance, or any such attempt, or if any *suggestion* or other matter be stated without leave of a judge when necessary, it is incumbent on the defendant's attorney to return the issue as irregular and insufficient, within twenty-four hours, and with a notice of the particular objection; for otherwise he will not be at liberty to insist that there was an insufficient delivery of an issue, and may be bound to proceed to trial upon a record corresponding with the issue. (f)

(d) See 1 Arch. K. B. 4th ed. 259.

(e) See further, *post*, as to notice of trial; which it seems it is not essential

for a defendant to return.

(f) *Ants.* vol. iii. 521, tit. *Issue and Paper Book*.

We have seen that prescribed rules expressly require that the issue be *entered* on the proper issue roll, or an *incipitur thereof*, before the record of nisi prius shall be suffered to be signed, sealed, or entered for trial. (h) A defendant may still in K. B. and C. P. *rule the plaintiff to enter the issue* as in the forms in the note, and sign judgment of *non pros* if the rule be not complied with. (i) And before the Reg. Gen. Hil. T. 2 W. 4, reg. 70, it was in general essential that the defendant should, in K. B. and C. P., have ruled the plaintiff to enter the issue, and caused it to have been entered, before he could move for judgment as in case of a nonsuit. By that rule, however, it was ordered, that "no entry of the issue shall be deemed *necessary* to entitle a defendant to move for judgment as in case of a nonsuit, or to take the cause down to "trial by proviso;" (k) and in the *Exchequer* no rule to enter the issue was ever necessary to precede a motion for judgment as in case of a nonsuit; (l) and in that Court it seems to have been considered that there is no occasion *now* to enter the issue in any case, and that the Reg. Gen. Hil. T. 2 W. 4, reg. 70, makes no alteration in the time for moving for judgment as in case of a nonsuit, but the time remains exactly the same as it was before. (m)

As regards the *time* when a defendant *may* rule a plaintiff to enter the issue, it has long been "an axiom in practice, that a plaintiff cannot be compelled to take *two steps* in the same term;" (n) therefore a defendant could not rule the plaintiff to

CHAP. XXIV.  
ISSUE AND NOTICE OF TRIAL.

Of the defendant's ruling the plaintiff to enter the issue; and of entering the issue. (g)

(g) As to docketing an issue, see *Hopwood v. Watts*, 3 Nev. & Man. 146. (h) *Ante*, 763.

(i) In the King's Bench.

B. } — the — day of — is given to the plaintiff to enter the issue.  
v. } Entered.  
D. }

Form of rule to enter the issue in K. B.

B. } — the — day of — is given to the plaintiff to enter the issue;  
v. } otherwise let a non pros be entered. Entry of such rule.  
D. }

By the Court.

In the Common Pleas.

On the — day of —, A. D. 1835.

B. } It is ordered, that unless the plaintiff, within four days next after notice of  
v. } this rule to be given to his attorney or agent, shall cause the issue joined be-  
D. } tween the said parties in — term last past, to be entered upon record of  
the same term, a non pros may be signed. By the Court.

Form of rule to enter the issue in C. P.

At the defendant's request.

(k) *Jervis's Rules*, 61, note (t). This rule will diminish the frequency of rules to enter the issue, but not abolish them.

(l) *Coalsworth v. Martin*, 2 Tyr. 16; 2 Crom. & J. 123; 3 Dowl. 184, note

(a).

(m) *Williams v. Edwards*, 3 Dowl. 183, 184.

(n) *Per Lord Ellenborough*, K. B. in *Mich. T. A. D. 1816*.

**CHAP. XXIV.** reply, and also in the same term rule him to enter the issue; nor indeed can a defendant in a town cause in C. P. in any case, or in K. B., unless notice of trial has been given, rule the plaintiff to enter the issue the same term it has been joined.(o) And in a country cause, in neither Court could a rule to enter the issue be given till the term after that in which issue was joined.(o) But in the Exchequer, Reg. Easter T. 15 G. 2, directs the plaintiff to enter the issue *when required* by the defendant.(p) The recent alterations in the terms and vacations do not appear to have affected the prior general rule of practice, that the plaintiff cannot be compelled to take two steps in a term.

Time within which plaintiff, when ruled, must enter the issue.

The plaintiff, when so ruled, must, in a town cause, enter the issue and bring the record into the office within four days exclusive after notice of the rule; and in a country cause, before the continuance day, or judgment of *non pros* may be signed by the defendant.(q) But the plaintiff may, on summons, obtain further time.(r) And if no judgment of *non pros* has been signed the issue may be entered at any time.(s)

Of the plaintiff's entering the issue. (t)

Whether the plaintiff has or not been *ruled* to enter the issue, he must, before he can *pass* his *nisi prius* record, enter the issue itself,(u) or, as is most usual, an incipitur only, in the subscribed form,(u) on the roll, before the time of passing such record, for otherwise the record, according to ancient rules, is not to be passed or sealed at the *nisi prius* office.(x) The

(o) Reg. Mich. 4 Ann. K. B. Tidd, 727, 764; 6 T. R. 218.

(p) Price's Pr. 271; Man. Ex. 320; Tidd, 727.

(q) Tidd, 727.

(r) Imp. K. B. 370; Imp. C. P. 363; 1 T. R. 16; Tidd, 728.

(s) See the practical proceedings, 1 Arch. K. B. 4th ed. 265, 304.

Form of entry of issue.

(u) In the K. B. [or "C. P." or "Exchequer."]

On the — day of — A. D. 1835.

[N. B. Always the date of the declaration.]

[Venus] (to wit). A. B. by G. H. his attorney complains of C. D. who was summoned, &c. [Copy the whole issue to the end of the award of the venire.]

Form of an incipitur only of the issue on the roll.

In the K. B. [or "C. P." or "Exchequer."]

On the — day of — A. D. 1835.

[N. B. The date of the declaration.]

[Venus] (to wit). A. B. by G. H. his attorney complains of C. D. who was summoned to answer the said A. B. by virtue of a writ of summons issued on the — day of —, in the year of our Lord —, out of the Court of our Lord the King before the King himself at Westminster. For that, &c. [or otherwise, copying the commencement of the issue till the words 'for that,' &c.]

(x) Reg. Mich. T. 5 Ann. reg. 1; ante, Reg. Easter T. 5 W. & M. C. P. 1 Arch. K. B. 4th edit. 264, 304, note (t).



Reg. Gen. Hil. T. 4 W. 4, reg. 15, orders that "the *entry* of proceeding *on the record for trial*, or on the judgment roll, (according to the nature of the case,) shall be taken to be, and shall be in fact, the *first* entry of the proceedings in the cause, or of any part thereof, upon record; and no fees shall be payable in respect of any prior entry made or supposed to be made on any roll or record whatever." (y) But it has been observed that this rule does not alter the practice as to the entering the *Issue*, which is to be deemed an entry of proceedings on the record for trial within the meaning of this rule. (x)

CHAP. XXIV.  
ISSUE AND NOTICE OF TRIAL.

II. OF NOTICE OF TRIAL.....	773	Of continuing notice of trial..	779
When requisite.....	id.	Of countermanding notice of trial .....	780
Time of giving it .....	id.	Of fresh notice of trial when necessary .....	781
Time to be thereby given to defendant.....	775	Conduct of defendant's attorney on receiving insufficient issue or insufficient notice of trial.....	id.
What in general .....	id.		
What short notice .....	776		
Form of notice of trial.....	777		
To whom to be given .....	778		

We have seen that, in order to expedite his action, the plaintiff may in some cases give *notice of trial* even before issue has been actually joined. A notice of trial (which must always be in writing (a) ) is considered so essential a proceeding that where a verdict was obtained in the absence of the defendant on account of *no* notice of trial having been given, the Court set aside such verdict, although the defendant had not in support of his rule nisi for that purpose ventured to swear that he had a good defence on the merits; and the Court said that as the plaintiff was irregular, no such affidavit was necessary, and the verdict, judgment, and execution were set aside; (b) and a notice of trial is necessary, though a special day has been duly appointed by the Court; (c) and although the defendant has compelled the plaintiff to give a peremptory undertaking to try, still a regular notice of trial must be given. (d)

Of notice of trial, and when requisite.

With respect to *the time of giving notice of trial*, as a general rule, a plaintiff's attorney should not serve it before he has ascertained that he is certain of being able to adduce *all the evidence* necessary to recover a verdict at the appointed time;

Time of giving notice of trial, viz. how soon or how long delayed.

(y) Jervis's Rules, 104.  
(z) 1 Arch. K. B. 4th edit. 264, 304, note (t).  
(a) Reg. Mich. Term, 4 Ann. K. B. Cas. Pr. C. P. 3; Tidd, 753.  
(b) Williams v. Williams, 2 Crompt. & M. 473; 2 Dowl. 350, S. C.  
(c) Imp. K. B. 371, 374.  
(d) Dax, Pr. 73, 74.

CHAP. XXIV.  
ISSUE AND NOTICE OF TRIAL.

because if not so prepared, then the giving such notice would of itself enable a defendant sooner to move either for costs for not proceeding to trial, or for judgment as in case of a nonsuit, for not trying at the appointed time. It therefore results that at least as soon as the issue has been joined, the plaintiff's attorney should *first consider the evidence*, and *subpoena the witnesses*, and not until he is confident of their attendance should he serve the notice of trial. It would seem incongruous to serve a notice of trial before the *issue* has been *actually joined*; however, in order to expedite proceedings on the part of a plaintiff, Reg. Gen. Hil. T. 2 W. 4, reg. 59, orders that in all cases where the plaintiff in pleading concludes to the country, the plaintiff's attorney *may give notice of trial at the time of delivering his replication or other subsequent pleading*; and in case issue shall afterwards be joined, such notice shall be available; but if issue be not joined on such replication or other subsequent pleading, and the plaintiff shall sign judgment for want thereof, and forthwith give notice of executing a writ of inquiry, *such notice shall operate from the time that notice of trial was given as aforesaid.* (e)

In general the notice of trial is *indorsed on the issue*, and consequently delivered therewith; but it may be given on a *separate paper*; (f) and the latter seems preferable when at the time of the delivery of the issue the plaintiff is not quite certain of being able immediately to try. The plaintiff's attorney must at all events give notice of trial in a town cause for the term next after that in which or in the vacation of which issue was *completely joined*, (g) and which suffices, although issue was joined sufficiently early in the previous term to have given notice of trial for the sittings after such term; (h) and in country causes, for the second assizes after issue joined, for otherwise the defendant may afterwards move for judgment as in case of a nonsuit; (i) and the same practice extends to trials before the sheriff. (k) But still, unless such judgment has been given, the plaintiff may at any time afterwards give notice of trial, subject to this qualification, that if he delay for four terms after issue joined, and the delay was not at the *defendant's* request, (l) then he must give a *term's notice*; and Reg. Gen.

(e) See Jervis's Rules, 57; Tidd, 578, 754, for the prior rules.

(f) Tidd, 754.

(g) When not so completely joined, see *Gilmore v. Melton*, 2 Dowl. 632; *Brown v. Kennedy*, id. 639; *Seabrook v. Cave*, id. 691.

(h) 2 T. R. 734; 4 T. R. 557; 1 Hen.

Bl. 123; 2 Hen. Bl. 550; *Horwood v. Roberts*, 2 Dowl. 534.

(i) *Post* as to judgment as in case of nonsuit, and when it may be moved for *Horwood v. Roberts*, 2 Dowl. 534.

(k) *Horwood v. Roberts*, 2 Dowl. 534.

(l) *Evans v. Davies*, 3 Dowl. 786.

Hil. T. 2 W. 4, reg. 52, orders that when a term's notice of trial or inquiry is required, such notice *may* be given at any time before the *first day* of term, which rule assimilates the practice of all the Courts in that respect. (m) Against a *prisoner*, Reg. Gen. Hil. T. 2 W. 4, reg. 85, orders that a plaintiff shall proceed to trial or final judgment within three terms inclusive after declaration, or the defendant shall be supersedable; but if the plaintiff give due notice and set his cause down for trial in the third term, and it be not tried in the third term, or at the sittings after, in consequence of the arrear of causes, and not attributable to the plaintiff's fault, the defendant will not be supersedable. (n)

CHAP. XXIV.  
ISSUE AND NOTICE OF TRIAL.

No material alteration as regards *the time* of notice of trial has been introduced by the new rules. The times of notice were fixed by concurrent rules in K. B. and C. P. of Mich. Term, in 1654, and in the Exchequer by rules of Easter T. 56 G. 3, and Easter Term, 57 G. 3, (o) and in all the Courts is the same, viz. if the venue be laid or the cause is to be *tried in London or Middlesex*, and the defendant (or one of several (p)) *reside* within *forty computed miles* of London, then *eight days' notice* suffices, exclusive of the day it was given and inclusive of the day of trial. (q) But if *all the defendants reside above forty computed miles from London* then *fourteen days' notice* must be given. The expressions in the rules are, "*residing*," or "*dwelling*," or "*living*," and each means a *permanent residence* at the time of serving the notice and not a mere *temporary resorting* to a place; (r) and if a defendant be in Ireland or abroad he is entitled to the full fourteen days' notice; (s) and a defendant, who has removed to a place upwards of forty miles from London pending the action, but before notice of trial, is entitled to fourteen days at least, if he have given notice of his removal; (t) and if the residence be upwards of forty miles, the defendant will be entitled to a fourteen days' notice, though he happen to be in London at the time the notice is served. (u)

Time to be given by notice of trial.

By Reg. Easter T. 51 G. 3, K. B., Reg. Hil. T. 32 G. 3, C. P. and Reg. Hil. T. 1 W. 4, Exchequer, it was provided, that

(m) 9 Bar. & Cres. 621; Price, Pr. 278; Tidd, 576, 577.

(n) Myers v. Cooper, 2 Dowl. 423.

(o) 4 Price, 4; Tidd, 755, 756.

(p) 4 T. R. 520.

(q) See the rules, and 2 Stra. 954, 1216.

(r) 1 East, 688; Douglas v. Ray, 4 T. R. 552; 2 Price, 279.

(s) Id. ibid.; 1 Arch. K. B. 265, 266.

(t) Rochfort v. Robertson, 12 East, 427; Raine v. Hodgson, 2 Price, 279.

(u) Blaaw v. Chaters, 6 Taunt, 458; 2 Marsh. 151, S. C.

CHAP. XXIV.  
ISSUE AND NO-  
 TICE OF TRIAL.

if the trial is to be in *London* at the *adjournment day*, it shall suffice to give eight days' notice before the first sitting day after the term, if the defendant reside upwards of forty miles, and four days, if the defendant reside within that distance. (x)

The statute 14 G. 2, c. 17, sect. 4, enacts that when an indictment, information, or *cause* shall be tried on either of the circuits elsewhere than in London or Middlesex, then in all cases, without regard to the residence of the defendants, at least *ten days' notice* of trial must be given; and this is construed to be exclusive of the day of service and inclusive of the last day. (y) In all cases of notice of trial, Sunday, Christmas-day, Good-Friday, or a day appointed for a public fast or thanksgiving, is a day, and to be included, unless it be the last; (z) and yet Sunday is not reckoned as one of the two days in a *continuance* of a notice of trial; and therefore notice of continuance, served on Saturday evening for Monday, was held insufficient; (a) and it should seem on principle that Saturday for Monday would be an insufficient short notice of trial, as in effect only allowing thirteen hours to prepare. (a) And we have seen that the days between the Thursday before Easter-day and the Wednesday after are to be reckoned in *notices of trial* and inquiry, (b) and therefore a notice of trial before the sheriff for Easter-Tuesday was holden good. (c)

Short notice of trial. (d)

We have seen that Reg. Gen. Hil. T. 2 W. 4, reg. 59, orders "that the expression 'short notice of trial' shall *in country* "causes be taken to mean four days;" (e) and one day is to be construed exclusive, the other inclusive; (f) and the Court said short notice of trial in country causes must mean *four days peremptorily*, whatever may be the state of the pleadings, so that if the defendant delay delivering his rejoinder, and thereby prevent the plaintiff from giving the full four days' notice, this cannot excuse shorter notice; for the plaintiff's attorney, when before the judge on the summons for time to plead, should have saved the assizes by stipulating that if the issue for trial was not raised in time to give the regular notice, then *two*

(x) 15 East, 593; Tidd, 755; Jervis's Rules, 16, 17.

(y) Tidd, 755, Price, Pr. 276.

(z) Tidd, 757; Imp. K. B. 373.

(a) *Wardle v. Ackland*, 2 Dowl. 28; 3 Tyr. 819; and see *Grojean v. Manning*, 2 Tyr. 725; 2 Crompt. & Jer. 655, S. C.

(b) *Ante*, vol. iii. p. 106; Reg. Easter

T. 2 W. 4, Jervis's Rules, 75.

(c) *Charnock v. Smith*, 3 Dowl. 687, where see an explanation of Reg. Easter T. 2 W. 4.

(d) See *constructions*, *ante*, 709.

(e) Jervis's Rules, 57, note.

(f) *Ante*, 709. Reg. Hil. T. 2 W. 4 reg. 8.

days' notice should be sufficient. (g) And in another case, **CHAP. XXIV.** although Bayley B., on the motion for a new trial, said the **ISSUE AND NO-** rule may mean four days *if practicable*, and that if a defendant **TICE OF TRIAL.** obtained time and prevented the plaintiff from giving four days, the defendant *might* dispense with the rule, yet afterwards the rule was made absolute, the whole Court considering that three days' notice was insufficient, although the defendant had occasioned the delay; and they also said that the four days must have expired on or before the commission day, and the delay in the trial for a few days after was immaterial. (h) But in a *town cause*, "taking short strict notice of trial" imports *two days' notice*, one exclusive and the other inclusive; (i) though it would seem on principle that Sunday ought not to be considered as one of the two days, for otherwise a short notice served on Saturday evening for Monday might suffice, though allowing in effect only a few hours. (k)

The notice must always be in *writing*. (l) It may be either *indorsed on the issue* at the time it is delivered, or may be given *separately on a distinct paper*, though when the plaintiff avails himself of Reg. Gen. Hil. Term, 2 W. 4, reg. 59, by giving notice of trial at the time he delivers his replication or surrejoinder concluding to the country, then of course, as the issue has not then been made up, the notice of trial *must* be on a separate paper. When the notice is on the back of the issue, it suffices in a *country cause* to indorse, "*Take notice of trial at the next assizes*;" because it then necessarily refers to the within issue, which shows the venue; and the time and place of trial will depend on the same, and must be as well known to the defendant as to the plaintiff; though if such words, without title of the cause, date, county, or attorney's name, had been written on a separate paper, it would have been insufficient. (m) But in a *town cause*, a notice, although *indorsed* on the issue, must be more particular, and specify whether the trial is to be at the first day of the sittings or on the adjournment day. (n) The safest course, whether the notice of trial be indorsed, or be

Form of notice of trial.

(g) *Lawson v. Robinson*, 3 Tyr. 491; *Crompt. & M.* 499; and see same principle, *King v. Jones*, *Crompt. & M.* 71.

(h) *Lawson v. Robinson*, 2 Dowl. 69.

(i) *Ante*, 709.

(k) *Grojean v. Manning*, 2 Tyr. 725; 2 *Crompt. & Jer.* 655, S. C.; *Wardle v. Ackland*, 2 Dowl. 28; 3 Tyr. 819, S. C., which although decisions on a continuance of notice of trial seem on principle to es-

tablish this position.

(l) *Ante*, 773; Reg. M. 4 Ann. c. .

(m) *Tyle v. Stevenon*, 2 Bla. R. 1298; *Henbury v. Rose*, 2 Stra. 1237; *Price's Prac.* 276. This seems analogous to a notice in blank to plead *indorsed* on a declaration, *ante*, 499.

(n) MS. Mich. T. A. D. 1818; and *Chitty's Summary Prac.* 158.

CHAP. XXIV.  
ISSUE AND NOTICE OF TRIAL.

on a separate paper, is to adopt a *full form* in all cases; those in the notes are usual. (o) If the notice misdescribe the place of trial, as "at Guildhall, Westminster," since trials having ceased to take place there, it will be deemed insufficient, if the defendant swear positively that he was misled. (p) In general the notice is, that the *cause* (not the *issue*) will be tried; but when there is an issue in fact and one of law, or where one of several defendants has suffered judgment by default, the notice then is, that the *issue* or issues will be *tried* and the *damages assessed*. (q)

To whom notice of trial or countermand to be given or on whom served.

The Reg. Gen. Hil. T. 2 W. 4, reg. 57, orders that "notice of trial and inquiry, and of continuance of inquiry, *shall be given in town*, (r) but a *countermand* of notice of trial and inquiry may be given either in town or country, unless otherwise ordered by the Court or a judge." Which rule assimilates the practice as to the service of notice of inquiry and trial in C. P. to that in K. B. and Exchequer, (s) and continues the option of serving the notice of countermand in town or country as before in K. B. (t) But notice of trial at bar is to be given to the proper officer of the Court, before giving notice of trial to the party. (u)

The notice of trial is to be served on the defendant's attorney, either personally or at his residence, when the defendant has ap-

Notice of trial in London to be indorsed on issue or be on a separate paper.

(o) In the K. B., [or "C. P." or "Exchequer of Pleas."]

Between { A. B. Plaintiff,  
and  
C. D. Defendant.

Take notice of trial in *this cause* \* for the sittings within [or "for the first day of the sittings after" or "for the adjournment day of the sittings after"] this present term, to be holden at the Guildhall of the city of London. Dated this — day of —, A. D. 1835.

To Mr. I. K. defendant's attorney,  
[or "agent."]

Your's &c.  
G. H. plaintiff's attorney,  
[or "agent."]

The like in Middlesex.

[Same as above to the asterisk,] for the — sittings within, [or "for the sitting after"] this present term, to be holden at Westminster Hall, in the county of Middlesex. Dated, &c. [same as the above.]

Notice of trial at the assizes.

[The same as the first form to the asterisk, and then proceed as follows,] for the next assizes to be holden at —, in and for the county of —. Dated this — day of —, A. D. 1835.

To Mr. I. K. defendant's attorney,  
[or "agent."]

Your's &c.  
G. H. plaintiff's attorney,  
[or "agent."]

[See several other forms, Tidd's Forms, 270, 271; T. Chitty's Forms, 126, 127.]

(p) *Cross v. Long*, 1 Dowl. 342.

(q) See the forms, Tidd's Forms, 270, 271; T. Chitty's Forms, 126, 127.

(r) i. e. to the agent in town, and not to the defendant's attorney in the country.

(s) Tidd, 576, 577, 753, 754; and see Jervis's Rules, 57.

(t) Tidd, 757.

(u) Reg. Gen. Hil. T. 2 W. 4, reg. 60.

peared by attorney, unless the residence of the attorney cannot be ascertained, in which case a copy should be served on the defendant himself, (v) and another copy addressed to the attorney stuck up in the office, and another copy left at his last known residence. If there be several defendants who have appeared by separate attorneys, a notice must be served on each, and if several defendants have appeared in person, then also each must have notice.

CHAP. XXIV.  
ISSUE AND NOTICE OF TRIAL.

When a plaintiff who has given notice of trial afterwards discovers that he cannot obtain the requisite evidence, or be otherwise prepared to try on the appointed day, he may in a *town cause* either *continue* his notice to a subsequent sittings, or in a town or country cause he may *countermand* his notice of trial, and by the latter proceeding delay the time of trial indefinitely; for after a countermand, a fresh notice of trial must be given. (w) But as a continuance and countermand occasion trouble, delay, and expense, they should in general be avoided, by a plaintiff's attorney assuring himself, before he serves a notice of trial, that he will be ready to try by the appointed time.

Of Continuing or Countermanding notice of trial.

In a town cause, if notice of trial has been given for a particular day, and the plaintiff find that he cannot be prepared to try on that day, he may, *two days* before it, give notice of trial by *continuance* for the next or other subsequent sitting in or after the term (x) in the subscribed form; (y) but the plaintiff cannot continue his notice of trial more than once in a term; (z) and in the Common Pleas but once in any case. (a) Nor can there be a countermand and continuance in the same

Notice by Continuance.

(v) Tidd, 753; 1 Arch. K. B. 4th ed. 268.

(x) Tidd, 758; Imp. K. B. 280; Imp. C. P. 372.

(w) Imp. K. B. 379.

(y) In the K. B. [or "C. P." or "Exchequer."]

Between { A. B. Plaintiff,  
and  
C. D. Defendant.

Form of notice of trial by Continuance.

I do hereby *continue* the notice of trial given you in this cause to the sitting after this present — term. Dated this — day of —, A. D. 1835.

To Mr. I. K. defendant's attorney, &c.

Your's, &c.  
G. H. plaintiff's attorney.

(s) Tidd, 758; Sel. 411; Imp. K. B. 380; Dax's Prac. 75; Price's Prac. 276.

(a) Imp. C. P. 372.

CHAP. XXIV.  
ISSUE AND NO-  
TICE OF TRIAL.

notice. (b) In C.P. notice of trial for the sitting after term cannot be continued to the first sitting in the next term, but in the K. B. it may. (c) If the defendant prevented the plaintiff from trying at one sitting, by entering a *ne recipiatur*, it was held that the plaintiff might proceed to trial at the next, upon giving notice by continuance before the rising of the Court at the first sitting. (d) Two days' notice are sufficient, the first exclusive the second inclusive; (e) but the intervening day must not be a Sunday, and therefore notice on Saturday evening for Monday morning is insufficient. (f) In *country causes* there is no notice of trial by continuance.

Of Counter-  
manding notice  
of trial.

The Reg. Gen. Hil. Term, 2 W. 4, r. 61, orders, that "in *country causes*, or where the defendant resides more than forty miles from town, a *countermand* of notice of trial shall be given *six days* before the time mentioned in the notice for trial, unless short notice of trial has been given."

And reg. 62 orders, that "in *town causes*, where the defendant lives within forty miles of town, *two days'* notice of *countermand* shall be deemed sufficient." (g) The form of notice may be as subscribed. (h) It appears to have been supposed, that in a town cause a notice of countermand might be served on Saturday for Monday; (i) but as the principle of the decisions relative to the service of a notice of continuance on Saturday evening not being sufficient for Monday, because the defendant cannot properly take means on Sunday for preventing the attendance of his witnesses, seems here equally applicable, it would seem that Sunday ought not to be included in a notice of countermand. (k) A defendant's undertaking to accept

(b) Tidd, 758; Imp. K. B. 379; Imp. C. P. 371.

(c) Imp. K. B. 389; but see 1 Sel. 411.

(d) Tidd, 758.

(e) *Id. ibid.*

(f) *Grosjean v. Manning*, 2 Crompt. & Jerv. 635; 2 Tyrw. 725, S. C.; *Wardle*

*v. Ackland*, 2 Dowl. 28; 3 Tyr. 819, S. C.

(g) See the previous and other practice, Tidd, 757; 14 Geo. 2, c. 17, sect. 5, which also required *six days'* notice in *country causes*, or where the defendant resided more than forty miles from London.

Form of notice  
of countermand  
of trial.

(h) In the —.

I do hereby *countermand* the notice of trial given you in this cause. Dated this — day of —, A. D. 1835.  
To Mr. I. K. defendant's attorney.

Between { A. B. Plaintiff,  
and  
C. D. Defendant.  
Your's, &c.  
G. H. plaintiff's attorney.

(i) Barnes, 305; Pr. Reg. 395, S. C.; Tidd, 757.

(k) *Grosjean v. Manning*, 2 Crompt. &

Jerv. 635; 2 Tyr. 725, S. C.; *Wardle v. Ackland*, 2 Dowl. 28; 3 Tyr. 819, S. C.



short notice of *trial* does not entitle the plaintiff to give less than the usual notice of *countermand*. (*l*) We have seen that Reg. Gen. Hil. T. 2 W. 4, reg. 57, orders that *countermand* of notice of trial or inquiry may be given either in town or country, unless otherwise ordered by the Court or a judge.

CHAP. XXIV.  
ISSUE AND NOTICE OF TRIAL.

After *countermand* there must be a fresh notice of trial; (*m*) and if a cause be put off by rule of Court, there must then also be a new notice of trial: (*n*) so where a cause has been made a remanet at the *assizes*; (*o*) and even when a plaintiff has, at the instance of the defendant, given a peremptory undertaking to try at the next sittings or assizes, there must be a fresh notice. (*p*) But in a *town cause*, when it has been made a remanet, no new notice is necessary, as the defendant is then bound to continue his attendance till the cause has been tried. (*q*) And when a cause has been made a remanet to the next sitting, by an order of *nisi prius*, no fresh notice is requisite. (*r*)

Fresh notice of trial, when necessary.

If after a rule for a new trial has been made absolute, the party who succeeded on that rule suffer more than four terms to elapse without taking the case down to trial, a *term's notice of motion* is necessary to discharge the rule, as either party may try by proviso. And an order to change an attorney is not a proceeding in a cause dispensing with a *term's* notice of proceeding. (*s*)

The safest conduct for the defendant's attorney to pursue, when an insufficient issue or notice of trial has been served, if he think fit to object at all, is to return the issue and notice, with a written intimation that it is insufficient, and in what respects. And in one case, that of an insufficient notice of inquiry, we have seen that the practice is imperative that the notice must be returned. (*t*) But as regards a defective *notice of trial*, and some *other proceedings*, however laudable the candour would be, yet it is not essential; (*u*) and in case of an insufficient notice of trial, it is not necessary to return the issue or notice, (*x*) and the defendant or his attorney may deliver a brief to counsel to attend in Court and watch the proceedings,

Conduct of defendant's attorney when an insufficient issue or notice of trial, &c. has been served.

(*l*) *King v. Jones*, Crompt. & M. 71.

(*m*) Imp. K. B. 379; Tidd, 757.

(*n*) 8 T. R. 224; 1 Dowl. & R. 15.

(*o*) 6 Bar. & Cres. 125; 9 Dowl. & Ryl. 126; 4 Bing. 414; but see Tidd, 758, (*f*).

(*p*) 8 T. R. 245.

(*q*) *Id. ibid.*; 4 Bing. 415.

(*r*) 1 Dowl. & R. 15; Tidd, 757, 758.

(*s*) *Deacon v. Fuller*, 3 Tyr. 382.

(*t*) *Ante*, 530.

(*u*) See *Wardle v. Ackland*, 2 Dowl. 30.

(*x*) *Semble, Lawson v. Robinson*, 2 Dowl. 70, 71.

CHAP. XXIV.  
ISSUE AND NOTICE OF TRIAL.

and even take notes, without thereby waiving the irregularity: and he may nevertheless afterwards move to set aside the verdict for the irregularity in the notice. (y) But if the action be *defended*, and witnesses cross-examined, or the jury addressed at the trial, though after protest, the irregularity will be thereby waived, and the Court would afterwards refuse to set aside the verdict. (z)

III. Of motions  
 for Costs of the  
 Day for not pro-  
 ceeding to trial  
 according to  
 notice. (a)

III. If a plaintiff give notice of trial either in a town or country cause, and do not try or give notice of continuance or countermand before the appointed time, he may then, by motion to the Court, be compelled to *pay the costs of the day* which the defendant thereby sustained. This practice is in K. B. and C. P., founded on the rules of Mich. T. 1654, sect. xviii. in K. B., and sect. xxi. in C. P., which direct, "that in case of "such warning (i. e. notice of trial,) and no proceeding, the "defendant, upon motion, is to have his costs of his former "attendance, to be taxed by the prothonotary, unless the "plaintiff give the defendant warning, (i. e. *continuance* or "*countermand*.) in convenient time, that he would not proceed, "or show cause to be allowed by the Court in excuse of such "costs," (b) such as an accident happening to a material witness on his way to the trial. (c)

The 14 Geo. 2, c. 17, sect. 5, also enacts, that in case any party shall have given such notice of trial as aforesaid, (i. e. at least ten days' notice of trial at the assizes in London or Middlesex, where the defendant resides above forty miles from London, as mentioned in section 4, and shall not afterwards *duly countermand* the same in writing at least six days before such intended trial, every such party shall be obliged to pay unto the party to whom such notice of trial shall have been given as aforesaid, the like costs and charges as if such notice of trial had not been countermanded. Early proceedings for these costs (which are sometimes considerable, upwards of 11*l.*) (d) are in general advisable. Before the recent rule of Hil. T. 2 W. 4, reg. 69, in the Court of K. B. and Exchequer, the defendant might first move the Court for the costs of the day, and immediately afterwards move for judgment as in case

(y) Per Curiam, in *Grosjean v. Manning*, 2 Tyr. 726; 2 Crompt. & Jerv. 635.

(z) *Doe v. Jepson*, 3 Bar. & Adol. 402; *Fraas v. Paravaini*, 4 Taunt. 545; *Gillingham v. Waskett*, McCl. Rep.

(a) See the full practice, Tidd, 758 to

760; 2 Arch. K. B. 4th ed. 907 to 909; 1 Arch. C. P. 53, 248, 249, 253.

(b) Tidd, 9th ed. 758.

(c) Barnes, 133; 5 Taunt. 88.

(d) See Bills of Costs, page 76 to 78.

of a nonsuit in respect of the *same default*, for which he had moved for the costs of the day; but in the Common Pleas such double proceeding in respect of the *same default* was not permitted, (e) and now by that rule, in all the Courts, if the defendant move for the costs of the day he cannot, in respect of the *same default* in trying, move for judgment as in case of a nonsuit, but must wait until there has been *another default* in trying; and therefore since that rule, when the defendant is anxious to press the plaintiff to trial, the usual course is to forbear any distinct motion for costs in the first instance, and to move for judgment as in case of a nonsuit, and thereupon compel the plaintiff to give a peremptory undertaking; and upon discharging the rule, or subsequently, the Court will, on motion, order the payment of the costs of the day. (f) And now all the Courts, in discharging the rule for judgment as in case of a nonsuit, will in general grant the costs of the day as a part of their rule, without requiring a separate rule for that purpose; (g) but not if they make the rule absolute, because then the costs of the day would be included in the general costs; (h) or if the Court, in discharging the rule for judgment, say nothing respecting the costs of the day, the defendant may afterwards make a separate application for such costs, (i) and a term's notice is not necessary previously to moving. (k)

Reg. Gen. Hil. T. 2 W. 4, reg. 110, orders, that "where a pauper omits to proceed to trial, pursuant to notice or an undertaking, he may be called upon by a *rule to show cause* why he should not pay costs, though he has not been *dis-paupered*." (l)

A separate motion for costs of the day for not proceeding to trial, is in the *Exchequer* not a rule absolute in the first instance, nor a rule nisi in the common form; but if cause be not shown in four days, it makes itself absolute without any fresh application or motion for that purpose, whereas we have seen that in most other rules there must be a motion by counsel to make the rule absolute. (m) It may be moved for even after the plaintiff has tried his cause and recovered a verdict. (n)

(e) 4 Taunt. 491; 7 Taunt. 476.

(f) See the rules, post, 785.

(g) *Pierry v. Owen*, 1 Dowl. 362; *Lenniker v. Barr*, id. 563; 2 Crom. & J. 473, S. C.

(h) *Johnson v. Smith*, 1 Dowl. 421.

(i) *Post*, 785; *Hoclim v. Reed*, 1 Tyr. 386; *Lenniker v. Barr*, 2 Crom. & Jer. 473.

(k) *French v. Burton*, 2 Crompt. & Jer.

634.

(l) As to a pauper's liability, *Doe v. Edwards*, 2 Dowl. 474. It must be a rule nisi, *Doe d. Lindsay v. Edwards*, 2 Dowl. 468.

(m) *Robinson v. Robinson*, 3 Dowl. 177; *Scott v. Marshall*, 2 Tyr. 176, S. P.

(n) *Redit v. Lacock*, 2 Cr. & M. 337; 2 Dowl. 247, S. C.

CHAP. XXIV. And proposals to refer, made after the commission-day, are no answer to a motion for costs for not trying. (o) And the Court will allow an affidavit in support of a motion for costs of the day for not proceeding to trial to be amended. (p)

IV. Of motions for Judgment as in case of Nonsuit.

The law has provided two modes on behalf of defendants to prevent a plaintiff from keeping actions *suspended* and untried for any indefinite time; viz. a motion for "*a judgment as in case of a nonsuit*," and a trial by *proviso*. The former originated in the statute 14 G. 2, c. 17, justly intitled, "An act to prevent inconveniences arising from delays of causes after issue joined," and enacting, "that where *any issue* shall be joined in an action or suit at law in the superior Courts, and the plaintiff *shall neglect to bring such issue on to be tried according to the course and practice of the said Courts*, it shall be lawful for the judge or judges of the said Courts respectively, at any time after such neglect, upon motion made in open Court, (due notice having been given thereof,) to give *the like judgment* for the defendant or defendants as in case of a nonsuit, unless the said judge or judges shall, upon just cause and reasonable terms, allow any further time or times for the trial of such issues; and if the plaintiff shall neglect to try such issue within the time or times so allowed them, the judge shall proceed to give such judgment aforesaid." And sect. 3 provides, "That if such judgment be given, the defendant shall also have his costs as upon judgments of nonsuit." The very contradictory decisions relating to the practice of moving for judgment as in case of a nonsuit may be attributed to the terms of this enactment, which, it will be observed, speak of the plaintiff's neglect to bring the issue to be tried according to the *then course and practice* of each of the superior Courts, which materially varied as respected *the time* when a plaintiff in a town or country cause ought to try. The decisions also varied relating to the necessity for notice of motion. In the C. P. and Exchequer such notice was considered indispensable, and as the terms of the act seem to import; but in the K. B. it was otherwise. These variations in practice have in part, but not entirely, been determined, by the Reg. Gen. Hil. T. 2 W. 4, reg. 68, which orders "that a rule nisi for judgment as in case of nonsuit may be obtained on motion *without previous notice*; (q) but in that case

(o) *Eaton v. Shuckburgh*, 2 Dowl. 624.  
(p) *Larken v. Bovill*, 2 Tyr. 746.

(q) In Exchequer, before this rule, it was necessary to give four days' notice of

"it shall not operate as a stay of proceedings." Reg. 69 orders, that "no motion for judgment as in case of a nonsuit shall be allowed after a motion for costs for not proceeding to trial for the same default, *but such costs may be moved for separately*, (i. e.) without moving at all for judgment as in the case of a nonsuit, or after such motion is disposed of, (r) or the Court, on discharging a rule for judgment as in case of a nonsuit, may order the plaintiff to pay the costs of not proceeding to trial; (s) but the payment of such costs shall not be made a condition of discharging the rule." (t) Reg. 70 orders, that "no entry of the issue shall be deemed necessary to entitle a defendant to move for judgment as in case of a nonsuit, or to take the cause to trial by proviso." And Reg. 71 orders that "no trial by proviso shall be allowed in the same term in which the default of the plaintiff has been made, and no rule for a trial by proviso shall be necessary." (u) These statutes and rules, it seems, equally apply to actions ordered to be tried before the sheriff, under the 3 & 4 W. 4, c. 42. (x)

CHAP. XXIV.  
JUDGMENT AS  
IN CASE OF  
NONSUIT.

The inducements to move for judgment as in case of a nonsuit are the natural desire to bring any litigation to a termination, and in defendible actions to avoid the risk of the death of witnesses or loss of the means of establishing other evidence, and the wish of the defendant's attorney to be reimbursed his costs by the plaintiff without calling on his client. When the defence is clear, either of these motives are just and proper; but unfortunately it too frequently occurs that motions for judgment as in case of a nonsuit are made as if they were

Reasons for and  
against a motion for judgment as in case of a nonsuit.

motion for judgment, though there was no rule to enter the issue, *Coalworth v. Martin*, 2 Tyr. 169; 2 Crompt. & Jervis, 125, S. C. So notice was necessary in C. P., 2 Taunt. 48. But in K. B., though seemingly contrary to the words of the statute, no notice was necessary, *Lofft*, 265; *Tidd*, 491; *Jervis's Rules*, 60, note (s). The statute probably intended that notice should be given so as to afford the plaintiff an opportunity of offering a peremptory undertaking, and save the expense of motion and rule nisi. So a defendant might move for judgment as in case of a nonsuit without giving a term's notice of proceeding, although the cause has been at issue more than four terms, *Shinfield v. Laxton*, 4 M. & Scott, 187; 2 Dowl. 778, S. C.

(r) After a rule for judgment as in case of a nonsuit has been discharged,

without imposing terms as to costs, a rule will be granted for the costs of not proceeding to trial, *Stockin v. Reed*, 1 Tyr. 386.

(t) See *Lenniker v. Barr*, 2 Crompt. & Jer. 473, where it was held that the costs of the day for not proceeding to trial may be obtained as part of the order for discharging a rule for judgment as in case of a nonsuit, though not as a condition precedent.

(s) See *Jervis's Rules*, 60, note (s), for the previous practice. Before this rule defendant might, in K. B. or Exchequer, though not in C. P., move for costs of the day, and immediately after for judgment as in case of a nonsuit, *Tidd*, 759, 760.

(u) See previous practice, *Tidd*, 761.

(x) *Begbie v. Grenville*, 2 Dowl. 238; *Walls v. Redmayne*, 2 Dowl. 508; *Madely v. Baily*, 3 Dowl. 205.

CHAP. XXIV.  
JUDGMENT AS  
IN CASE OF  
NONSUIT.

matters quite of course, without duly considering the evidence and merits, or consulting the client, or communicating consequences; and even without any reasonable ground for confidence that there is an entire defence. In a late case, therefore, Mr. Baron Parke justly observed that, "in nineteen cases out of twenty, motions for judgment as in case of nonsuit are "against the interest of the defendant;"(y) and it is most injudicious to attempt to force the plaintiff to trial; for many plaintiffs who may either doubt their success, or suspect that the defendant may be insolvent, or may dislike the trouble or expense of a trial, and would therefore gladly remain passive, if not urged to proceed, yet will, if so urged and provoked by a motion of this nature, proceed to trial at all risks, rather than tamely submit to the payment of costs to a debtor or other wrongdoer, and by due exertion will frequently succeed; and therefore undoubtedly it would be culpable in any attorney, without full authority from his client, after due caution regarding the consequences, to adopt a proceeding of this nature; and if he do, and his client fail, he would be responsible to his client in damages.(z)

The practice as to this motion, and in particular the time of moving it.(a.)

The *practice* relating to these motions in general have already been so fully considered that we shall only advert to a few more recent decisions.(a) According to the very terms of the statute the Court can only be moved when the plaintiff has neglected to *bring the issue on to be tried according to the course and practice of the particular Court in which the action is depending*; it must therefore be shown to the Court by *affidavit*, and not contradicted, *first*, that the *issue* has been completely and formally *joined*, and if not, as where the *similiter* had not been added, nor even the *ꝯc.* concluding the plea, the

(y) Per Parke, B. in *Butterworth v. Crabtree*, 5 Dowl. 185.

(z) The late Lord Tenterden having, on the home circuit, observed upon the absurdity of indiscriminate motions of this nature, the late Mr. Marryatt reminded his lordship of an action of ejectment tried before him for the recovery of an estate worth 1000*l.* per annum, in Sussex, where the ancestor of the lessor of the plaintiff and himself had been out of possession nearly twenty years, and the latter was advised by an eminent conveyancer that a trial might endanger his title to a still larger property, of which he was and had been in possession for many years, and therefore he had resolved not to try; but in consequence of the defendant's attorney moving for judgment

as in case of a nonsuit, and intimating that he would also recover the other property of which the plaintiff was in possession, the latter resolved to try; and in consequence of inadvertence in the defendant's attorney, in not being prepared with evidence of a part of his title (*viz.* of an outstanding term, on which he principally relied), the plaintiff obtained a verdict, and recovered the estate; whilst if the defendant's attorney had not taken that absurd step the statute of limitations would very shortly have given the defendant a complete title.

(a) See the practice in general, Tidd, 9th ed. 758 to 769; 2 Arch. K. R. 4th ed. 910 to 917. As to time, Chitty's Summary Prac. 163 to 167.

motion for such judgment was discharged with costs; (b) *secondly*, it must appear *when* the issue was joined, or when notice of trial was given, so as to show that the defendant has been in fault for not trying either according to his own notice or within the time allowed by the practice of the particular Court. (c) The affidavit on the part of the defendant should in general be more full and particular than is usual, and it should answer in anticipation any excuse which it is probable may be attempted to be advanced by the plaintiff for not trying; and when it is supposed that the plaintiff will pretend that he suspected the defendant had become insolvent, it will be proper, according to the facts, to swear to the contrary; and in general much more care should be observed in these affidavits than is usually bestowed upon them. It should also be understood by all practitioners, that a rule for judgment as in case of a nonsuit should not in general be moved absolute for three or four days after they *might be so*; because it very frequently occurs that when they have been too hastily moved absolute, counsel for the opponent intimates that he has been instructed to show cause, in which case the rule must be opened, and much time and trouble will be lost in getting back the brief.

CHAP. XXIV.  
JUDGMENT AS  
IN CASE OF  
NONSUIT.

We have seen that the necessity for ruling the plaintiff to enter the issue before he moves for judgment is taken away by Reg. Gen. Hil. T. 2 W. 4, reg. 70; but that rule makes no alteration in the time for moving for judgment as in case of a nonsuit, and such time remains exactly as it was before; and the only effect of that rule is to save the necessity for taking that step, and without it the plaintiff is equally bound to proceed to trial as heretofore; (d) and it has recently been decided that the uniformity of process act has made no alteration as to the time of moving for judgment as in case of a nonsuit. (e) As the practice respecting *the time* of moving differs in some respects, at least in a town cause, in C. P. from that in K. B. and Exchequer, it may be convenient to examine the practice of each Court separately.

*In the King's Bench.*—By the long established practice in K. B. (differing from that in C. P.,) although issue has been joined early enough in the term for the plaintiff to give notice of trial for the sittings after it, or for the next assizes, he is not

In the King's  
Bench.

(b) *Ante*, 769; *Smith v. Parslow*, 2 Tyrw. 284; 2 Crom. & J. 217, S. C.

(c) 1 Hen. Bla. 282; 2 Hen. Bla. 558.

(d) Per Parke, B. in *Williams v. Edwards*, 3 Dowl. 183.

(e) *Wingrove v. Hodson*, 2 Dowl. 379; see *post*.

CHAP. XXIV.  
JUDGMENT AS  
IN CASE OF  
NONSUIT.

bound to do so; the rule being, that no notice of trial need be given until the term succeeding that in or of which issue was joined; (*f*) and no motion for this judgment can be made *until the third term* inclusive after issue joined, (*f*) unless the plaintiff has given notice of trial previously, and not proceeded to trial in pursuance of such notice; (*g*) in which case, if the notice were given for a trial in the vacation, the defendant may move in the following term; (*h*) or if the notice were given for a trial in term he may move for judgment in the following term, though not in the same term. (*i*) And it seems that where the plaintiff gives notice of trial sooner than he need, but does not proceed accordingly, the defendant may move for judgment in the following term, but not before. (*k*) And where issue was joined in Easter Term, and notice of trial was given for the first sittings in Trinity Term, and the plaintiff having in due time *continued* it till the sittings after that term, it was held that the defendant could not move in that term. (*l*) So where issue was joined in Trinity Term, and notice of trial was given for a sitting in Michaelmas Term, and *countermanded* in time, the defendant cannot move for judgment in that term. (*m*) It was held in the King's Bench, though otherwise in C. P., that if *no notice* of trial has been given, the defendant cannot move until the third term after that in which issue was joined, inclusive thereof; and this although the issue was joined sufficiently early in the first term to have given notice of trial at the sittings in or after that term; (*n*) and therefore in a town cause, where the issue was joined on November 11, a motion in the following Hilary Term was discharged, the plaintiff not having given notice of trial. (*n*) When a town cause has been made a *remanet* from the sittings after Easter Term to the sittings after Trinity Term, and the plaintiff has then made default, the defendant may move for judgment as in case of a nonsuit in the Michaelmas Term following; and the Court said there was a material distinction in this respect

(*f*) 1 Sellen Pr. 408, cites *Hall v. Buchanan*, 4 Term Rep. 557; 2 Term R. 734; *Anonymous*, 2 Dowl. 122; 2 Arch. K. B. 4th ed. 912, note (a). But note that the Reg. Hil. 20 & 21, Car. 2, there referred to, only orders that issues joined of any former term shall be tried the first or second sittings of every term peremptorily.

(*g*) See the decision in the Exchequer, *Wingrove v. Hodson*, 2 Dowl. 379, *post*; and 2 Arch. K. B. 4th ed. 912; *Anonymous*, 2 Dowl. 122.

(*h*) 2 Chitty's Rep. 244; Tidd, 764.

(*i*) *Isaac v. Goodman*, 2 Dowl. 34; 1 Cr. & M. 494; *Preedy v. Macfarlane*, 2 Dowl. 216; *Marshall v. Foster*, 2 Dowl. 228; 2 Cr. & M. 213.

(*h*) *Howlett v. Powlett*, 8 Bing. 272; 1 M. & Scott, 355; 1 Dowl. 263, S. C.

(*l*) Tidd, 764.

(*m*) *Marshall v. Foster*, 2 Crompt. & M. 213; 2 Dowl. 228, S. C.

(*n*) *Munt v. Trememondo*, 4 Term Rep. 557; but see *Frampton v. Payne*, 11 Bla. 65, *contra*; Tidd, 759, 764.



between town and country causes. (o) But when a town cause is *delayed by the general course of business*, or it is not tried in consequence of the non-attendance of special jurymen, and of neither party praying a tales, it is otherwise. (p)

CHAP. XXIV.  
JUDGMENT  
AS IN CASE OF  
NONSUIT.

In a *country cause* a plaintiff is not bound to give notice of trial till the term succeeding that in which issue is joined; (q) and if he have not given such notice, the defendant cannot move for judgment till after the *second* assizes after the issue was joined. (r) But if issue be joined (although only *two days before* an issuable term (as in Easter term, or in its vacation, two days *before* Trinity term,) the plaintiff is bound to proceed to trial *at the very next assizes*, whether or not he has given notice of trial; and if he do not then try, the defendant may in the following term move for judgment. (s) But if the issue be not joined until *on or after the first day* of an issuable term, then, unless the plaintiff has given notice of trial for the next assizes, the defendant cannot move for judgment till the term after the *second* assizes, or the *third* term, whether the issue had been entered or not. (t) If the plaintiff give notice to try at any assizes, then if he do not accordingly try, the defendant may, in the term following the assizes, move for judgment. (u) If the country cause be made a remanet, from the pressure of business, or without the plaintiff's default, in general no motion for judgment as in case of a nonsuit is sustainable, the plaintiff having once taken down the cause. (x) Where issue was joined in June, and the trial had been ordered to take place in the *Sheriff's Court*, and there had been two distinct sittings in the Sheriff's Court (which it was insisted by the defendant ought to be deemed equivalent to two assizes), Parke, B. held otherwise, and that a motion for judgment in Michaelmas term was too early; though if the plaintiff had given notice of trial he would have waived his right to the full time; but intimated that the Court would consider whether in future a *country* cause before a sheriff should not be put on the same footing as a town cause, as both are now in

In country  
causes.

(o) 6 Bar. & Cres. 152; 2 B. & Ald. 709; Tidd, 763.

(p) 9 Bar. & Cres. 769.

(q) 2 Term R. 734; and see 2 Bing. 360.

(r) *Id.*; 9 Moore, 687; 1 Cromp. & J. 18; *Miller v. Hasall*, T. T. 9 G. 4; Tidd, Supp. 135, *sed quare*.

(s) *Williams v. Edwards*, 3 Dowl. 183, Eschequer, *post*; *Spiera v. Parker*, and

*Crowley v. Dean*, 1 Crom. & J. 18.

(t) *Id.* *ibid.* note (b), citing Jervis's Rules, 60, note (s); *Crowley v. Dean*, 1 Crom. & J. 18; *Simon v. Folkingham*, 1 Tyr. 501, *id.* note (c), referring to *Miller v. Hasall*, Trin. T. 9 Geo. 4; Supplement to Tidd, 764.

(u) Tidd, 764.

(x) 3 Term R. 1; 3 Bing. 499; 6 B. & Cres. 125; Tidd, 763.

CHAP. XXIV.  
JUDGMENT  
AS IN CASE OF  
NONSUIT.

effect in the same situation.(y) Where the plaintiff made default in proceeding to trial at the summer assizes, pursuant to his notice, and in the following Michaelmas term the defendant moved for and obtained costs of the day, and the plaintiff did not give notice of trial or try at the following spring assizes, it seems to have been doubted whether the defendant was not premature in his motion in the subsequent Easter term.(z)

In the Common  
Pleas.

*In the Common Pleas* the practice is stated to be that in a town cause the plaintiff is obliged to give notice of trial *in the same term* in which issue is joined, if it was so joined early enough in the term to give such notice,(a) and that if he do not, or if he give notice of trial and do not proceed to trial in pursuance of his notice, the defendant may move for judgment *in the next term*;(b) but that if issue be joined so late in the term that notice of trial cannot be given in that term, the plaintiff has the whole of the next term to try his cause, and the defendant cannot move for judgment until the third term.(b)

*In country causes* the plaintiff is *not bound* to try at the *next assizes* after issue joined, and the defendant cannot move for judgment until the third term.(c)

In the Exche-  
quer.

*In the Exchequer*, the rule has recently been stated to be, that "in a town cause the plaintiff has the whole of the term "after that in which issue is joined to try. There is no default till the third term. There must be a default. You "may come the term next after that in which the issue was "joined, *if notice of trial has been given* and no trial accordingly; but not till the following term, if no notice has been "given."(d) In that case the issue had been joined in July, 1833, and delivered in October following, but without any notice of trial, and a motion for judgment was made in the following Hilary term, which the Court considered premature, saying it was quite clear that a defendant had no right to

(y) *Butterworth v. Crabtree*, 3 Dowl. 184; *Begbie v. Grenville*, 2 Dowl. 238, *sed quere*; and see *Maddley v. Batty*, 2 Dowl. 205.

(z) *Moseley v. Clark*, 2 Dowl. 66.

(a) 2 Arch. C. P. 251, refers to Reg. Mich. T. 1834, XXI. but which contains no such regulation. In 1 Sellon's Prac. 408, however, the same practice is stated as distinguishable from that in *K. B.* and *Frampton v. Payne*, 1 Hen. Bla. 65, is referred to; but then it is added, "but

the plaintiff has the whole of the next term after issue is joined to try his cause in, *Baker v. Newman*, 1 Hen. Bla. 125."

(b) 2 Arch. C. P. 251, cites *Frampton v. Payne*, 1 Hen. Bla. 65; 2 Hen. Bla. 558; 2 New Rep. 597.

(c) 2 Bing. 360; 9 Moore, 687.

(d) Per Bayley, B. and Vaughan, B. after consulting Parke, B. and Patterson, J. in *Wingrove v. Hodson*, 2 Dowl. 379; *Anonymous*, 2 Dowl. 122, S. P.

move until the third term after issue joined, unless notice of trial had been given. (e)

CHAP. XXIV,  
JUDGMENT  
AS IN CASE OF  
NONSUIT.

In another case, where the issue had been joined in Trinity term and notice of trial given for the *first sitting* in the following Michaelmas term, but the cause had not been set down, the Court refused a rule for judgment, saying, "You cannot move in the same term in which default was made." (f)

In the Exchequer it was held that where issue was joined in a town cause in the term, and notice of trial was given for a sitting in it, but was countermanded, it was premature to move *in the same term* for judgment as in case of a nonsuit, on an affidavit that the plaintiff had given notice of trial and neglected to proceed to trial. (g)

We have seen that judgment as in case of a nonsuit is to be given, *unless the said judge or judges shall upon just cause and reasonable terms allow any further time or times.* (h) *First*, are to be considered *what excuses* or circumstances have been considered a *just cause*. *Secondly*, what is not *just cause*,

Of further proceedings and motion for judgment as in case of a nonsuit.

In general a *slight cause* or ground of excuse for not trying is deemed sufficient on the *first* default, but there must be *some*, and if not, the defendant is not bound to accept a peremptory undertaking, and the motion for judgment will be absolute. (i) Where an action was brought for false imprisonment, and the defendant afterwards indicted the plaintiff for an assault, charged to have been committed at the time the plaintiff was imprisoned, a motion for judgment was discharged with costs, the Court saying it was not reasonable to expect that the plaintiff should proceed with his action whilst the defendant's proceedings relating to the same subject-matter were still pending. (k) And where pending an action against a supposed acceptor the drawer paid the amount of the bill and the costs of the action against himself, that fact was held to be a sufficient answer to the acceptor's motion, although he denied his liability; and the Court said that he was not entitled to require a peremptory undertaking, and he might try by proviso; (l)

I. What a sufficient cause.

(e) *Id. ibid.*; *sed quare*, was not the issue to be considered as of Trinity term, and if so, was not *Hilary* the third term?

(f) *Freedy v. Macfarlane*, 2 Dowl. 216; and see *Begbie v. Greville*, 2 Dowl. 238.

(g) *Isaacs v. Goodman*, 3 Tyrw. Rep. 559; see Reg. Gen. Easter, 5 G. 4; 1 Tyr. Rep. 1, App. XII.

(h) *Ante*, 784; 14 G. 2, c. 17, sect. 1.

(i) Per Curiam in *Nicholl v. Collingwood*, 2 Dowl. 60; *Cleasby v. Poole*, 3 Dowl. 162, S. P. post, 793, note (u).

(k) *Leng v. Hutchins*, 1 Hodge's R. 56; 3 Dowl. 414, S. C.

(l) *Monk v. Bonhan*, 2 Crom. & M. 430; 2 Dowl. 336; 4 Tyr. 312, S. C.; but see *ante*, 740, note (g), where it appears that to prevent the costs of a trial by proviso a plaintiff must pay costs, sup-

**CHAP. XXIV.**  
**JUDGMENT**  
**AS IN CASE OF**  
**NONSUIT.**

and where a plaintiff has *once taken down his cause to trial* at the assizes when it was made a remanet, the defendant cannot obtain his judgment, although the plaintiff gave a subsequent notice of trial, on which he took no steps. (m) So where the plaintiff has once taken his cause to trial and been nonsuited, which was afterwards set aside, the defendant cannot move for judgment, but should try by proviso. (n) And where a plaintiff, at the request of the defendant's attorney, delayed the trial, it was held that the defendant could not move for judgment, and his application was discharged with costs. (o) So where a defendant took out a summons for putting off the trial, and at the instance of the defendant the hearing stood over from the 12th to the 19th of March, and the plaintiff then thinking he might be put to inconvenience in getting ready for trial if the order was refused, countermanded, it was held that the defendant could not move as upon a default of the plaintiff. (p) And it is a sufficient excuse and answer to a motion for judgment for not proceeding to trial pursuant to notice, that the cause was withdrawn in order to obtain a special jury, counsel having advised that it would be imprudent to try by a common jury, and the defendant was compelled to accept a peremptory undertaking. (q) And it is a general rule that a rule for judgment as in case of a nonsuit will not be made absolute while it sufficiently appears to the Court by affidavit that any thing remains due under an agreement between the parties to pay by instalments. (r)

What not a sufficient cause.

*What is not a just cause.* An affidavit, in answer to the defendant's motion, stated that an agreement had been entered into between the parties on certain terms, which had been performed, and that the suit was determined, each party to pay his own costs, is not sufficient, for the plaintiff should have made a separate motion to stay the proceedings, and the Court required the plaintiff to give a peremptory undertaking. (s) Nor is it any excuse that the action was brought by an attorney without the plaintiff's authority, for the plaintiff's remedy is against the attorney, and his misconduct is not to affect the

posing the defendant really has a defence on the ground of forgery.

(m) *Gilbert v. Kirkland*, 2 Dowl. 153.

(n) *Ashley v. Flaxman*, 2 Dowl. 697.

(o) *Jenkins v. Charity*, 2 Dowl. 197;  
*Doe v. Lord*, 2 Dowl. 419; and see  
*Downes v. Cross*, 2 Crompt. & J. 466 as to

arrangements precluding a defendant from moving.

(p) *Rendell v. Bailey*, 2 Dowl. 113.

(q) *Webber v. Roe*, 3 Dowl. 589.

(r) *Anonymous*, 1 Tyr. Rep. 378.

(s) *Greenslade v. Nunn*, 1 Gale, 46, *sed quare*.

defendant. (t) And it is no excuse that the plaintiff being insolvent had neglected to supply his attorney, and therefore the latter withdrew the record; and although the plaintiff offered a peremptory undertaking, the Court made the rule for judgment absolute, saying it was a good answer for the attorney, but not for the client, and there must be some cause alleged before they could discharge the rule, (u) otherwise it would repeal the statute.

CHAP. XXIV.  
JUDGMENT  
AS IN CASE OF  
NONSUIT.

The circumstance of the defendant having since the Reg. Gen. Hil. Term, 2 W. 4, unnecessarily ruled the plaintiff to enter the issue, is no ground of opposition to his motion for judgment. (x) And where a defendant is entitled to move for judgment as in case of a nonsuit he is not deprived of his right to move by the plaintiff's giving notice of trial before the motion; and therefore on such motion the plaintiff must, at all events, give a peremptory undertaking. (y) And where an action of ejectment was brought on certain breaches, and money was paid into Court, as to that for nonpayment of rent, and the plaintiff took it out, and did not proceed to trial, the defendant is entitled to move for judgment, unless the plaintiff gave notice that he had abandoned all further proceedings; but the Court recommended a stet processus and reference to the master, to say whether the plaintiff ought to pay any costs for not proceeding to trial upon the remaining breaches. (z) And if a plaintiff, knowing the insolvency of the defendant, declare against him on being ruled to prevent nonpros, and afterwards discharge a rule for judgment as in case of nonsuit by giving a peremptory undertaking, the Court will not afterwards discharge the same, for he should have applied to the Court or discontinued at an earlier stage. (a)

"*And reasonable terms.*" The statute, it will be observed, allows an extension of time once or even oftener, if just cause appear, and *upon reasonable terms.* (b) The latter usually are the giving a *peremptory undertaking* to try at the next or other named opportunity; and if by any unforeseen accident a trial then be prevented, such undertaking may, upon reasonable terms, *be enlarged*, so as to allow the plaintiff to try at a subsequent time. To excuse a trial pursuant to a peremptory undertaking, a still stronger cause or reason must be made

Of Peremptory  
Undertakings.

(t) *Mundry v. Newman*, 1 Crom. M. & Ros. 402.

(u) *Cleasly v. Poole*, 3 Dowl. 162.

(z) *Sargeant v. Jones*, 2 Dowl. 420.

(y) *Smedley v. Christie*, 2 Dowl. 152.

(x) *Doe v. Towgood*, 2 Dowl. 404.

(a) *Cunningham v. Rees*, 1 Tyr. 1.

(b) *Ante*, 784.

CHAP. XXIV.  
JUDGMENT  
AS IN CASE OF  
NONSUIT.

---

appear than in the first instance, and the discovery just before the trial would otherwise have taken place that the declaration required amendment, and that a proposal to refer was going on, and therefore the notice of trial at the next assizes was countermanded, were held inadequate excuses. (b)

Plaintiff's motion to enlarge undertaking.

When the plaintiff has not tried according to his undertaking, in consequence of the absence of a material witness, then, in order to prevent the rule being absolute, he is to anticipate the application of the defendant by moving to *enlarge* his peremptory undertaking until a subsequent sitting or assizes; and the affidavit in support of such motion need not state the name of the absent witness; and the Court said it might be often very dangerous and inconvenient to name the witness, though on a second default it is necessary. (c) Where a plaintiff has given a peremptory undertaking but not by rule, the rule for judgment as in case of a nonsuit for not fulfilling that undertaking is *nisi* in the first instance. (d)

---

(b) *Haines v. Taylor*, 2 Dowl. 644.  
(c) *Montfort v. Bond*, 2 Dowl. 403.

(d) *Vokins v. Snell*, 2 Dowl. 411.

## CHAPTER XXV.

OF THE JURY AND JURY PROCESS, VIEWS, AND THE NISI PRIUS  
RECORD.

I. Of the necessity for inquiry respecting the qualification of each juror.....	795	proceeding on each ....	799
II. Of the jury process in general	796	Of the panels of jurors....	<i>id.</i>
• Form of venire facias juratores.....	797	What communications with jurors improper .....	800
Distringas juratores..	<i>id.</i>	Of special juries .....	801
Habeas corpora juratorum .....	798	III. Of a view .....	803
Of the venire facias in particular .....	<i>id.</i>	IV. Of the record of nisi prius ..	804
Of the distringas and habeas in particular .....	<i>id.</i>	Prescribed form of.....	<i>id.</i>
The practice in issuing and		Suggestions in, when necessary .....	<i>id.</i>
		Of making up and passing record .....	805
		Times of entering same with marshal, &c. ....	806

THE *qualification of jurors* and the *jury process* are principally governed by stat. 6 Geo. 4, c. 50, which repeals and consolidates most of the previous statutes on the subject. The history and practice relating to these subjects will be found in the works referred to, (a) and the latter demands much more attention than has usually been given to it, and the statute in particular should be well considered; (b) at all events more care and attention should be devoted to the examination of the *panel* of common jurors and list of special jurors, and in adequate time before the trial, full inquiries should be made into all circumstances which might render any one or more of such jurors unfit to try the cause; so that if any objection exist, care be taken to prevent that person being sworn on the jury; because if his interest, opinion, or prejudice, should be *adverse* to the client, either may occasion the loss of the verdict, or if he should be *too favourable* to the client, and the latter obtain the verdict, it might on that ground be set aside, even though it be sworn that such juror wished to find a contrary verdict. (c)

CHAP. XXV.  
JURY AND  
JURY PROCESS.

Of the necessity for inquiries respecting the qualifications, &c. of each juror.

(a) 3 Bla. Com. chap. 33; Tidd, 9th ed. 777 to 795; 851 to 858; 1 Arch. K. B., 4th ed. 306 to 312; *id.* 348 to 355; 1 Chitty's Crim. Law, 2d ed. 500 to 551.

(b) See Chitty's Col. Stat 627 to 643, and notes.

(c) We have seen that it has been considered that a judge, and a fortiori, a juror, ought not to interfere in a cause where the nephew even of his deceased wife is a party, *ante*, vol. iii. 9; and any relationship, even more distant than the

CHAP. XXV.  
JURY AND  
JURY PROCESS.

*Ample* time is afforded as regards common jurors, by the enactment in 6 Geo. 4, c. 50, sect. 19, that the sheriff shall make out a list of jurors and keep the same in the office of his undersheriff, for the gratuitous inspection of the parties to the action and their respective attorneys, *for seven days at least before the sitting of the next Court of assizes or nisi prius*. By due inquiry of the client and his witnesses into the circumstances in which each juror may stand with reference to the cause, many extraordinary and unexpected verdicts might be avoided. (d)

II. OF THE  
JURY PROCESS  
IN GENERAL.

The *proceedings* to summon a jury to try a cause are, *first*, the writ of *venire facias juratores*, and *secondly*, in K. B. and Exchequer, a writ of *distringas juratores*, and in C. P., in lieu of that writ, a writ of *habeas corpora juratorum*, each of which is directed to the sheriff; and the former commands him to return twelve good and lawful men of *the body* of his county, qualified according to law, and not as heretofore any *hundreds*; (e) and sect. 15 enacts, that the sheriff shall, upon his return of such writ of *venire facias*, *annex a panel* of not less than *forty-eight* jurors, containing the names alphabetically arranged, together with the places of abode and additions of such jurors, and it is provided that in the writ of *habeas cor-*

ninth degree, is even ground of challenge to a juror. In *Dauncey v. Colonel Berkeley*, on a motion for a new trial, argued in K. B. in Trinity Term, A. D. 1827, in an action for crim. con. it appeared that the plaintiff was a bankrupt and had obtained his certificate, and was consequently clearly entitled to receive for his own use the £1000 recovered by the verdict, yet the Court made absolute a rule for a new trial, merely because it appeared that one of the special jurors was the *plaintiff's assignee*, (and although it was sworn that he pressed his co-jurors to find a verdict for only £750 damages), saying that although the juror had no legal or beneficial interest in the verdict, still there might be a *feeling* to increase the amount, and that it was essential that every jurymen should be *wholly free*, even from *suspicion* of bias and be *omne exceptione majores*. It may be scarcely practicable to discover every secret ground of influence, but still an active practitioner should exert every possible inquiry so as to exclude any questionable juror, and if any suspicion exist of the partiality of any particular juror, it is not necessary *formally* and *publicly* to *challenge* him, but the counsel retained in the cause may, by *private* intimation of the objection, prevent the objectionable juror from being sworn. It is well known

that in Ireland leases for the lives of two or three named persons are a common tenure. On a recent trial there of an indictment for an atrocious murder, the judge observed to the jury, that the case was unhappily so clear, that perhaps they would consider it unnecessary for him to sum up the evidence, whereupon all the jury said certainly. But one of them said, as it was a case of life and death, it would be most decent to retire to consider of their verdict. Upon which the jury were closeted for a considerable time, the juror who had proposed the retiring, declaring, that however clear the case might seem, he could never bring his mind to a verdict of guilty; at length the other jurors said, that if he would assign a *good reason* they would concur; upon which he exclaimed, why, "*He's the last life in my lease*;" and he with the rest of the jury, whose estates were of similar tenure, to the astonishment of the crowded Court, immediately delivered their unanimous verdict, *Not Guilty*. The numerous grounds of challenge, either to the array or to the poll, and especially those *proper affectum*, will be found in the works before referred to.

(d) 1 Stark. Ev. 477, n. (e).

(e) 6 Geo. 4, c. 50, sect. 13.



*pori juratorum*, or *distringas*, subsequent to such writ of venire facias, it shall not be requisite to insert the *names* of all the jurors contained in such panel, but it shall be sufficient to insert in the mandatory part of such writs respectively these words, "the bodies of the several persons *in the panel to this writ annexed* named," or words to the like import, and to annex to such writs *respectively panels* containing the same names as were returned in the panel to such venire facias, with their places of abode and additions; and it has been recently decided, that unless a *panel be annexed* as well to the *distringas* or *habeas corpora juratorum* as to the *venire*, a writ of error coram nobis, in case the plaintiff should obtain a verdict on such defective proceeding, would be sustainable. (e) The usual forms of the writs are stated in the note. (f) The history and full

CHAP. XXV.  
JURY AND  
JURY PROCESS.

(e) *Rogers v. Smith*, 1 Adol. & El. 772; 3 Nev. & Man. 772.

(f) William the Fourth, by the grace of God, of the United Kingdom of Great Britain and Ireland, King, Defender of the Faith. To the Sheriff [or "Coroner"] of —, [or "to — and — elisors duly appointed in this behalf,"] greeting. Venire facias  
juratores in  
K. B.\*  
We command you that you *cause to come* before us at Westminster forthwith [or "on —," making the writ returnable on a particular day before the trial] twelve good and lawful men of the body of your county, qualified according to law, by whom the truth of the matter may be better known, and who are in nowise of kin either to A. B. the plaintiff or to C. D. the defendant, to make a certain jury of the country, between the parties aforesaid, in an action on promises, [or "of debt," &c. as the action may be,] because as well the said C. D. as the said A. B., between whom the matter in variance is, have put themselves upon that jury, and have there then the names of the jurors and this writ. Witness [name of chief justice] at Westminster, the — day of —, in the — year of our reign.

William the Fourth, [&c. as in last form,] to the Sheriff of —, greeting. We Distringas ju-  
command you that you *distrain* the several persons named in the panel hereunto an-  
nexed, [or, if it be a special jury, "that you distrain S. P. of —, I. P. of —," &c.  
naming them as in the master's list,] jurors summoned in our Court before us, as between  
A. B. plaintiff and C. D. defendant, by all their chattels in your bailiwick, so that  
neither they, nor any one by them, do lay hands on the same until you shall have  
another command from us in that behalf, and that you answer to us for the issues of  
the same, so that you have their bodies before us at Westminster, on — [making  
the distringas returnable on the first particular return-day after the trial,] or before  
our right trusty and well beloved [the name of the chief justice,] our chief justice,  
assigned to hold pleas in our Court before us, if he shall first come, on — the —  
day of —, [the day of trial,] at the Guildhall of the city of London aforesaid, [or, if  
in Middlesex, "at Westminster Hall, in the County of Middlesex, aforesaid," or, if at  
the assizes, "before our justices assigned to take the assizes in your county, if they  
shall first come on —, [the commission day of the assizes,] at —, [the place  
where the assizes are holden,] in your said county," according to the form of the sta-  
tute in such case made and provided, to make a certain jury between the said parties  
in an action on promises [or, "of debt," or, as the action is,] and to hear their judgment  
thereupon of many defaults, and have there then the names of the jurors and this writ.  
Witness —, [name of chief justice,] at Westminster, the — day of —, in the  
— year of our reign.

\* See variations and forms in C. P. and Exchequer, Tidd's Forms, 289; T. Chitty's Forms, 150.

† See other forms in Exchequer, Tidd's Forms, 282; T. Chitty's Forms, 153.

CHAP. XXV.  
JURY AND  
JURY PROCESS.

practice relative to jury process, as well common as special, will be collected from the works referred to. (g) In practice the two writs of Venire and Distringas, or Habeas Corpora, are issued at the same time. It is the safer course to have *each returned, as well as a panel annexed to each*, so that both, with the two panels, may be afterwards annexed to the nisi prius record before it is entered with the marshal. (h) At the same time it is said that the venire is not used, and is sued out merely for the purpose of having it allowed in costs; (i) and if that were so, the issuing a venire should be abolished; but the observation was made before the passing of 6 Geo. 4, c. 50, sect. 13, which seems expressly to require that writ as well as the distringas or habeas corpora.

The Venire Facias Juratores in particular.

The Venire must be directed according to the award of it on the issue roll, (k) and its form in all respects not altered by 6 Geo. 4, c. 50, s. 13, is by that act directed to be in the *accustomed form*. By 3 & 4 W. 4, c. 67, s. 2, the venire, except in trials at bar, *may be tested on the day on which it is issued, and be made returnable forthwith*.

The Distringas juratores and Habeas corpora juratorum in particular.

The *distringas juratores* in K. B. or Exchequer, or *habeas corpora juratorum* in C. P. is to be directed the same as the venire and correspond therewith, and is to be tested on the return day of the venire, and in causes at nisi prius may be returnable on the first day of the term after the trial; or, since 3 & 4 W. 4, c. 67, sect. 2, it *may be tested in term or vacation on a day subsequent to the teste of the writ of venire facias juratores*. (l)

Form of Habeas corpora juratorum in C. P.

William the Fourth, [— as in first form, ante, 797,] to the sheriff of —, greeting. We command you that you have before our justices at Westminster, on —, [the next general return after the trial,] or before the right honourable [the name of the chief justice,] our chief justice assigned to hold pleas in our Court of the Bench, by force of the statute in such case made and provided, if he shall first come, on the — day of —, [the day of trial,] at the Guildhall of the city of London, [or, if in Middlesex, "at Westminster Hall, in your county," or, if at the assizes, "before our justices assigned to take the assizes in your county, if they shall first come, on —, the — day of —, [the commission day of the assizes,] at —, [the place where the assizes are holden] in your said county,] the bodies of the several persons named in the panel annexed to this writ,\* [or, if a special jury, "the bodies of S. P., of —, T. R. of —," &c. naming them as in the prothonotary's paper,] jurors summoned in our Court, before our justices at Westminster, between A. B. plaintiff, and C. D. defendant, in an action on promises, [or, "of debt," or as the plea may be,] to make that jury, and have there this writ. Witness —, [the name of the chief justice,] at Westminster, the — day of —, in the — year of our reign.

(g) 3 Bla. Com. chap. 23, of the trial by jury; Tidd, 9th ed. 777 to 795; 1 Arch. K. B. 4th ed. 306 to 313; 1 Arch. C. P. [100], 154 to 160.

(h) 1 Arch. C. P. [100].

(i) 1 Sellon, 427; 1 Arch. K. B. 306.

(k) 1 Arch. K. B. 4th ed. 307.

(l) 3 & 4 W. 4, c. 67, sect. 2.

\* And this is indispensable, *Rogers v. Smith*, 1 Adol. & El. 772; 3 Nev. & M. 772, S. C.; ante, 797, note (e).

The statute, 13 Car. 2, stat. 2, c. 2, s. 6, provided that it shall not be necessary that there be fifteen days between the teste and return of a distringas. CHAP. XXV.  
JURY AND  
JURY PROCESS.

If the trial stand over from one sitting to another, the *distringas* or *habeas corpora* must be resealed previously to the sitting to which it stands over, otherwise the marshal must not insert it in the daily list of causes for trial, and the cause cannot be tried; (*m*) for the rule Hil. T. 4 W. 4, reg. 18, which dispenses with the necessity of *repassing* the *nisi prius* record, does not dispense with the *resealing* of these writs, but enables a judge, on an *exparte* application, to amend the day of the teste and return of the *distringas* or *habeas corpora*, or the clause of *nisi prius*. (*n*)

In practice the writs of *venire* and *distringas* or *habeas* are issued at the same time. (*o*) They may be purchased at a stationer's, and filled up by the plaintiff's attorney, and then sealed and taken, in a town cause to be tried in *Middlesex*, to the office of the undersheriff of that county in Red Lion Square, and who will return the *distringas* or *habeas*. It is, as we have seen, *safer*, and best accords with the directions of the statute, 6 G. 4, c. 50, to have the *venire* as well as the *distringas* or *habeas* returned, and a panel of the jurors annexed to each; (*p*) at all events a panel must be annexed to the latter, and if omitted, a writ of error would be sustainable. (*q*) If the cause is to be tried in *London*, similar proceedings are to be adopted, excepting that the undersheriff's or secondary's office is in Coleman Street. In *country causes*, the *venire* is to be taken to and returned by the deputy of the proper undersheriff in London, and the *distringas* or *habeas* was returned by the undersheriff in the proper county, or since the appointment of a deputy under 3 & 4 W. 4, c. 42, within a mile of Inner Temple Hall, by such deputy, (*r*) and to the *venire* as well as the *distringas* and *habeas*, a *proper panel* is to be annexed in pursuance of 6 G. 4, c. 50. The several writs must be taken to the proper offices in sufficient time to enable the sheriff to summon the jury in proper time as presently directed; and the statute 6 G. 4, c. 50, seems imperative, that both the writs shall be sent to the undersheriff, in the case of common jurors *ten days*, and in the case of special

(*m*) Reg. East. T. 35 G. 3, reg. 1; Reg. Mich. 6 G. 4; 1 Arch. K. B. 4th ed. 305, 309.

(*n*) 1 Arch. K. B. 4 ed. 305.

(*o*) 1 Arch. K. B. 4 ed. 306, 306.

(*p*) 1 Arch. C. P. [100].

(*q*) *Ante*, 797, note (*e*).

(*r*) *Ante*, vol. iii. 47.

CHAP. XXV.  
JURY AND  
JURY PROCESS.

juries *three days at least*, before the commission day at the assizes. (s) If a cause has been tried and a verdict taken for the plaintiff, subject to an award, but which is not made in time, it seems that such verdict must be cancelled by leave of the Court before the plaintiff can again proceed to trial, and the order of a judge to amend the teste of the distringas before the second trial will not suffice. (t)

Of the Panel,  
summoning the  
jury, &c.

The statute 6 G. 4, c. 50, regulates the conduct of the sheriff as to lists of common jurors, and his conduct, and time, and manner of summoning them, and requires the sheriff to annex a *panel* to the venire, and also to the distringas and habeas. (u) Such panel contains the name and additions of residence and degree of trade or occupation of each juror alphabetically arranged, printed on a long narrow slip of parchment. The 25th section directs that *common jurors* shall be summoned *ten days* before the day of attendance *on the circuits*, by showing to the man to be summoned, or in case he be absent from the usual place of abode, by leaving with some person there inhabiting, a *note* in writing, under the hand of the sheriff or other proper officer, containing the substance of the summons; and special jurors are to be summoned in like manner, *three days* at least before the day on which they are to attend. But it is provided that jurors for London or Middlesex shall be summoned as heretofore, and the statute contains enactments relative to fines for nonattendance. (x)

What communications with jurors improper.

It has been held that the circumstance of one of the parties verbally or in writing soliciting one or more jurors, particularly when special jurors, to attend the trial, without more, is not to be deemed an illegal *labouring of the jury to find a verdict for a party*. (y) But although it may be natural to desire that when the expense of a special jury has been incurred their attendance should ensue, yet, *unless the attornies on both sides* will concur in a *joint* written application to each of the special jurors requesting their attendance, on the ground that *both parties* wish the question to be decided by gentlemen of superior intelligence, yet there is always risk of an *ex parte*

(s) *Chalton v. Burfit*, 1 Moore & Scott, 450.

(t) *Evans v. Davies*, 3 Dowl. 786.

(u) *Ante*, 797, n. (s).

(x) See the enactments and cases in Chitty's Col. Stat. 635, 636; *ante*, vol. ii. 397.

(y) Tidd, 9th ed. 906; *Snell v. Tim-*

*brell*, 1 Stra. 643; Co. Litt. 157; 1 Arch. K. B. 4 ed. 353. In a case of appeal in the House of Lords, July, 1835, Lord Brougham said that the *solicitors* might without impropriety request any particular peer to attend, but that it was improper for Counsel so to interfere.

application being misunderstood; for special jurors so applied to have been known to resent the application and consider it either as an imputation that they would neglect their duty to attend when summoned, or attribute it to improper expectation, or hint that the juror will find in favour of the party so applying, saying, Why otherwise would he trouble me on the subject? At all events, the communicating either publicly or privately any information against the character or the cause of the opponent, to one or more of the jury, would endanger the verdict if against him, (x) and even be punishable as a grave misdemeanour. (a)

CHAP. XXV.  
JURY AND  
JURY PROCESS.

The jury act, 6 G. 4, c. 50, contains the principal directions relating to *special juries*, and which have been already so fully stated in other works, that we will only add references to subsequent enactments and decisions. (b) It having been held under the 34th section, that a judge's power to certify for costs, viz. that the cause was proper to be tried by a special jury, only extended to *verdicts*, and not to a case where the plaintiff was nonsuited; (c) the 3 & 4 W. 4, c. 42, extended that power to *nonsuits*. (d) In a late case the lord chief justice declared that it was the especial duty of attorneys who had applied for a special jury, to take care and attend, and be provided with, the means of paying to each special juror the proper fee at the proper time; (e) and hence it is not the duty of an attorney to apply for a special jury unless his client first provide him with sufficient money for the purpose. It has been observed that obtaining a rule for a special jury is a common mode of delay adopted by defendants, as they can in general gain a term by it; (f) it would therefore be advisable to introduce some restrictive regulation, as either the leave of the Court or a judge, or a written certificate of counsel that the cause is in his judgment fit to be tried by a special jury. To avoid this delay, the Court will, on affidavit of admission of the debt by the defendant, or other strong ground, discharge the rule; (g) but the Court refused to discharge a rule for a special jury on the ground that the defendant had obtained it in June 1831, and up to Michaelmas term following had omitted to strike the jury, although the cause stood for trial in July. (h) When

(i) *Coster v. Merest*, 3 Brod. & Bing. 272; 7 Moore, 87, S. C.; Tidd, 966.

(a) *The King v. Jolliffe*, 4 Term Rep. 285.

(b) Tidd; 1 Arch. K. B. 4 ed. 309 to 313.

(c) *Wood v. Greenwood*, 10 Bar. & Crea. 689.

(d) 3 & 4 W. 4, c. 42, sect. 35.

(e) Per Lord Denman, C. J. sitting Middlesex after Trin. T. 1835.

(f) 1 Arch. K. B. 4th ed. 312.

(g) *Cradock v. Davis*, 1 Chitty's Rep. 176; *Doe v. Lorimer*, id. 256; *Bloxam v. Brown*, 4 Taunt 470.

(h) *Andrews v. Thornton*, 8 Bing. 64.

CHAP. XXV.  
JURY AND  
JURY PROCESS.

it is obvious that the application for a special jury is for delay, the chief justice or judge, who would try the cause, may be applied to for his order that the cause shall be tried at one of the sittings in the term. (i) In the King's Bench the rule for a special jury in term time must be served a reasonable time before the trial, or the cause may be tried by a common jury, and therefore where a cause stood for trial at a sitting in term, and after the rising of the Court on the day before the trial, the defendant served the plaintiff with a rule for a special jury, and the cause was, notwithstanding, tried by a common jury, the Court of King's Bench held the proceedings regular. (k)

At the sittings after term no trial can be had by a special jury in Middlesex or London unless the rule be served on or before the day preceding the adjournment day. (l) It must also have been marked on that day as a special jury cause in the marshal's book. (m)

In the Common Pleas an express rule orders that no cause shall be tried by a special jury in Middlesex or London unless the rule for such special jury shall be served and the cause marked in the marshal's book as a special jury cause two days previous to the adjournment day. (n)

Time of trial,  
and discharging  
a rule for spe-  
cial jury.

The Court *in banc* will not forward or alter the order of the trial of special juries, although the rule has been obtained for delay. (o) But the chief justice will in some cases make an order as to the time of trial. (p) If the defendant has not summoned the special jurors in time the cause will be tried by a common jury; (q) and when it is shown by affidavit, not sufficiently contradicted, that the rule for a special jury has been obtained for delay the Court will on motion discharge the rule. (r) In the Common Pleas the Court will not so interfere, but will appoint a day for trial by the special jury, even in term, unless the defendant will submit to proper terms. (s) If

(i) *Johnson v. Gas Light Company*, 7 Taunt. 390; *Roberts v. Bradshaw*, 1 Stark. Rep. 31; *Briggs v. Dixon*, 4 Moore, 414, 470; *Maltby v. Moses*, 1 Chitty's Rep. 489.

(k) *Gunn v. Honeyman*, 2 B. & A. 400; and see *Johnson v. Blackwell*, 6 Car. & P. 236, post, 803, note (t); Tidd, 793, 795, 817.

(l) Rule Trin. 30 G. 3; Rule Hil. 44. G. 3, K. B.; 10 East, 1; Tidd, 817, 793, note (b).

(m) Chitty's Summary Prac. 175.

(n) Rule Trin. T. 52 G. 3 C. P.; 4 Taunt. 600; 2 Chitty's B. 378; Chitty's Summary, 176.

(o) *Maltby v. Moses*, 1 Chit. R. 483; Tidd, 818; *Johnson v. The Coke and Gas Light Company*, 7 Taunt. 390; Tidd, 795; ante, vol. iii.

(p) *Maltby v. Moses*, 1 Chit. R. 489; Chitty's Summary, 180.

(q) *Archer v. Bamford*, 1 C. & P. 64; Tidd, 818, 795.

(r) *Cradock v. Davis*, 1 Chit. R. 176; *Doe v. Lorimer*, id. 236; *Maltby v. Moses*, id. 489; Tidd, 794.

(s) *Bloxam v. Brown*, 4 Taunt. 470; *Briggs v. Dixon*, 4 Moore, 414; *Tripp v. Patmore*, id. 470; *Johnson v. The Coke and Gas Light Company*, 7 Taunt. 390; Tidd, 795.

a rule be obtained on Saturday to make a cause a special jury, which is marked as a special jury at 2 o'clock on that day, and notice of it is given to the plaintiff's attorney at 7 o'clock on that evening, the cause being in the list for Monday, the judge will try it in its order on Monday as a common jury cause, although there be an affidavit of merits.(t) The application for a judge's certificate, that the cause was fit to be tried by a special jury, must be made immediately after the verdict; and an application on the day after the trial is too late.(u) As a general rule, it seems that in an action for a libel the judge will probably certify, if a justification has been pleaded; but not if there be only a plea of general issue.(x)

CHAP. XXV.  
JURY AND  
JURY PROCESS.

Judge's certificate.

In many actions, especially those relating to nuisances and boundaries, a *View* of the premises may be very useful; and the proceedings to obtain the same are principally regulated by 6 G. 4, c. 50, sect. 23. The writ of view must contain the name of a shewer appointed by the defendant, as well as of one appointed by the plaintiff; otherwise the costs of the view will not be allowed under that statute.(y) The rule of Trin. T. 7 G. 4, required an affidavit, and leave of the Court or a judge, in order to obtain a view; but the subsequent rule of Hil. Term, 2 W. 4, reg. 63, orders, that "the rule for a view may in all cases be drawn up by the officer of the Court on the application of the party, without affidavit or motion for that purpose."(a) So that now either party may of right, and without affidavit or leave of the Court or of a judge, insist on a view. It is scarcely necessary to insinuate, that in an action for a nuisance, attributable to the working of a steam engine, or other machinery, and many others, it is very essential at the time of view that persons on each side should be so placed during the *whole time* whilst experiments are proceeding, as well on the premises from which it is alleged the injury proceeds as upon the premises where the injury is felt; so as to prevent the too frequent frauds, by secretly reducing or increasing the power of the works in operation whilst the jury proceed from one of the premises to the other.

(t) *Johnson v. Blackwell*, 6 Car. & P. 236.

(u) *Waggett v. Shaw*, 3 Campb. 316; Tidd, 792.

(x) *Roberts v. Brown*, 6 Car. & P. 757.

(y) See practice in general, Tidd, 795 to 799; 1 Arch. K. B. 513, 514.

(z) *Taylor v. Thompson*, 7 Bing. 403.

(a) *Jervis's Rules*, 59, note (m).

CHAP. XXV.  
JURY AND  
JURY PROCESS.

IV. OF THE RE-  
CORD OF NISI  
PRIUS.

Before the uniformity of process act, 2 W. 4, c. 39, the very great variety of mesne process then in practice occasioned an equal variety in the forms of *Nisi Prius Records*; because such records were merely descriptive of such process and of the pleadings; but now that the process has been simplified, ~~one~~ *general form* of record has been prescribed by Reg. Gen. Hil. T. 4 W. 4, and which is stated in the subscribed note. (b) When the cause is to be tried in a county palatine the record is to conclude with an award of the *mittimus*, the same as the issue in such cases. The first part of the record is an exact copy of the issue, stating the name of the Court at the top, and then the date of the declaration, with the statement whether the defendant was summoned or arrested to answer the plaintiff, and the exact date of the writ is mentioned, so that the time of commencing the action cannot be disputed at nisi prius, which is certainly a great improvement in practice. (c) Then follows the whole declaration, and each of the pleadings is to commence a new line, stating the date of its title; and it has been observed, "that it would much facilitate reference if attornies, in engrossing the records, and also in making copies of paper-books for the judges, would denote in the margin by the words 'first count,' 'second count,' and so on, the commencement of the different counts of a declaration:" (d) and the same observation might also be extended to the rest of the pleadings. (d) And Reg. Easter T. 18 Car. 2, K. B. directed, that at the foot of each pleading signed by counsel his name shall appear in the Paper-Book, and in all copies of pleadings.

Suggestions  
when necessary.

As the *whole* of the issue is to be engrossed, any suggestion of death, or other event, will necessarily appear on the record before the award of the venire. If any death or other material event has occurred *since the issue* was delivered, and before the

Form of nisi  
prius record in  
K. B., C. P., or  
Exchequer, as  
prescribed by  
Reg. Gen. Hil.  
T. 4 W. 4.

(b) The placita are now to be omitted, Reg. Gen. Hil. T. 4 W. 4, and the record of nisi prius in each of the superior Courts is to be a mere copy of the issue to the end of the award of the venire, and then proceed as follows:—

Afterwards on the — day of —, in the year of our Lord, — [this is to be the teste or date of the writ of distringas, or habeas corpora,] the jury between the parties aforesaid is respited here until the — day of — in that year, [this is to be the return day of the distringas or habeas corpora,] unless — shall first (nisi prius) come on the — day of — [this is to be the first day of the sittings, or the commission day at the assizes,] at —, according to the form of the statute in such case made and provided, for default of the jurors, because none of them did appear; therefore let the sheriff have the bodies of the said jurors accordingly.

[N. B. The postea is to be in the usual form.]

(c) Reg. Gen. Hil. T. 4 W. 4, reg. 2, s. 1.

(d) Per Littledale, J. 3 Car. & P. 163, note (a). But great care must be ob-

served not to mislead; and it would be advisable that the pleader should frame such marginal analysis. See post, this Briefs.

\* Teste of the writ of distringas or habeas corpora.



trial, it is the safest course to state it in the record; (e) for although it has been held that such suggestion may be entered at any time, (f) yet in another case, for want of such suggestion in the nisi prius record, Lord Ellenborough thought that a witness on the trial could not be convicted of perjury; (g) and a form of suggestion of death just before a trial has been given. (h)

CHAP. XXV.  
JURY AND  
JURY PROCESS,

If the record be grossly imperfect the judge may refuse to try the cause. (i) It is always *made up* by the attorney for the plaintiff in ordinary cases, or by the defendant's attorney when he is about to try by proviso. The proceedings on *passing* the record, so as to be perfectly ready for trial, vary in some respects, and have been very clearly stated in a recent publication. (k) We have seen that it is indispensable, according to ancient rules, that at least an *incipitur of the issue* be *first entered* on an issue roll; (l) and indeed the nisi prius record cannot be sealed or passed until after the issue or an *incipitur* has been thus entered. (m) Before the record of nisi prius is passed, the *distringas*, (if the action be in K. B. or Exchequer), or the *habeas corpora juratorum*, if in C. P., duly returned by the sheriff, and the panel, are to be annexed to the Record, and are to be taken to the marshal's office, and who *will enter the latter for trial*. If *particulars of the plaintiff's demand* or of *defendant's set-off* have been delivered at any time pending the action in any case, then, in pursuance of Reg. Gen. Hil. T. 1 W. 4, reg. 6, a copy of such particulars *must be annexed* to the record before it is entered with the judge's marshal; (n) and we have seen the consequences of annexing a copy not corresponding with the particulars originally delivered. (o) With the aid of such particulars the judge who is to try the cause is better enabled to ascertain the nature of the plaintiff's claim and of the defendant's set-off, whenever the description in the pleadings is so general as to afford no substantial information of what is the nature of the complaint or defence; and in that view the rule requiring such

Of Making-up,  
and Passing the  
Record.

(e) 8 & 9 W. 3, c. 11, sect. 7.

(f) 1 Burr. 363; 5 Term R. 577; Barnes, 469.

(g) *Rex v. Cohen*, 1 Stark. Rep. 511, cited in *Price v. James*, 2 Dowl. 435.

(h) See form Chitty's Col. Stat. 2, note (e).

(i) *Rex v. Tremaine*, 8 T. R. 590; *Beni v. Benyon*, 6 Car. & P. 217.

(k) 1 Arch. Prac. K. B. 4th ed. 304, 305.

(l) *Id. ibid.*, and *id.* 264; and *ante*,

VOL. III.

763, 771, 772.

(m) *Ante*, 763, 771, 772.

(n) *Ante*, 613; Reg. Gen. Trin. T. 1 W. 4, reg. 6; Jervis's Rules, 28; and see the decisions, *ante*, 613. That rule appears to extend not only to particulars which are to accompany every declaration in *assumpsit* or *debt*, containing an *indebitatus* count, but to every particular of demand or set-off delivered at any time pending an action.

(o) *Ante*, 613.

CHAP. XXV.  
JURY AND  
JURY PROCESS.

particulars is of great utility. These several instruments in K. B. and C. P. constitute the authority and documents upon which each particular cause is tried. In addition to the *general commission* to try all causes in the Exchequer there is also a *particular commission*, authorizing the justices of assize to try each cause depending in that Court. (p)

Times and  
modes of enter-  
ing the Record.

With respect to the *time of entering* a cause for trial, if it is to be tried in London or Middlesex at any sittings *in term*, it must be entered with the marshal *two days* before the day of sittings; for otherwise the marshal may, at the request of the defendant, enter a *ne recipiatur*. (q) Causes to be tried *after term* should, in strictness, be entered, and the records delivered to the marshal at the times following; viz. the causes in *Middlesex* the first day of the sitting after term, and the causes in London two days before the adjournment day in London; but notwithstanding these rules causes are frequently set down for trial, and afterwards entered, before the record is carried in. (s)

No occasion for  
repassing a Re-  
cord.

If the cause be made a remanet, Reg. Gen. Hil. T. 4 W. 4, reg. 18, (t) expressly orders, that the *record* need not be *repassed* in either Court; and that if it shall be necessary to amend the day of the teste and return of the *distringas* or *habeas corpora*, or of the clause of *nisi prius*, the same may be done by order of a judge, obtained on an application *ex parte*. (u)

In a *country cause*, the venire, *distringas*, or *habeas corpora*, with the panels, particulars of demand, and set-off, are to be in like manner annexed to the record, and the whole taken to the judge's chambers at the circuit town, and there entered with his marshal, *in general* before the first day of sittings of the Court *after* the commission day; but varying in some respects in different circuits or parts of circuits. (x)

(p) 1 Arch. K. B. 4th ed. 316.

(q) Reg. Hil. 15 & 16 Car. 2, reg. 2, K. B.; and Reg. Hil. 32 G. 3, C. P.

(r) Reg. Hil. 34 G. 3, reg. 2, K. B.; Reg. Hil. 8 G. 1; Reg. East. 1 G. 2, C. P.

(s) *Cope v. Holl*, 1 Dowl. & Ryl. 181; 1 Arch. K. B. 4th ed. 316.

(t) Jervis's Rules, 92, but it must be

resealed; and if not, it will be struck out and not tried, *Waters v. Wootton*, 1 Dowl. 328.

(u) *Id. ibid.*; ante, 799; 1 Arch. K. B. 4th ed. 316.

(x) Chitty's Summary Prac. 176, Reg. Hil. 14 G. 2; Reg. Hil. 32 G. 3; 3 Campb. 363; Todd, 818; Manning Exch. App. 222, 223.

## CHAPTER XXVI.

OF THE EVIDENCE AND WITNESSES (a) TO BE ADDUCED, AND CONDUCT TOWARDS THE LATTER;—SUBPŒNA DUCES TECUM;—NOTICES TO PRODUCE;—NOTICES OF GROUNDS OF DEFENCE, AND ADMISSIONS, &c.

I. Necessity for what enquiry into the evidence .....	807	nesses on interrogatories, or on commission under 1 W. 4, c. 22...	816
II. The rules of evidence coeval with the common law, and only modified by statutes	808	Thirdly, other recent improvements relating to witnesses and evidence .....	817
III. Considerations respecting evidence must be,	809	IV. Professional conduct towards witnesses antecedent to the trial .....	821
First, <i>what</i> must be proved? .....	ib.	<i>Who</i> to examine them, and <i>how</i> as to their expected testimony ..	ib.
Secondly, <i>how</i> , or the <i>modes</i> of proof .....	ib.	Examination of all documentary evidence ..	825
The best evidence essential .....	ib.	Expediency of subpoenaing even doubtful witness or evidence ..	826
When or not secondary evidence admissible ....	ib.	Improving education of a witness when practicable .....	ib.
Proof by witnesses		Readiness to release if necessary .....	827
1. <i>Viva voce</i> ..	810	Number of witnesses, or quantity of evidence to adduce .....	ib.
2. On Interrogatories .....	ib.	V. The practical proceedings to compel attendance of witness with documents ....	828
3. What witnesses incompetent ..	ib.	Of the subpoena, and subpoena duces tecum ..	ib.
Proof by documentary evidence ..	ib.	The form and requisites thereof .....	829
Propriety of objection on account of interest considered ..	ib.	The course of practice ..	ib.
Statute 46 G. 3, chap. 3, compelling a witness to give evidence against his interest .....	811	The copy of subpoena, and service .....	830
Consideration of rule preventing a witness from voluntarily giving evidence in favour of his interest ....	ib.	Time of serving .....	831
Exceptions by statutes enumerated	814	Tender of expenses ....	832
In particular 3 & 4 W. 4, c. 42, sect. 26, 7, and decisions thereon ..	ib.	Expediency of instructing witnesses .....	ib.
Examination of wit-		VI. Notices to produce .....	834
		VII. Notices of grounds of defence, &c. ....	836
		VIII. Of agreed admissions] .....	837

I. BEFORE the delivery of the briefs, the attornies for the plaintiff and the defendant respectively must collect, examine, consider,

(a) The treatises and books in which the subject of *evidence* has been principally considered are Trials per Pais; Gilbert's Law of Evidence; 3 Bla. Com. chap. xxiii. p. 367 to 376; Viner's

Abridgment; Bacon's Abridgment; and Comyn's Digest titles, Evidence and Tesmoigne; Buller's Law of Nisi Prius; Espinasse's Nisi Prius; Selwyn's Nisi Prius. The modern treatises, Peake's,

CHAP. XXVI.  
EVIDENCE AND  
WITNESSES.I. NECESSITY  
FOR ENQUIRY  
INTO THE EVIDENCE BEFORE  
DELIVERY OF  
THE BRIEF.

CHAP. XXVI.  
EVIDENCE AND  
WITNESSES.

analyze, and arrange the *evidence* to be adduced, as well in support of his own case as in answer to that of the opponent; and indeed we have seen that at least the *substance* of the evidence ought to be ascertained even at much earlier stages of the cause. (b) The requisite evidence is always to be considered with reference to, *first, what must be proved? and secondly, how?*

II. THE RULES  
OF EVIDENCE  
COEVAL WITH,  
AND PART OF  
THE COMMON  
LAW, AND MOD-  
IFIED ONLY  
BY STATUTES.

II. There are several *well established rules at common law*, and a few *enactments* relative to *evidence*, which together constitute a distinct branch of law, certainly most important as regards the result of a cause, and of which every student, and still more every practitioner, should at least have a *general knowledge*. Most of the rules are coeval with and parts of the *common law* itself; and it will be found that the few statutes on the subject rather qualify and introduce *exceptions* to the common law rules than create any new rules. The whole might perhaps be stated in a small compass; but the difficulty in applying the rules has induced most authors on the subject to collect a *crowd* of authorities and instances in illustration of each rule, and also to attempt at the same time to describe *rights, injuries, and remedies* under each head; and consequently the numerous publications certainly are more bulky than in a scientific view was necessary, though exceedingly

Phillips, Starkie, and Roscoe, are justly of high character. The perspicuous and practical outline in Tidd, 9th edit. chap. xxxv. will also be found useful. It would lead the author beyond the design of this work to attempt to state the whole law on the subject of evidence; at most, an outline can be given, with a statement of the *recent improvements* by statute and rules, and some practical observations. The student and practitioner should examine *all the general rules*, and ascertain the *principles* on which they are founded. A student might do well to form a common-place book, with heads arranged alphabetically, as in Lee's *Prac. Dict. tit. Evidence*; and from time to time enter every decision under its appropriate head, and increase the number of heads as occasion may arise. It is also submitted, that he should study *physiology*, or at least so much as relates to the *external senses, the mental faculties, the mind, and the causes of deviation from the highest state of intellect to idiocy or insanity*. A very general knowledge of those subjects will soon convince practitioners how much they would assist him. This study would enable him to make suggestions upon the admissibility or

weight of evidence in numerous cases. Thus suppose six witnesses, each equally entitled to credit for veracity, and that all having been present together in a room with one of the parties to the case, with equal opportunities of hearing what passes, and on a trial one of the six swears that such party used a particular expression, giving the very words, and which are most important to the verdict, but the other five swear positively that no such expression was used—which should the jury believe? Persons who have not fully considered the organs and function of hearing would declare in favour of the five; but others who know the variations in hearing, and the authenticated instances on the subject, will probably decide in favour of the single witness, and such is the practice in law. See *per Sir J. Nicholl*, in *Tucker v. Ayra*, 3 Phil. Ex. Rep. 541. And see *Rex v. Simons*, 6 Car. & P. 540, 541; *Earle v. Pickles*, 5 Car. & P. 542; *Savage v. Brocklepp*, 18 Ves. J. 336, as to the reasons why little reliance on evidence of overheard conversations should be placed; and 1 Chitty's *Medical Jurisprudence*, 302, &c.

(b) *Ante*, vol. iii. 118.

useful to practitioners, who naturally seek to find *full directions precisely applicable to their own particular case*. We will now attempt to take a very general view of the rules and statutes on the subject, and then give some practical directions.

CHAP. XXVI.  
EVIDENCE AND  
WITNESSES.

III. The *first* and *principal* question in every cause is, *what* must be proved? Here the maxim has always been, that the parties must recover *secundum allegata et probata*, i. e. according to the pleadings and the proof. The inroad upon the principles of pleadings, by so generally allowing almost any matter of defence to be given in evidence under the general issue, had rendered that rule but rarely applicable; but the excellent recent rules of pleading have in a great measure removed the evil, and restored the practical utility of the rule, excepting in cases where by statute (as in actions against justices of the peace, officers of the customs and excise, and other public officers, &c.) the defendant is still allowed to plead not guilty, and give all the special matter in evidence. We have also seen, that by the excellent Reg. Gen. Hil. Term, 4 W. 4, when a party sues or is sued as assignee of a bankrupt, or executor, or in other representative character, unless the allegation thereof be specially traversed in the pleadings, it need not be proved; a regulation, which will obviously save immense expense in trials, and prevent numerous nonsuits upon mere collateral points, foreign to the real matter in dispute between the parties. As a general rule, every practitioner should carefully examine the *pleadings*, and from which he will now in *most cases* collect *what* he must prove; and if not, he should then obtain advice as to the requisite evidence, unless he can safely rely on his own knowledge and experience. (c)

III. CONSIDERATIONS RESPECTING EVIDENCE.

*What must be proved.*

With respect to the *modes* of proof, the *first* and *principal* rule is, that the *best evidence* of which the nature of the case admits must be adduced; and that a party must not attempt to rely on what is termed *secondary evidence*, at least without proving that the former *cannot* be adduced, and *why*; as on account of *actual destruction* of an original deed, or *loss*, after *most diligent search*, and *subpœnaing* every person who is at all likely to have the *best evidence* in his custody or power to

*Secondly. Of the Modes of Proof.*  
Of the necessity to produce the best evidence.

(c) The known difficulty in evidence has justly led to the practice of allowing to the successful party the expense of a fee to counsel for his opinion on evidence,

as part of the costs of the cause; though in general the expense of all private advice must be borne by the client himself, although successful.

CHAP. XXVI.  
EVIDENCE AND  
WITNESSES.

produce the same; (d) and even then a jury will sometimes suspect that the best evidence is withheld, and will find a verdict against the party entirely on that account; and, consequently, in adducing *secondary evidence*, the utmost attention must be given to satisfy the jury that there is no suppression of or want of exertion to obtain the best description of proof. (e)

Evidence is first of witnesses, or secondly, written or documentary.

Evidence, and the rules respecting the same, have always been classed under two principal heads; viz. *first*, oral evidence, or the testimony of *Witnesses*, either examined *in voce* in open Court before the judge and jury, or upon *interrogatories*; and *secondly*, *Written or Documentary evidence*.

Who may or not be Witnesses.

With respect to *Witnesses*, they are regulated by ancient common law rules, modified by a few statutes. All persons, of whatever religion or country, provided they have competent understanding of the nature and obligation of an oath, and a belief that through the influence of the Almighty, or some supreme authority beyond that of temporal Courts, they would suffer punishment for perjury here or hereafter, are *prima facie competent* to give evidence; and therefore it has been more usual to consider the *exceptions* to the admissibility of witnesses, and show who are *not competent* to become witnesses, and these are persons,

1. Of *defective understanding*. (f)
2. Of *uninformed mind*. (g)
3. Of *no religious principle*. (h)
4. Or *convicted of certain crimes*. (i)
5. Or *directly interested* in the event. (k)
6. Or an *husband or wife*, who cannot give evidence against each other, or (l)

(d) Therefore it is of no avail merely to serve a third person, who is a stakeholder, with notice to produce a document; but he must be subpoenaed to produce the same; *Parry v. May*, 1 Mood. & Rob. 279.

(e) The law makes no distinction between the *degrees* in *secondary evidence*; and therefore, although the defendant had kept a copy of an original letter, and he served a notice on the plaintiff to produce the original, and it was not produced, the defendant was allowed to give *parol evidence* of the contents of such letter; and it was held that he was not bound to produce the copy. *Brown v. Woodman*, 6 Car. & P. 206; and see *Tyson v. Kemp*, 6 Car. & P. 71; *The King v. Wrangle*, 1 Har. & Wol. 41.

(f) These should be subpoenaed unless absolutely and universally insane, *Attorney-General v. Parnther*, 3 Bro. C. C. 440.

(g) In criminal cases, and perhaps in civil, a trial may be postponed until the intended witness has been sufficiently instructed, 1 Starkie's Evid. 94.

(h) As an atheist, 1 Stark. Ev. 17, 22.

(i) Restored by pardon, or by having suffered the prescribed punishment: 1 Stark. Evid. 2d edit. 99; 1 & 2 G. 4. c. 28, s. 13; 9 G. 4. c. 52, sect. 3 & 4, except when conviction of perjury or subornation.

(k) Usually removed by payment or release. The general rule as to interest is the same in England as Scotland, *Ross v. Rowal*, 1 Clark & Fin. 424.

(l) *Davis v. Dinwiddie*, 4 Term R. 678; *Barron v. Grillard*, 2 Ves. & B. 166; but a wife's statement of her husband's treatment is admissible for defendant in action for crim. con., *Winter v. Wroth*, 1 Mood. & Rob. 404, and *per*

7. Persons not allowed to violate *professional confidence*. (m) CHAP. XXVI.

All other persons are *competent*, even the *nearest relation*, as a father, mother, brother, or sister, and of course all other more remote relations; and masters and servants are *competent* witnesses for and against each other; although we have seen that no relation, even beyond the ninth degree, is competent to be a *juror* in any action where his relation is a party.

*Documentary evidence* is very various; as public and private statutes, (n) records, deeds, wills, and an infinity of other written instruments.

There have been two views of the subject of *interest*, which is by far the most frequent and difficult ground of discussion respecting *competency*, viz. *first*, whether a witness ought to be *compelled* to give evidence *contrary* to his own interest; and *secondly*, whether he ought to be *allowed voluntarily* to give evidence in *favour* or support of a cause, in the event of which he is *legally* interested. The doubts on the former question were, to a certain extent, put an end to by the statute 46 Geo. 3, chap. 3, intituled, "an act to *declare* the law with respect to witnesses refusing to answer," and which recites "whereas doubts have arisen whether a witness can by law refuse to answer a question relevant to the matter in issue, the answering of which has no tendency to accuse himself, or to expose him to any penalty or forfeiture, but the answering of which may establish or tend to establish that he owes a debt, or is otherwise subject to a civil suit at the instance of his majesty, or of some other person or persons;" and then enacts, "that a witness cannot by law refuse to answer a question relevant to the matter in issue, the answering of which has no tendency to accuse himself, or to expose him to penalty or forfeiture of any nature whatsoever, by reason only or on the sole ground that the answering of such question may establish, or tend to establish, that he owes a debt, or is otherwise subject to a civil suit, either at the instance of his majesty, or of any other person or persons." The immediate occasion of that statute was a point which arose on Lord Melville's impeachment, and when the then living autho-

Consideration of the objection to a witness on account of interest.

Statute 46 Geo. 3, chap. 3, declaring that a witness shall give evidence against his pecuniary interest.

and see *Hanson v. Lord Kinnaird*, 6 East, 193; 6 Car. & P. 323, note (a). So proof of wife's conduct is admissible, *Jones v. Thompson*, 6 Car. & P. 415.

(m) *Ante*, vol. ii. 21; *Greenough v. Gaskell*, 1 Mylne & Keene, 98; *Moore v. Tyrrell*, 4 Bar. & Adol. 875 to 878; *Rex v. Brewer*, 6 Car. & P. 365; *Mynn v. Joliffe*, 1 Mood. & Rob. 226; *Cromack v. Hawthcote*, 4 J. B. Moore, 357; 2

*Brod. & B. 4; Wordsworth v. Hamshaw*, id. 5.

(n) If an act, private in its nature, be by the usual clause declared public, and to be taken notice of as such, it requires no proof, *Woodward v. Cotton*, 1 Crom. M. & R. 44; 6 Car. & P. 401, 491; id. 495, note (a), overruling other recent decisions to the contrary, as *Beaumont v. Mountain*, 4 Moore & Scott, 177.

CHAP. XXVI.  
EVIDENCE AND  
WITNESSES.

rities of the law were nearly divided in opinion, whether a witness was *compellable* to answer a question when a true answer *might prejudice his interest*. It will be observed that the act purports to be *declaratory* of the law, and not as introducing a new rule. And therefore the law of England is to be considered as having *always* established as a rule, that a man shall be compellable to speak the truth at the peril of an indictment for perjury, when the evidence is essential to the administration of justice between other parties, although his evidence might establish against him a *debt* or liability to a *civil* action or proceeding; (o) though not so as to accuse himself of a *crime* or expose him to a prosecution for a *penalty* or *forfeiture*; and therefore as well since this act as before, a witness is not compellable to give evidence in proof of what might constitute even a *link* in the chain of evidence against him in proof of a *crime* or *offence*, subjecting him to a *penalty* or punishment. (p)

What interest will prevent a person from voluntarily giving evidence in support of that interest.

With respect to the *exclusion* of the *voluntary* evidence of a witness who is *interested* in the matter in issue, the rule is to allow the witness to swear *against* his interest, *but not in favour of it*; and the law makes no distinction as to the *quantum* or *degree* of interest, for *however small* it may be, yet whilst it continues *unsatisfied, unreleased, or not otherwise discharged*, the witness supposed to be influenced by such interest is not allowed, if objected to, to give any evidence on the point. (q) But the interest must be a *present, certain, direct, and vested* interest, and not uncertain or *contingent*; (r) and therefore the heir apparent is competent to support the claim of his father or ancestor, though the remainder-man, having a *vested* interest, is incompetent. (s) The difficulty is in the *application* of this rule; of late years the Courts have endeavoured, as far as possible, consistent with the authorities, to let the objection in respect of any supposed interest go to the *credit* rather than to the *competency* of a witness. (t)

Many individuals of highly cultivated minds and great legal

(o) *Ex parte Chamberlain*, 19 Ves. 483.

(p) *Maccallum v. Turton*, Bart. 2 Young & J. 183; *Cates v. Hardacre*, 3 Taunt. 424.

(q) Tidd, 9th ed. 799, cites cases *Res v. Bray*, Rep. T. Hardw. 358; *Abrahams v. Bunn*, 4 Burr. 2251; *Bent v. Baker*, 3 Term R. 27; *Burton v. Hindle*, 5 T. R. 174; *Doe v. Tooth*, 3 Young & Jerv. 19; and see per Best, C. J. in *Hovill v. Stephenson*, 5 Bing. 497, S. P.

(r) *Goodtitle v. Welford*, Dougl. 134; *Carter v. Pearce*, 1 Term R. 163; *Goss*

*v. Tracy*, 1 P. Wms. 287; *Ralston v. Rowal*, 1 Clark & Fin. 424.

(s) *Smith v. Blackham*, Salk. 283. In an action against the vendor of a horse, for the breach of warranty, a prior vendor, who had made a similar warranty, is not a competent witness for defendant without a release, *Biss v. Houstain*, 1 Mood. & Rob. 302.

(t) Per Lord Mansfield, *Wakem v. Shelley*, 1 Term Rep. 300; same practice in Courts of equity, *Vaughan v. Warral*, 2 Swanston, 399.



attainments have expressed doubts upon the propriety and expediency of such rule utterly excluding the evidence of an *interested* witness, and some have treated it as a rule derogatory and insulting to the character of mankind, as supposing that an individual sufficiently impressed with the obligation of an oath, and believing in a future state of rewards and punishments, according to the veracity of his evidence, will nevertheless be induced, by even a small pecuniary interest, to forswear himself; and therefore they have insisted that the evidence ought to be admissible, subject to observations on the credit to be attached to it. But others, and in particular the late Chief Justice Best, treated such views as too theoretical to impugn a rule of law best adapted to the weakness of the generality of mankind, who, it is supposed, cannot sufficiently controul their inclinations in favour of *their own interest*, and therefore ought not to be subjected to the peril of an indictment for perjury, merely for the sake of establishing a fact in favour of third persons. (u)

Certainly, upon another question of *competency*, although we have seen that *relationship or affinity*, even beyond the *ninth* degree, is an insuperable objection to a person acting as a *juror* in any action where his relation (however distant) is a party, whether as plaintiff or defendant, (x) yet undoubtedly *relationship*, excepting in the instance of husband and wife, (a particular rule proceeding upon another rule, and established in order to prevent ill feeling between husband and wife,) (y) constitutes no objection to the competency of a witness; (z) and therefore a father or mother, a brother or a sister, may be compelled or allowed to be a witness for or against his nearest relation, and so on; and yet it is admitted that in fact *prejudices* very frequently influence the evidence of a near relation, *much more strongly* than *pecuniary interest* could effect, and even in a degree that could not be overcome or neutralized by a release as may be a pecuniary interest. (a) The relation between husband and wife, from its peculiar nature, and as absorbing the legal existence of the wife, is an absolute bar to the admission of any evidence either for or against each other, excepting for the protection of the wife; for the allowance of the first

(u) See observations of Best, C. J., in *Hovill v. Stephenson*, 5 Bing. 497, in opposition to the observations in *Starkie on Evidence*, 1st edit. and see 1 *Starkie on Evidence*, 2d edit. page 19, 20, 21.

(x) *Ante*, 795, 796, in note.

(y) *Davis v. Dinwoody*, 4 T. R. 678.

(z) 2 Hale, 276; Sayer, 45; Co. Lit. 6 b; 1 Hale, 303; Bul. Ni. Pri. 287; Hawk. B. 2, c. 46.

(a) See *Hovill v. Stephenson*, 5 Bing. 497, 498.

**CHAP. XXVI. EVIDENCE AND WITNESSES.** would induce partiality, and that of the latter provoke dissensions. (b)

Exceptions by statute, enabling interested witnesses to give evidence. 3 W. & M. c. 11, s. 2.

1 Ann. stat. 1, c. 18.

13 G. 3, c. 78, s. 68, 77.

27 G. 3, c. 29.

54 G. 3, c. 170, s. 9.

35 G. 3, c. 21, s. 22.

3 & 4 Wm. 4, c. 42, s. 26, 27.

Some *exceptions* to the general rule, excluding the testimony of a witness who has even the *smallest interest* in the result of an action or proceeding, have from time to time been introduced by particular statutes; thus 3 W. & M. c. 11, sect. 2, renders admissible the testimony of parishioners, (excepting when almsmen,) against churchwardens or overseers. And by 1 Ann. stat. 1, c. 18, evidence of inhabitants may be taken in prosecutions for not repairing bridges. And the general highway act, 18 Geo. 3, c. 78, s. 68, 77, renders inhabitants of a parish competent witnesses in numerous cases. And 27 Geo. 3, c. 29, renders inhabitants competent witnesses in proceedings for the recovery of penalties given to the parish. The 54 Geo. 3, c. 170, s. 9, enacts, that inhabitants of a parish shall be competent witnesses for and against the parish in questions relating to *rates or boundaries, orders of removal, settlement of the poor, or the recovery of any charges or maintenance of bastards, or the election or appointment of officers, or the allowance of the accounts of any parochial or district officer.* (c) So inhabitants are competent witnesses in questions upon the county rate, under the 55 Geo. 3, c. 51, sect. 22. All which statutes tend to establish that by the common law every pecuniary interest, however small, constitutes an objection to the competency of a witness, although what might be considered a much stronger bias, viz. the wish of a father that his son's action may succeed, constitutes no legal objection whatever to his testimony.

In addition, also, to the foregoing exceptions, the recent act 3 & 4 W. 4, c. 42, sect. 26, 27, introduced a further exception, which on first view might be supposed to be more extensive than it really is. Sect. 26 enacts, "that in order to render the rejection of witnesses on the *ground of interest less frequent*, if any witness shall be objected to as incompetent, *on the ground that the verdict or judgment in the action in which*

(b) *Rez v. Cliviger*, 2 T. R. 265; 4 T. R. 678; *Rez v. Locker*, 5 Esp. R. 107. See other cases and exceptions, 1 Chitty's Crim. Law, 2d ed. 594, 595.

(c) As to when a parishioner is a witness, &c., *Doe v. Corbell*, 6 Car. & P. 545. In *Slocombe v. St. John*, 29 Aug. A. D. 1829, at Croydon Assizes, coram Parke, J.; Serjeant Andrews, Brodrick and Thesiger, for plaintiff; Gurney and Law for defendant; Parke, J. held, that a rated inhabitant was a competent witness to prove whether or not the right of ap-

pointment of one of the churchwardens was by custom vested in the minister. But an inhabitant of a parish is not, by this act or otherwise, a witness to prove a supposed right to take gravel or stones from the sea shore to repair parish roads, *Oxenden v. Palmer*, 2 Bar. & Adol. 236; *Rez v. Bishop Auckland*, 1 Mood. & Rob. 286. And a rated inhabitant is not a witness for the overseer in his defence to an action of a surgeon and apothecary for attendance on paupers, *Tothill v. Hooper*, 1 Mood. & Rob. 392.

*it shall be proposed to examine him would be admissible in evidence for or against him, such witness shall, nevertheless, be examined; but in that case a verdict or judgment in that action, in favour of the party on whose behalf he shall have been examined, shall not be admissible in evidence for him, or any one claiming under him; nor shall a verdict or judgment against the party on whose behalf he shall have been examined be admissible in evidence against him, or any claiming under him."* And sect. 27 enacts, "that the name of every witness objected to, as incompetent on the ground that such verdict or judgment would be admissible in evidence for or against him, shall at the trial be indorsed on the record or document on which the trial shall be had, together with the name of the party on whose behalf he was examined, by some officer of the Court, at the request of either party, and shall be afterwards entered on the record of the judgment; and such indorsement or entry shall be sufficient evidence that such witness was examined in any subsequent proceeding in which the verdict or judgment shall be offered in evidence."

It has been held that this statute does not make the drawer of an accommodation bill a competent witness for the acceptor without a release. (d) So in an action on the case for injuring the plaintiff's wall by digging a cellar near it, it was held that this act did not render a workman, who dug by the defendant's direction, a competent witness, and that a release was requisite. (e) And in an action against a carrier for the negligently carrying a package of glass, his servant is not a competent witness without a release. (f) So in an action against a person who had hired a gig for negligence in the care of it, a person entrusted by the defendant was not allowed to give evidence without a release. (g) Again, in an action for damage done to the plaintiff's horse and cart by the alleged negligent driving of the defendant's servant, such servant is, notwithstanding this act, an incompetent witness without a release; for per Lord Denman, Ch. J. "that statute does not apply; it renders competent those persons for or against whom the verdict or judgment would be evidence; but if this witness says what he is expected to say and is believed, there never can be any action against him, and therefore a release must be given." (h)

Decisions on  
that act.

(d) *Burgess v. Cuttill*, 6 Car. & P. 352; 1 Mood & R. 315, S. C.

(e) *Mitchell v. Hunt*, 6 Car. & P. 351, per Patteson, J.; but see the argument of counsel, 4 Nev. & Man. 232.

(f) *Harrington v. Caswell*, 6 Car. & P.

352.

(g) *Heming v. English*, 6 Car. & P. 542.

(h) *Harding v. Cobley*, 6 Car. & P. 664; but *quære* the reasoning.

CHAP. XXVI.  
EVIDENCE AND  
WITNESSES.

Examination of  
witnesses on a  
commission or  
on interrogato-  
ries under 1 W.  
4, c. 22. (i)

We have already in part considered the great modern improvement as regards the power of obtaining *at law* an examination of a witness who is going abroad on *interrogatories*, or under a *commission* when a witness is already abroad, (k) though not if the witness be in Scotland. (l) The statute 1 & 2 W. 4, c. 22, gives to each of the Courts a compulsory power in this respect. And if there be reasons for apprehending the death of a witness or his inability to attend in consequence of illness, his evidence may and ought to be immediately secured on interrogatories before the master of the Court or a barrister, as is very frequent under a judge's order. (m) But as this statute introduces at law a great boon, therefore the party applying for such examination must in general pay the costs of the proceeding, as was the rule in equity before the statute. (n) The granting a commission to examine a witness abroad is however discretionary, and it will not be granted on the application of a defendant, unless it appear clear that the suggested witness will give material evidence, especially if the witness is at a great distance and the issuing of a commission would occasion considerable delay, unless indeed the money be brought into Court. (o) Nor is a rule for the examination of witnesses on interrogatories in a foreign country an absolute stay of proceedings, but only limited. (p) Nor will the Court compel a party as plaintiff to send out a written document to be produced to a witness abroad, (q) Although a degree of evidence may be secured under this statute, yet there may be many cases in which it would be unwise to dispense with a *viva voce* examination of the witness in open Court before the judge and jury; and therefore in a late case it was held *that expenses of bringing over witnesses from abroad* (from Barbadoes) and of subsisting them here and of their return, may be allowed at the discretion of the master, subject to the review of the Court, as well since as before the 1 W. 4, c. 22; and Lord Lyndhurst, C. B. observed, "But though proofs merely formal" may be well obtained by that means, it may prove very difficult to elicit facts on interrogatories which might be obtained "by *viva voce* examination. The reading of written evidence "produces but a slight impression. Again, a witness if pre-

(i) See in general *ante*, vol. ii. 346 to 348, and 1 Arch. K. B. 4th ed. 296 to 303; and *Stevens v. Forster*, 6 Car. & Pa. 289.

(k) *Ante*, vol. ii. 346 to 348; 1 & 2 W. 4, sess. 2, c. 22.

(l) *Wainright v. Bland*, 1 Gale, 103.

(m) *Pond v. Dimes*, 3 Moore & S.

161; 2 Dowl. 730, S. C.

(n) *Ante*, vol. ii. 346 to 348; 1 & 2 W. 4, sess. 2, c. 22; *Bridges v. Fisher*, 1 Bing. N. C. 510; 1 Hodges, 36, S. C.

(o) *Lloyd v. Key*, 3 Dowl. 233, and see *Dalton v. Lloyd*, 1 Gale, 102.

(p) *Forbes v. Wells*, 3 Dowl. 318.

(q) *Cunliffe v. Whitehead*, 3 Dowl. 634.

“ sent might be able to explain a difficulty unexpectedly arising  
 “ in the progress of the cause, or to refute a misrepresenta-  
 “ tion.” (r) But loss of time to such a witness will not be  
 allowed for. (s)

CHAP. XXVI.  
 EVIDENCE AND  
 WITNESSES.

The 11 G. 4 and 1 W. 4, c. 70, sect. 11, authorized the judges to make rules and orders for regulating the proceedings of all the Courts, and under that authority the Reg. Gen. Hil. T. 2 W. 4, were promulgated, and which contain two rules to save the expense of *witnesses* to prove office copies of judgments and other documents. Reg. VI. ordered, “ That the  
 “ expense of a witness called only to prove the copy of any  
 “ judgment, writ, or other public document, shall not be allowed  
 “ in costs, unless the party calling him shall, within a reason-  
 “ able time before the trial, have required the adverse party,  
 “ by notice in writing and production of such copy, to admit  
 “ such copy, and unless such adverse party shall have refused  
 “ or neglected to make such admission.” (t) And Reg. VII. further ordered, “ That the expense of a witness called only  
 “ to prove the handwriting to or the execution of any written  
 “ instrument stated upon the pleadings should not be allowed,  
 “ unless the adverse party should upon a summons (u) before  
 “ a judge, a reasonable time before the trial, (such summons  
 “ stating therein the name, description, and place of abode, of  
 “ the intended witness,) have neglected or refused to admit,  
 “ such handwriting or execution, or unless the judge, upon  
 “ attendance before him, shall indorse upon such summons that  
 “ he does not think it reasonable to require such admission.”  
 But those two excellent rules appear to have been virtually superseded by the more extensive practice rules of Hil. Term, 4 W. 4, immediately stated. (v)

Thirdly, Other recent improvements relative to witnesses and evidence.

The 3 & 4 W. 4, c. 42, sect. 15, and the rules of Court of Hil. T. 4 W. 4, reg. 20, founded thereon, introduced several important regulations calculated to diminish the expense of adducing evidence on a trial. The statute, sect. 15, after reciting that it was expedient to *lessen the expense of the proof of written or printed documents or copies thereof* on the trial of causes, enacts, “ That it shall and may be lawful for the said judges,

Power to the judges to make regulations as to the admission of written documents.

(r) *Macalpine v. Powles*, 3 Tyr. 871; 3 Dowl. 299, by name of *M'Alpine v. Coles*, S. C.

(s) *Id. ibid.*; *Willis v. Peckham*, 4 J. B. Moore, 300.

(t) See form of notice suggested in

Addenda to Chitty's Summary of Practice, 35.

(u) See suggested form of summons, Chitty's Addenda to Summary of Practice, page 36.

(v) *Post*, 818.

CHAP. XXVI.  
EVIDENCE AND  
WITNESSES.

" or any such eight or more of them as aforesaid, at any time  
" within five years after this act shall take effect, to make regu-  
" lations by general rules or orders from time to time, in term  
" or in vacation, touching the *voluntary admission*, upon an  
" application for that purpose, at a reasonable time before the  
" trial, of one party to the other, of all such *written or printed*  
" *documents or copies* of documents as are intended to be  
" offered in evidence on the said trial by the party requiring  
" such admission, and touching the *inspection thereof* before  
" such admission is made, and touching the costs which may  
" be incurred by the proof of such documents or copies on the  
" trial of the cause, in case of the omitting to apply for such  
" admission, or the not producing of such document or copies  
" for the purpose of obtaining admission thereof, or of the  
" refusal to make such admission, as the case may be, and as  
" to the said judges shall seem meet; and all such rules and  
" orders shall be binding and obligatory in all Courts of com-  
" mon law and of the like force as if the provisions therein  
" contained had been expressly enacted by parliament."

Proceedings re-  
quiring admis-  
sion of written  
documents, or  
liability to pay  
costs.

The practice rules of Hil. Term, 4 W. 4, reg. 20, order that  
" Either party, after plea pleaded and a reasonable time before  
" trial, may give notice to the other, either in town or country,  
" in the *form hereunto annexed*, marked *A. (x)* or to the like

## A.

Prescribed form  
of notice, and  
request to admit  
execution of  
specified written  
documents.

(x) In the K. B. [or " C. P." or " Exchequer."]

{ A. B.  
v.  
C. D.

Take notice that the { plaintiff } in this cause proposes to adduce in evidence  
the several documents hereunder specified, and that the same may be inspected by  
the { defendant, } his attorney, or agent, at on between  
the { plaintiff, }  
the hours of and that the { defendant } will be required to admit that  
such of the said documents as are specified to be originals were respectively written,  
signed, or executed, as they purport respectively to have been; that such as are speci-  
fied as copies are true copies; and such documents as are stated to have been served,  
sent, or delivered, were so served, sent, or delivered, respectively; saving all just  
exceptions to the admissibility of all such documents as evidence in this cause.  
Dated, &c.

To E. F. Attorney  
for { defendant  
plaintiff.

G. H. Attorney  
for { plaintiff }  
defendant. }

[Here describe the documents, the manner of doing which may be as follows :]

## ORIGINALS.

Description of the Documents.	Date.
Deed of Covenant between A. B. and C. D. 1st part, and E. F. } 2nd part .....	1 January, 1828.
Indenture of Lease from A. B. to C. D.....	1 February, 1828.

" effect, of his intention to adduce in evidence certain written  
 " or printed documents, and unless the adverse party shall  
 " *consent* by indorsement on such notice within forty-eight  
 " hours to make the admission specified, (y) the party requiring  
 " such admission may call on the party required, by *summons*,  
 " to show cause before a judge why he should not consent to  
 " such admission, or, in case of refusal, be subject to pay the  
 " costs of proof; and unless the party required shall expressly  
 " consent to make such admission, the judge shall, if he think  
 " the application reasonable, make an order that the costs of  
 " proving any document specified in the notice which shall be  
 " proved at the trial to the satisfaction of the judge or other  
 " presiding officer, certified by his indorsement thereon, shall  
 " be paid by the party so required, *whatever may be the result*  
 " *of the cause.* (z) Provided that if the judge shall think the  
 " application unreasonable he shall indorse the summons ac-  
 " cordingly. Provided also that the judge may give such *time*  
 " *for inquiry* or examination of the documents intended to be  
 " offered in evidence, and give such directions for inspection  
 " and examination, and impose such terms upon the party  
 " requiring the admission, as he shall think fit. If the party

## ORIGINALS.—(Continued.)

Description of the Documents.	Date.
Indenture of Release between A. B. and C. D. 1st part, &c. . .	3 February, 1828.
Letter, Defendant to Plaintiff . . . . .	1 March, 1828.
Policy of Insurance on goods by ship <i>Isabella</i> , on voyage from Oporto to London . . . . .	3 December, 1827.
Memorandum of agreement between C. D. captain of said ship, and E. F. . . . .	1 January, 1828.
Bill of exchange for £100 at three months, drawn by A. B. on and accepted by C. D., indorsed by E. F. and G. H. . . . .	1 May, 1829.

## COPIES.

Description of Documents.	Date.	Original or Duplicate served, sent, or delivered, when, how, and by whom.
Register of Baptism of A. B. in the parish of X. . . . .	1 January, 1808.	
Letter,—plaintiff to defendant.	1 February, 1828.	Sent by general post, 3 Feb. 1828.
Notice to produce papers. . .	1 March, 1828.	{ Served 2 March, 1828, on defen- dant's attorney, by E. F. of —,
Record of a judgment of the Court of King's Bench in an action, J. S. v. J. N. . . }	Trinity Term, 10 Geo. IV.	
Letters Patent of King Charles II. in the Rolls Chapel . . . }	1 January, 1680.	

(y) See the form of admissions, T.  
Chitty's Forms, 130.

(z) It will therefore be observed that  
the rule does not dispense with the usual

proof, but merely subjects the party who  
vexatiously requires it, to the payment of  
costs.

CHAP. XXVI.  
EVIDENCE AND  
WITNESSES.

" required shall consent to the admission, the judge shall order  
" the same to be made. No costs of proving any written or  
" printed document shall be allowed to any party who shall  
" have adduced the same in evidence on any trial, unless he  
" shall have given such notice as aforesaid, and the adverse  
" party shall have refused or neglected to make such admis-  
" sion, or the judge shall have indorsed upon the summons  
" that he does not think it reasonable to require it. A judge  
" may make such order as he may think fit respecting the costs  
" of the application, and the costs of the production and  
" inspection, and in the absence of a special order the same  
" shall be costs in the cause."

The above rule of Hil. T. 4 W. 4, r. 20, gives a *single judge at chambers*, but not the Court *in banc*, jurisdiction to order the admission of documents; and though at the request of the judge the Court may hear and *report to him their opinions* on a matter of that nature, yet they will not pronounce a formal judgment, but leave the judge afterwards to order as he may think fit. (x) In a recent case an order was made, that on the plaintiff paying the defendant the expenses of examining a judgment and other documents abroad, the defendant should pay the expenses of proving them at the trial, provided such proof should be satisfactory to the judge, and be so certified by him, whatever might be the result of the case, if after such examination the defendant did not admit them. (z) The subscribed orders were drawn up at chambers. (a)

With respect to the practical operation of this rule, Mr. Bagley observes, (b) that " as these regulations have taken effect within a short period, and their practical operation is but partially understood, it may be proper to observe that it is not compulsory in any case on the party intending to produce documents in evidence to adopt the course there pointed out, and that when it is considered unadvisable to inform the opposite party of the nature or contents of the documents proposed to be offered at the trial, the premature disclosure may be avoided, but in that event the cost of proving the document falls inevitably on the party producing it in evidence. On the other hand, when no solid objection exists to putting the adverse party in possession of the nature of the documents proposed to be offered in evidence, and any considerable expense is likely to

(x) *Smith v. Bird and another*, 3 Dowl. 641.

(a) See form of order, 3 Dowl. 645.

(b) Bagley's Chamber Prac. 307 to 309.



be incurred in proving them, it seems judicious in all cases to require their admission in the manner prescribed; for whether the judge shall determine that the required admission is reasonable or unreasonable, the party producing the document in evidence will not be entitled to the costs of proof in any event, unless he has availed himself of the rule. If a judge, upon hearing the parties, intimates his opinion that a document ought to be admitted, the admission is generally assented to; (b) but if it should be refused, the only event in which the party refusing can escape from the obligation to pay the costs incurred in proving the document, is where the party adducing such document has failed to prove it to the satisfaction of the judge presiding at the trial, as testified by the absence of his indorsement on the document. It is altogether in the discretion of the judge, before whom the summons is made returnable, to say when it is reasonable to call for the admission of the document specified; but it is presumed that it would not be considered reasonable to require the admission of any document, when it appeared from the pleadings that the validity of such document was clearly in issue; as where non est factum is pleaded to an action on a specialty, or forgery to an action on a promissory note or bill of exchange; nor does it seem reasonable in general to require an admission of the execution of a private instrument to which the party called upon to admit is in no respect privy. Even in such instances, however, although the judge should be of opinion that it was unreasonable to require the admission, unless the party producing the document applies for its admission in the manner prescribed, he cannot recover the costs of proof, although the issue should be determined in his favour." (c)

It may be added, that when it is expected that fraud or illegality, or other matter of defence arising at the time of executing a deed or other instrument, will come in question, then it may be so important that the attesting witness should attend, that at least one of the parties should secure the attendance of such witness.

IV. As observed by the late Lord Tenterden, "It is of the very greatest importance, as regards the result of a trial, that the principal attorney himself should, in due time, examine the

CHAP. XXVI.  
EVIDENCE AND  
WITNESSES.

IV. PROFESSIONAL CONDUCT TOWARDS WITNESSES, ANTECEDENT TO TRIAL. (d)

(b) See form of admission, T. Chitty's Forms, 130.

309.

(c) See Bagley's Chamb. Prac. 307 to this important part of practice.

(d) See further in the next chapter on

CHAP. XXVI  
EVIDENCE AND  
WITNESSES.

witnesses, and take down the result in writing;" and either the principal or a very experienced clerk, who will afterwards attend at the consultation and to the conduct of the cause at the trial, and who will be above suspicion of tampering with the witnesses, should personally, and in the absence of the client, see and examine each witness apart from the other, so that one may not influence any other as to the *exact* testimony he will give; and he should in particular inquire whether he has any *interest* in the event of the action, or whether there are any circumstances which might affect his *competency* in the opinion of the *judge*, or his *credit* in the estimation of a *jury*, and whether, if there be any objection, it can be removed by release or otherwise. (e) Moreover, if it be a heavy or very important cause, the taxing officer, in the exercise of his discretion, will allow to the successful party the costs reasonably incurred in examining witnesses preparatory to brief, in addition to the common instructions. (f) In the course of this proceeding, any instrument to which the party is supposed to have been an attesting or subscribing witness, may be shown to him, and he may without impropriety be interrogated as to all circumstances relating to the same. "The practice of procuring and examining witnesses is in itself innocent, and in many cases necessary and meritorious, and in none disgraceful, whether the employer or the person employed be considered, and to that extent all the judges have expressed an unanimous opinion in the Queen's case." (g) And we shall find that even in the Scotch law, where *precognition* of witnesses is considered so objectionable, yet such a *verbal inquiry* of witnesses as to their expected testimony is permitted, because it may be indispensable to a just trial. In the Scotch law, however, it is not permitted to require a witness *himself* to state *in writing*, still less to *subscribe to*, a statement of what he will prove, because it has been supposed that operation might afterwards induce him to adhere to a statement made on a mere *ex parte* examination, which upon more mature consideration he would doubt. In England it has been the practice to request an *intended witness* to write down *his statement* of

(e) It may also be expedient to ascertain from the witness his age and relationship, or connection, if any, with the plaintiff or defendant, and in some cases whether he is a Churchman or Dissenter, or of what other religious tenets or political opinion, and in general his opinion of the plaintiff or defendant or the case of either. On the trial, if a witness, without objecting to it, take the oath in the usual form,

he may afterwards be asked whether he think the oath binding upon his conscience; but it is unnecessary and irrelevant to ask him if he considers any other form of oath more binding, and such question cannot be asked. *The Queen's case*, 2 Brod. & Bing. 284.

(f) See Bills of Costs, page 76.

(g) By all the judges in *The Queen's case*, 2 Brod. & Bing. 302, 306, 307.

*the facts* to which he will depose, and which might on the trial be produced to the witness, in case he should then vary in his evidence. (h) In a late case, where it appeared that the plaintiff's attorney had examined a witness and taken down his statement in writing, and afterwards read it over to him, and he said it was quite correct, and upon the witness giving quite contrary evidence on the trial, the written account was read to the jury, and they found for the plaintiff, four other witnesses having sworn in favour of his claim, the judges (Lord Denman, C. J. and Bolland, B.) made no objection to such proceeding, although they differed in opinion as to the right of the plaintiff to discredit a witness called by himself. (i) It seems upon the whole to be the safest course for the *attorney himself to write down* the witness's statement, and just before the trial to read it over to him, and to correct it according to any alteration the witness may then suggest, and to be prepared to produce the same paper on the trial *valeat quantum*. It has also been considered not to be improper to write to a witness, and thereby inform him what is the material point in dispute, as so and so in particular, and then to request him to put down in writing what he knows and has heard the parties say on such and such particular occasions, or at any other time, drawing the attention of the witness only to particular occasions or conversations, but without suggesting the answer to the questions, excepting an intimation that accuracy will be essential.

It has, however, been considered highly improper to administer to the witness *any oath* as to the accuracy of the statement of his evidence before the trial, for although such swearing would be extrajudicial, and therefore not subject the witness to an indictment for perjury, yet still it might impose on the witness an improper bias before he has been duly examined upon the trial. (k)

In the *Scotch law* there is much more *jealousy* with respect to any *interference* or *intercourse* with a proposed witness than in England, as will appear from the few authorities referred to in the subscribed note; (l) and perhaps the principle of some

(h) *Dee d. Smith v. Smart*, post, 845, n. (i); and *Wright v. Beckett*, 1 Mood. & Rob. 414. But this is not allowed in the Scotch law, see note (l), post, 823. And it may well be objected that this proceeding may have the effect of inducing a witness to adhere on the trial to his first written statement, although, when examined on his oath in Court for the first time, his statement might differ.

(i) *Wright v. Beckett*, 1 Mood. & Rob. 414.

(k) In *Powlett v. Lord Sackville*, for crim. con. tried in Western Circuit, M.S. coram Garrow, R.

(l) In the Scotch law a distinction is taken as regards the pre-examination (there called *precognition*) of a witness in criminal or public prosecutions, and civil or private proceedings; on the former it

**CHAP. XXVI. of those rules and objections, such as the objections to showing to a witness the written statement of another witness, or**  
**EVIDENCE AND WITNESSES.**

is permitted, and precognition of a witness, at the instance of a public prosecutor, is clearly no objection to the admissibility of the witnesses; nor will the presence of the conductor of the prosecution, during the examination of the witnesses, be deemed improper.\* But in the latest cases, the Scotch Courts have expressed their strong disapprobation of taking precognition in civil causes;† and the reason of the distinction has been assigned to be, that the peremptory diets of Court, and the accuracy required in laying the indictment, render recognition necessary in criminal cases; and as they are taken at the instance of a public officer, who cannot have any private interest in the matter, no bad consequences can result. But that such a practice would be both unnecessary and dangerous in civil actions, where the pursuer (plaintiff) is allowed considerable latitude, both in forming his libel (declaration) and in leading (conducting) his proof. In such cases, too, precognitions are taken by a party interested in the issue of the cause, in absence of his opponent, in a loose and inaccurate manner; and in these circumstances the persons examined will hazard assertions which they would not have made upon oath, but which they may be afterwards ashamed to retract. The practice, therefore, of taking such precognition, has always been condemned by the Court. And the objection is considered the stronger when the witnesses have been examined in the presence of each other, and have been afterwards shown their declarations, so that even with the best intentions, their after evidence will be biased, and if so inclined they may prove a connected story, the falsehood of which it may be impossible to detect.‡

But if the evidence proffered to be given in a civil suit has been precognized before a justice of the peace, with reference to some charge of a criminal nature, then it may be admissible.§ However, where a precognition of several witnesses had

been so obtained before a justice, with reference to a criminal prosecution, and the pursued abandoned that proceeding, and brought a civil action for damages, and sent to each of the witnesses who had been examined a copy of their own declarations before the justice, together with the declaration of a particular witness, who was considered as the leading one, that they might recollect, as he said, what had passed, when the facts were more recent, the Court unanimously sustained the objection to the admissibility of the witnesses, and declared that although in all cases, even of criminal proceedings, a witness whose deposition has been taken has a right, before he is again examined in Court, to have his previous deposition cancelled; yet that to send, as was here done, the whole proof to each witness, was highly unwarrantable, and of the most pernicious tendency, and they rejected the evidence and fined the pursuer £5 for the use of the poor, for his malpractice.||

In an earlier case it was established, that dealing with a witness after citation, is illegal, as even showing a witness a paper as to what he is to depose, in the absence of the judge, or previously showing him interrogatories upon which he is to be examined,¶ or showing him an unsubscribed rental of lands, whereof the quantity of rent was to be proved, was considered an improper instructing.\*\* If a witness had been present at consultations in the cause, he was not admitted to give evidence.†† So if the agent for the person adducing a witness after he has been cited, speak to him on the cause, and mention to him an imputation on his character which had been stated by the other party, this will prevent him from examining such person as his witness.‡‡ So the purposely causing depositions to be shown or read, or proofs sworn or to be given by a witness, to another witness, renders the latter incompetent to give

\* *Anderson v. Spotal*, 7 June, A. D. 1793, *Morrison's Dictionary*, vol. xix. No. 208.

† *Wemyss v. Wemyss*, 26 Feb. A. D. 1793, *Morrison's Dict.* vol. xix. No. 207.

‡ *Id. ibid.*; but note only the argument for the defendant, and see reasons in *Fall v. Sowers*, 10 Aug. 1785, *Morrison's Dict.* vol. xix. No. 202; and see *Boyle v. Yule*, 4 Aug. A. D. 1778, 19 *Morrison's Dict.* No. 201.

§ *Wemyss v. Wemyss*, *supra*, †.

|| *Fall v. Sowers*, 10 Aug. A. D. 1785, *Morrison's Dict.* vol. xix. No. 202.

¶ *Goddes v. Parkhill and another*, 16 Jan. A. D. 1741, 19 *Morrison's Dict.* No. 166.

\*\* *Crumstane v. Cockburn*, Feb. A. D. 1682, 19 *Morrison's Dict.* No. 92.

†† *Home v. Home*, 5 July, A. D. 1699, 19 *Morrison's Dict.* No. 116.

‡‡ *Cadell v. Mortland and another*, 19 Jan. A. D. 1799, *Morrison's Dict.* vol. xix. No. 213.

even informing him what another witness will swear, and thereby naturally inducing him to swear to the like effect, might be equally applied to the administration of justice in England.

CHAP. XXVI.  
EVIDENCE AND  
WITNESSES.

Every honourable practitioner at all events will take care that no part of his own or his client's intercourse with the witness can possibly have the least influence upon him to give his testimony, otherwise than strictly according to the truth, and without evincing the slightest partiality to either party. Indeed in prudence and policy, this is of the utmost importance to the client's interest, because the *least improper interference* with a witness might so disgust a jury as to induce them to find a verdict against the client, although law and justice might, on the whole, be in his favour.

So with respect to *written or documentary evidence*, it will frequently be of the utmost importance for the principal attorney to examine it with care long before the trial.<sup>(1)</sup> It has too frequently occurred, that the client has relied upon a statement of written transactions or account books, but which, from some uncommunicated suspicious *alteration* being discovered on the trial for the first time, induces an invincible suspicion of fraud against the client, though in reality the erasure or alteration was

Previous examination of Documentary Evidence.

evidence;\* though it would be otherwise if they by accident saw the deposition.\* But the merely having conversation with a witness relating to a cause after he has been cited, constitutes no objection.†

In the first case, 2 Hale's Pl. Cr. 280, was cited to show that the wilful communication to one witness of what another has sworn, is an insuperable bar to the admissibility of the former.

But it was very early held, that a witness may be asked what he knows of the matter, provided no paction be made with him to abide by his information.‡ But a distinction has been taken between obtaining a verbal statement of what a witness will swear, and obtaining a written statement from him, and the latter may render his evidence inadmissible, because it is pledging him to subsequent consistency.§ But it was helden that a witness was admissible, although while in the service of the party by whom he was adduced, and before his citation, he had drawn up, at his master's desire, and delivered to him a statement of all the particulars

which he knew respecting the cause. It was urged in support of the witness, that a party must necessarily inquire of those who are to be cited as witnesses, what they know of the facts connected with the cause. On the other hand it was objected, that the defendant, by giving the witness the information necessary for drawing up the paper, had communicated to him the manner in which he intended to shape his pleadings, and how he expected the evidence of the witness to bear on it. But that the law is so anxious to prevent this knowledge on the part of witnesses, that it is an undoubted objection that a witness has heard another examined, whereas here the witness knows precisely the import of the whole evidence which the defendant means to bring forward. Authorities were cited to establish that point, but the Lords unanimously repelled the objection.||

(1) This is always essential as regards the stamp, *Beckwith v. Renner*, 6 Car. & P. 681.

\* *Jean Farquharson v. Alexander Anderson*, 2 Dec. 1802, by a small majority of the judges, *Morrison's Dict.* vol. xix. appendix. 2.

† *Id.*; also by a small majority.

‡ *Anga. B.* 13 Feb. A. D. 1679; 19 *Morrison's Dict.* A. D. 1786; *Arbuthnot*

of *Knox v. The Lady*, 21 July, 1680, 19 *Morrison*, No. 88.

§ *Ellis v. Hamilton*, 16 June, A. D. 1681, 19 *Morrison's Dict.* No. 89.

|| *Durham v. Muis*, 10 Feb. A. D. 1798; *Morrison's Dict.* No. 211.

CHAP. XXVI.  
EVIDENCE AND  
WITNESSES.

attributable to accident, or the improper conduct of a clerk, and which, if ascertained in time, might have been satisfactorily explained to the jury. (m) It seems therefore to result, that an attorney should so inquire and examine into the case and evidence, that he may become master of each, and judiciously decide on the exact evidence he will offer on the trial, and without apprehension of disastrous surprise, be able fearlessly to instruct counsel as to every part of the evidence he thinks it expedient to adduce.

Expediency of adducing even doubtful witnesses or evidence.

When the competency or credibility of a witness is doubtful, the prudent course, when it is expected that his evidence will be favourable, is to subpoena him at all events, because the opponent may perhaps not be aware of the objection, or prepared to substantiate it; and if he be, the reliance upon the objection may create a prejudice against the opponent who has taken it, and the expense of the witness's attendance will probably be allowed. (n)

Of endeavours to remove objections to witnesses by improvements before the trial.

If it be ascertained that the witness is incompetent from *defect of understanding*, then unless a commission of lunacy has been found, or the bare production of the witness would inevitably lead to a conclusion of incompetency, it may be expedient to subpoena him, and to require that in the meantime a regimen be adopted best calculated to improve the state of his mental faculties. And if it be known that a witness is addicted to intoxication, it is scarcely necessary to suggest that he should be placed under the care of some relative or friend, who will at least secure sobriety and decent conduct in Court. If the incompetency arise from *insanity or defect of education*, and the consequent inadequate knowledge of the obligation of an oath, as there are instances of postponing a criminal trial in order to afford a degree of instruction to a witness in the mean time, perhaps the same principle might be extended to a civil action, and therefore endeavours should be made to delay the trial as long as practicable, and the youth in the mean time placed under the best and most rapid course of education, as well moral as religious.

(m) In *Attwood v. Smallwood*, in the House of Lords, A. D. 1835, strong observations were made on the probable effect upon a jury of a suspicious alteration in documentary evidence. And in *Stoveld and others v. Ellis*, tried at Horsham assizes, A. D. 1840, (an action for a balance of a banking account,) the jury found a verdict against the bankers, merely because there were two erasures on the

credit side of the account, when, if it had been known before the trial that the books contained such erasures, their production in evidence might have been avoided.

(n) *Rushworth v. Wilson*, 1 Bar. & Cres. 267; *Hutchinson v. Alcock*, 1 Dowl. & Ry. 145; *Andrus v. Thornton*, 8 Bing. 451; as to allowance of expenses, *Benson v. Schneider*, 7 Taunt. 337; *J. B. Moore*, 76.

With respect to persons who have been guilty of a *crime*, the party objecting to his testimony may be required to prove the conviction by the record, and its consequences in excluding his testimony may be removed by proving a *pardon*, or by showing that endurance of the full term of punishment has expiated the consequences of the guilt as regards his *competency* to give evidence.

CHAP. XXVI.  
EVIDENCE AND  
WITNESSES.

With respect to the more frequent objection on the ground of *interest*, it must in general be *removed* by a *release*. Sometimes, however, even at *nisi prius* this may be effected by a *deposit of money*. (o) When there is the least apprehension that a release may be required by the client, his attendance at the trial should be secured; and as a general rule, every attorney, as well for a plaintiff as a defendant, should, on attending a trial, have with him a sufficient number of blank releases on proper stamps ready to be immediately filled up and executed. If an attorney promise a release, his engagement will be binding; but although after the witness has given his evidence, he refuse to perform his promise, the Court will not, on that account, grant a new trial. (p)

Readiness to  
Release.

In what is vulgarly termed "getting up a cause," or "preparing for trial," it is too much to expect of an attorney or counsel, before the trial, his decision that the testimony of any one of *several* witnesses or of *several* documents upon the same point may be dispensed with; and a prudent attorney should subpoena all witnesses and adduce all documents that it is expected will be favourable to his client, leaving it to the discretion of his counsel on the trial to call as many as he may think prudent. Many causes have been lost by calling too many, (q) or by giving in evidence more documentary evidence than was requisite; (r) but then no blame was imputable to the attorney as it might be were there a *deficiency* of proof. It will be essential also to adopt a judicious *arrangement of the witnesses* in the brief, and under the name of each to give a concise intimation of what reliance may be reposed in him, and in general stating, *first*, the evidence of the best and most important witness; though in proving an ancient right of common or way, or when

Number of wit-  
nesses or quan-  
tity of evidence.

(o) *Lees v. Smith*, 1 Mood. & Rob. 329.

(p) *Heming v. English*, 6 Car. & P. 542.

(q) See the instance of calling a *fifth* witness, supposed to be favourable, but who turned out adverse, *Wright v. Beckett*, 1 Mood. & Rob. 414.

(r) Thus in a late case on the Home Circuit, by the plaintiff's counsel unnecessarily putting in evidence deeds, instead of relying on a *possessory title*, the plaintiff recovered only a share in the property, in consequence of the deeds disclosing an outstanding term as to the residue.

CHAP. XXVI.  
EVIDENCE AND  
WITNESSES.

the witnesses are very numerous, it has been considered advisable to close the case with some of the very best witnesses, so as to leave a strong impression on the jury. The master in his discretion may allow for witnesses, although not called on the trial. (s)

V. OF THE  
PRACTICAL  
PROCEEDINGS  
TO COMPEL THE  
APPEARANCE  
OF WITNESSES.

V. The respective attorneys, having determined *what witnesses* to subpoena, and *what documentary* evidence to adduce, should, at least, a reasonable time before the trial, take care to issue such proper process, and adopt such proceedings, as may most effectually secure the attendance of each witness, and the production of all necessary documents; or in default subject him to an attachment or action on the case for the consequences of his omission. (t)

Of the subpoena,  
and subpoena  
duces tecum.

The process of the superior Courts, requiring a witness to attend on a trial, and the punishment by attachment, existed at common law; and although the 5 Eliz. c. 9, imposed a 10% penalty, and gave further recompense to the party aggrieved, to be assessed by the Court, (u) for non-attendance of a witness, and punishment for perjury; yet it is more usual to proceed by attachment, or by action on the case, for non-attendance, or by indictment at common law for perjury, than to proceed upon the statute. It is expedient, however, for a practitioner to examine the enactments in the statute, and in particular the 12th section, which enacts, "that if any person or persons upon whom any process out of any of the Courts of record shall be served, to testify or depose concerning any cause or matter depending in any of the same Courts, and having *tendered unto him or them according to his or their countenance or calling such reasonable sums of money for his or their costs and charges, as having regard to the distance of the place, is necessary to be allowed in that behalf*, do not appear according to the tenor of the said process, having not a lawful and reasonable let or impediment to the contrary, that then the party making default to lose and forfeit for every such offence 10%, and to yield such further recompense to the party grieved as by the discretion of the judge of the Court out of which the said process shall be awarded, according to the loss and hindrance that the party which procured the said process shall sustain by reason of the non-appearance of the said wit-

(s) *Adamson v. Noel*, 2 Chitty, R. 200. C.; *Pearson v. Fletcher*, 5 Esp. Rep. 90.  
(t) *Amey v. Long*, 9 East, 473; 1 (u) *Pearson v. Ills*, Dougl. 556, 561;  
Campb. 14, *id.* 180; 6 Esp. R. 116, S. Chitty, Col. Stat. 291, *post*.



ness or witnesses; the said several sums to be recovered by the party so grieved against the offender or offenders by action of debt, &c.”

CHAP. XXVI.  
EVIDENCE AND  
WITNESSES.

In general it is advisable to issue and serve, not only a subpoena to give evidence, but also to produce all documents in the witness's power, by a subpoena duces tecum, and, when practicable, the date and particulars of each deed or document should be stated, so as to preclude the possibility of excuse, that the particular document had escaped recollection; and afterwards the writ may conclude, “and all other deeds, documents, instruments, writings, and papers whatsoever, in your custody or power, that may afford any evidence or information touching the matters in difference in the said cause; and, further, it may be useful to require the witness in terms “diligently to search for and examine and enquire after all such deeds, documents, instruments, papers and writings;” so that the same may be produced and given in evidence to the jurors at the time and place of trial. This would prevent a not unfrequent excuse, that the witness was not aware that it was his duty to search, which, after having been served with so explicit a subpoena, he could not urge.(v) If a witness be

Of subpoenaing  
the witnesses.

(v) The following is the usual full form of subpoena duces tecum, with the addition of a suggested direction, “diligently to search for documents, &c.”—

William the Fourth, by the grace of God, of the united kingdom of Great Britain and Ireland king, defender of the faith, to L. M., N. O., &c. [names of all witnesses included in the subpoena not exceeding four] greeting: We command you that laying aside all and singular business and excuses you and every of you, be and appear in your proper persons before our right trusty and well beloved [name of chief justice] our chief justice assigned to hold pleas in our Court before us [or in C. P. “before sir, [name of chief justice,] knight, our chief justice of the bench:” or in Exchequer, “before sir, [name of chief baron,] knight, lord chief baron of our Court of Exchequer at Westminster, at the Guildhall of the city of London,” or in Middlesex, “at Westminster Hall, in the county of Middlesex,” adding in the Exchequer, “in the place where our said Court of Exchequer is usually holden,” or at the assizes, “before our justices assigned to take the assizes in and for the county of —, at — in the said county”] on —, the — day of — instant [or “next,”] by — of the clock in the forenoon of the same day, to testify all and singular those things which you, or either of you, know in a certain cause now depending in our Court, before us [or in C. P. “before our justices,” or in the Exchequer, “before the barons of our said Court of Exchequer,”] at Westminster, between A. B., plaintiff, and C. D., defendant, in an action on promises [or “of debt,” &c. as the action is,] on the part of the plaintiff [or “defendant,”] and on that day to be tried by a jury of the country; and also that you do diligently and carefully search for, examine, and inquire after, and bring with you, and produce, at the time and place aforesaid, a bill of exchange, dated the — day of —, A. D. —, drawn by — on —, and for the payment of £ —, two months after the date thereof; And a letter dated, &c. signed by one —, and addressed to —, and purporting to contain and be a notice of the dishonour or non-payment of the bill by the said drawee; And a certain instrument, purporting to be an indenture of lease made between A. B. of the one part, and C. D. of the other part, and dated the — day of —, 1835; And a certain paper-writing, purporting to be a receipt signed by G. G. for the sum of £ —, from one P. P., and dated the — day of —, 1835; And [here describe particularly every other document required to be produced,] together with all copies, drafts, and vouchers relating to the said documents and letters, and all other documents and paper writings whatsoever that can or may afford any information or evidence in this cause; then and there to testify and show all and singular those things which you or either of you know,

Full form of a  
subpoena duces  
tecum

To appear and  
give evidence in  
an action.

Also to search  
for and bring  
with him certain  
enumerated  
documents.

CHAP. XXVI.  
EVIDENCE AND  
WITNESSES.

served merely with a subpoena *to attend*, he need not search or bring with him any documents, even though he be at the same time served with a notice to produce; (x) and hence the general utility of the full form of writ which was established to be proper in a late case. (y) However, it is now settled that a subpoena *duces tecum*, without being *ad testificandum*, is sufficient; as a party may be compelled to produce a document without having any right to be *sworn, still less examined*, as a witness, or giving the opponent a right to examine or cross examine him. (z)

The best course on all occasions would be to issue a subpoena *duces tecum* in the *fullest form*, and as in the antecedent note; and the names of *four witnesses* are still allowed to be included in one writ; (a) although the practice of including several persons as defendants in mesne process when the subsequent declaration is not to be joint has, we have seen, been in a great measure determined. (b) The writ is then to be engrossed, and is usually on parchment, (b) and is to be *signed* by the signer of writs and duly *sealed*; as many copies of such writ are then to be made as there are witnesses named in the writ, not exceeding four; (c) and afterwards a *copy* must be served upon each of such witnesses *personally*, and at the same time the original writ, duly signed and sealed, *must be shown* to each witness, whether required or not, and, when necessary, a proper tender for expenses must at the same time be made; for otherwise he will not be liable to an attachment. (c)

The subpoena must have been *actually issued* before service of the copy; and though it has been supposed that the name of a witness, although not in the original subpoena, may be inserted therein at any time, if he have been regularly served with a copy; (d) yet as it is clear that the original subpoena, corresponding with the copy, ought in strictness to be shown to the witness at the time of the service of the copy, whether required by the witness or not, and that if that be omitted, *no attach-*

Statement of  
consequences of  
disobedience.

or the said documents, letters, or instruments in writing do import, of and concerning the said cause now depending. And this you, or any of you, shall by no means omit under the penalty upon each of you of 100*l.* Witness — [name of chief justice or chief baron] at Westminster, the — day of —, in the — year of our reign.

(z) *Perry v. May*, 1 Mood. & Rob. 279.

(y) *Amey v. Long*, 9 East, 473; 1 Campb. 14, 180, note (a), and next note.

(x) *Evans v. Masely*, 2 Crom. & M. 490; 4 Tyr. 169; 2 Dowl. 364; *Rush v. Smith*, 1 Crom. M. & R. 94; 2 Dowl. 687, S. C.; *Perry v. Gibson*, 1 Adol. & Ell. 48; and *Somers v. Masely*, Exche-

quer, S. P.

(a) *Wakefield v. Gall*, Holt's Cases N. Pri. 526.

(b) *Ante*, vol. iii. 184.

(c) *Jacob v. Hangate*, 3 Dowl. 456; *Wadsworth v. Marshall*, 3 Tyr. 223; Crom. & M. 87, S. C.

(d) *Wakefield v. Gall*, Holt's Rep. 526; Tidd, 805, *sed quare*.

*ment* can be sustained, (e) it would be unsafe to rely upon the former supposition. Such copy of the subpoena must be delivered to and left with the witness at the time of the service. (f)

CHAP. XXVI.  
EVIDENCE AND  
WITNESSES.

Whether a witness be favourable or not, it is always most prudent to subpoena him, or endeavour to do so, as soon as the *issue has been joined*, or at least, on the part of a defendant, as soon as notice of a trial has been given; *first*, because such service will prevent the witness from getting out of the way, and avoiding service; *secondly*, because it will protect the witness from arrest on civil process, and preclude all excuses, excepting dangerous illness, for non attendance; and, *thirdly*, because if such bona fide endeavour to serve be ineffectual, the judge, upon an affidavit of such early but unsuccessful endeavours and of the materiality of the witness, would probably postpone the trial on the application of the defendant, which he would refuse if the endeavours were too long delayed. At all events, a witness would have good ground to complain, if he were not served a reasonable time before the trial, (g) and perhaps even his disobedience might be excused. In a *Town cause* a bona fide endeavour to serve the witness ought to be made *at least four days before the trial*; (h) and a notice in London, served at two o'clock in the afternoon, for a witness to attend the sittings at Westminster on the same afternoon, is much too short. (i) In a *Country cause*, the witness, if out of the assize town, must at all events be served *before the commission day*, (k) and also before the day of attendance named in the writ; and if the service be afterwards, although before the actual day of trial, and in consequence the witness do not attend, the Court will not grant an attachment. (l) At the same time every prudent witness should exert himself and endeavour to attend, however short the notice. (m)

Time of serving  
a subpoena.

The safest course is always to serve a copy of the subpoena, and at the same time to produce and show the original to the witness in the presence of *two* persons, who will afterwards join in an affidavit that the original was produced; for if the witness, in answer to an application for an attachment, should swear that the *original* subpoena was not shown to him, the rule nisi for the attachment might be discharged with costs, and this

(e) *Jacob v. Hangate*, 3 Dowl. 456; *Wadsworth v. Marshall*, 3 Tyr. 228; *Crom. & M.* 87, S. C.

(f) *Thorp v. Gisbourns*, 11 Moore, 55; 3 Bing. 223, S. C.

(g) *Hammond v. Stewart*, 1 Stra. 510.

(h) *Postan v. Rose*, 4 Car. & P. 271.

(i) *Hammond v. Stewart*, 1 Stra. 510;

*Sims v. Kitchen*, 5 Esp. Rep. 46; *Bennett v. Jones*, 2 Chitty's Rep. 403; Tidd, 806.

(k) *Trist v. Johnson*, 1 Mood. & Rob. 259.

(l) *Alexander v. Dixon*, 1 Bing. 366.

(m) *Hammond v. Stewart*, 1 Stra. 510; *Sims v. Kitchen*, 5 Esp. Rep. 46; *Bennett v. Jones*, 2 Chitty's Rep. 403; Tidd, 806.

CHAP. XXVI.  
EVIDENCE AND  
WITNESSES.

Amount of sum  
to be tendered

although it be admitted that the witness did not demand inspection of the original. (n)

The statute 5 Eliz. c. 9, sect. 12, we have seen, subjects a witness to an attachment only when *having tendered unto him according to his countenance or calling such reasonable sum of money for his costs and charges as having regard to the distance of the place is necessary to be allowed in that behalf*, &c. (o) In a *town cause*, and when the witnesses reside in London or within the bills of mortality, it is the practice to tender only one *shilling* with the subpœna, because it is supposed that a witness in that case may travel the short distance on foot and without expense. In other cases only *a reasonable sum* to cover *travelling expenses to and from* and *expenses at the place of trial* need be tendered; and though it has been customary to allow solicitors, physicians, surgeons, and surveyors a fee for loss of time, yet no *right* to such allowance exists under the statute or otherwise; and it has recently been held that an *attorney*, when merely attending as a *witness*, cannot sue for any compensation *for loss of time*; (q) and probably physicians, surgeons, and surveyors are equally bound to attend gratuitously. (r) In *country causes*, or where a witness is subpœnaed to attend at any considerable distance, a sum, usually called *conduct money*, varying in amount to the station of the witness and *appropriate mode of travelling*, must be actually produced and tendered sufficient to cover his expenses *eundo, morando et redeundo*; (r) and although a sum has been actually accepted by a witness, yet if it were *too small* no attachment would be issued. (s)

Expediency of  
giving more particular  
instructions to each  
witness as to the  
time and place  
of trial.

It is advisable (though certainly not necessary) to apprise every witness of *the exact day and even hour* when it is expected the cause will be tried, but informing him that the communication is *entirely gratuitous*, and that *at his peril* he must take care and be in attendance according to the terms of the subpœna, and *continue such attendance every day until the cause has been tried* or otherwise disposed of, intimating to him the extraordinary run that sometimes takes place, in antecedent causes going off even to the extent of forty in two or

(n) *Jacob v. Hangate*, 3 Dowl. 456; *Wadsworth v. Marshall*, 3 Tyr. 228; *Crom. & M.* 87, S. C.

(o) *Ante*, 828.

(p) *Jacob v. Hangate*, 3 Dowl. 456.

(q) *Collins v. Godefroy*, 1 Bar. & Adol. 950; 1 Dowl. 326, S. C.; *Willis v. Peckham*, 4 J. B. Moore, 300; 1 Brod. & B. 515, even though promised to be paid for loss of time. So *merchants*, *Moore v. Adams*, 5 Maule & Selw. 156; *brokers*, *Lopes v. De Tassat*, 3 Brod. & Bing. 292; 7 Moore,

120, S. C.; and *scientific men*, *Severn v. Olive*, 3 Brod. & Bing. 72; 6 Moore, 235, S. C., are not entitled to any remuneration for loss of time or contingent losses, *Thelluson v. Staples*, Dougl. 48; see further, *Lee's Prac. Dict. tit. Witnesses*. A master of a vessel is allowed expenses, but not wages, *White v. Brayne*, 3 Dowl. 499.

(r) *Ashton v. Haigh*, 2 Chitty's Rep. 201, cited 3 Dowl. 261.

(s) *Dixon v. Lee*, 3 Dowl. 259.

three hours. It is further advisable in the evening before the day of trial to deliver to each witness at his residence a *written notice* that the cause will come on the next morning, probably *very early*, and that he must be precisely punctual at the appointed hour of nine or half past nine o'clock in the morning; and if the cause stand very early, the prudent course will be very early the next morning to send an active clerk to collect and bring every material witness to the Court with him; and as it not unfrequently occurs, especially at Westminster, that the witness gets into the wrong Court, it may be advisable to be very explicit to the witness in that respect, and even particularly to assign to him a place in the proper Court; and at the assizes some particular inn or place of rendezvous at the circuit town on the evening before or at an early hour before that appointed for the sitting of the Court should be named. It is, however, no excuse for non-attendance, that a person whom the witness instructed to watch the proceedings neglected to give him notice in due time. (t)

CHAP. XXVI.  
EVIDENCE AND  
WITNESSES.

When an officer of the Court or a banker or other person is served with a subpoena to produce some official or other document in his custody, and it be also intended to require *him* on the trial to give some parol evidence as to the practice in the office or respecting the custom of bankers or of trade, &c., then the witness so subpoenaed should be *particularly informed as to the latter*, not only that he may be better prepared to speak on the subject, but also that he may not, as frequently occurs, merely send *his clerk* or partner with the documents; for if the witness be not so informed, the Court will not grant an attachment on account of his not attending in person. (u) Whatever may be the liabilities of a witness, the interest of the client will be best observed by endeavouring to secure the attendance of the witness even by extra attention and trouble.

As a plaintiff is bound to have his witnesses in attendance in Court *at and from the commencement of the assizes*, without regard to the order in which his action may stand for trial in the cause paper, he is therefore entitled to the costs of their attendance from the evening before the first day of trial, and he should therefore take care to be secure of the attendance of the witnesses on that evening, and at the assizes to attend him at a named inn in the circuit town, before a named hour, stating at the foot of the copy of subpoena such his temporary residence during the assizes; (v) at least the propriety of the

(t) *Res v. Fenn*, 3 Dowl. 546.

(u) *Bennett v. Jones*, 2 Chitty's R. 403.

(v) *Coggrave v. Evans*, 2 Dowl. 443;

*Platt v. Green*, id. 216, 8. C.

CHAP. XXVI. **attendance of the witnesses before the very first day is in the discretion of the master. (x)**

**EVIDENCE AND WITNESSES.**

It has been held, on a rule for an attachment for not obeying a subpoena to attend as a witness, that it must appear that the party was called in Court on his subpoena; (y) and if he were so called, still if he was too ill to attend, that will be sufficient excuse. (y) But in a subsequent case, where upon a motion for an attachment an affidavit was produced stating that the witness was called three times in open Court, this was holden sufficient without alleging that he was called upon the subpoena; (z) and in another case it was held that a witness is guilty of contempt by not attending though the cause is not called on. (a) And a plaintiff's counsel has a right, before the jury is sworn, to have the witnesses called on their subpoena. (b) An action may be maintained if in consequence of the non attendance of the witness the plaintiff's attorney be obliged to withdraw the record, though the plaintiff be not nonsuited. (c)

If by an alteration in the state of the pleadings after notice of trial, (as by a judge giving leave to a defendant to withdraw his pleas of justification in an action for a libel,) certain witnesses have become unnecessary, the party who subpoenaed them must take the earliest means to *countermand* the attendance of such witnesses, or the expense of them will not be allowed as costs in the cause. (d) If the cause be made a remanet, the original subpoena must be resealed, and a fresh copy thereof again served. (e)

In all cases an attachment must be moved for in the following term, and not afterwards; (f) and unless it clearly appear from the affidavits that the evidence of the witness would have been material, no attachment will be granted against him for his non attendance. (g)

VI. OF NOTICES TO PRODUCE.

VI. A *notice to produce* is only proper when a document is supposed to be in the possession of the *party to the cause*, or of *his attorney or agent entirely for such party's use*; for if the document be in a third person's possession, even as a stake-

(x) *Platt v. Green*, 2 Dowl. 216.

(y) *In re Jacobs*, 1 Harr. & Wol. 123;

1 Mood. & Mal. 115.

(z) *Dixon v. Lee*, 3 Dowl. 259; *Res v. Fenn*, id. 546.

(a) *Barrow v. Humphreys*, 3 Bar. & Ald. 800, 598, cited by Parke, B. in 3 Dowl. 259.

(b) *Hopper v. Smith*, 1 M. & M. 115.

(c) *Mullett v. Hunt*, 3 Tyr. 875; 1 Crom. & M. 752.

(d) *Allport v. Baldwin*, 2 Dowl. 599.

(e) *Tidd*, 805, note (m); 1 Arch. K. B. 4th ed. 292.

(f) *Thorpe v. Gisborne*, 3 Bing. 225; 11 Moore, 55, S. C.

(g) *Dicas v. Lawson*, 3 Dowl. 457.

(h) *Dicas v. Lord Brougham*, 1 Gale, 14.

(i) See in general 1 Arch. K. B. 4th ed. 289. *Quere*, if a subpoena duces tecum even to a party in a cause, and at all events to his attorney, might not be of utility under the decisions, *ante*, 830, n. (z).

holder, a notice to produce to him would be of no avail, and he must be served with a subpoena duces tecum; (i) and if the attorney of the party have possession of a document, and claims *a lien or any interest on his own behalf*, the safest course is to subpoena him to produce the same.

As part of the general rule, that the *best evidence* must be adduced, it is an established rule not to admit *secondary evidence*; as, for instance, the production of a copy without proving that due means have been adopted to endeavour to obtain the production in Court of the original. Consequently when the opponent has in his possession or power *an original document*, a *written notice* must be served upon him in due time to produce the same, for otherwise a copy cannot be read in evidence; (k) and it must also be proved that the opponent *last* had the possession of the original, and that he was served with the notice to produce, a *reasonable* time before the trial; therefore a notice requiring a defendant to produce a lease served upon the wife of the defendant's attorney at his lodging in the evening before the day of trial, is too short. (l) So at the assizes, a notice to produce, served in the assize town, is too late. (m) But if a party himself be abroad, a notice served on the 13th of December, between 5 and 6 in the afternoon, upon his attorney, to produce documents at the trial to be on the 15th December, is sufficient, because it is to be supposed that a client going abroad will leave all his documents in the possession of his attorney. (n)

With respect to the *requisites* or terms of a notice to produce it should *particularize every document* as fully as possible, for a notice to produce "all letters, &c." without stating dates or extracts to bring the opponent's recollection to those required has been considered *too general*. (o) It is advisable to state the *dates* and *some particulars* of each document and letter, the same as in the preceding form of subpoena duces tecum, (p) especially when the terms of the letter are favourable to the party giving the notice; for the very reading of the notice in Court to the jury may lead to an inference in favour of the party giving the notice, even though the letter or document be not produced. It is recommended also that a notice to pro-

(i) *Parry v. May*, 1 Mood. & Rob. 279, ante.

(k) *Bate v. Kinsey*, 1 Crom. M. & Ros. 38; *Doe v. Morris*, 4 Nev. & Man. 598.

(l) *Doe d. Wartney v. Grey*, Stark. R. 283; *Sims v. Kitchen*, 5 Esp. R. 46; *Bennett v. Jones*, 2 Chitty's Rep. 495.

(m) *Bryan v. Wagstaffe*, 2 Car. & P. 127.

(n) *Bryan v. Wagstaffe*, 2 Car. & P. 126; Tidd, 803.

(o) *Jones v. Edwards*, M'Clel. & Young, 139.

(p) *Ante*, 829, note (u).

CHAP. XXVI. duce require the opponent to *search for* as well as to *produce*,  
EVIDENCE AND as in the subscribed form. (p)  
WITNESSES.

The proof of the service of the notice to produce must afterwards be followed by evidence that the opponent had and probably still has possession of the document and wilfully withholds it. These proceedings are essential, as it has been settled that an instrument which has been traced to the hands of an opposite party can in no case be presumed to have been lost or destroyed, unless such party has had notice to produce it. (q) However, in an action on an attorney's bill, it is not necessary to give notice to produce the original bill delivered to the party, but the production of a duplicate thereof is sufficient, because in this case both are originals; nor is it necessary that the parties examining the original delivered with the duplicate should have read the two bills alternately. (r)

VII. OF NOTICES OF INTENDED DEFENCE, OR TO PROVE CONSIDERATION.

VII. Before the late pleading rules, which now require almost all matters of defence to be pleaded specially, it was considered prudent and proper for a defendant to serve the plaintiff, a reasonable time before the trial, with a notice of the

Notice on behalf of a defendant to produce bills, notes, checks, books, letters, &c. stating the dates and particulars as far as practicable.

(p) In the King's Bench, [or "C. P." or "Exchequer of Pleas."]

Between { A. B. plaintiff,  
and  
C. D. defendant.

You are hereby required diligently to search for and produce to the Court and jury at the trial of this cause a bill of exchange, dated the — day of —, A. D. —, drawn by the plaintiff upon and accepted by the defendant for the sum of £—, payable to the order of the plaintiff at —, after the date thereof, and by him indorsed; and also a certain letter addressed to the said defendant, and dated, &c., and purporting to contain notice of the nonpayment of a bill of exchange for the sum of £—, dated the — day of —, and drawn [or "indorsed"] by the defendant, and which became due on, &c. [then state the dates and particulars of every other document as far as practicable, and then proceed as follows:]—and all other bills of exchange drawn by the plaintiff upon and accepted by the defendant; and also all bills of exchange drawn by the defendant upon and accepted by the plaintiff; and all bills of exchange indorsed by the plaintiff or by the defendant; and all promissory notes, made or indorsed by the defendant and payable to or indorsed to the plaintiff, and all checks drawn by the plaintiff or the defendant upon certain bankers in, or bearing date in, the month of —, A. D. —, or at any time since; and also all day books, waste books, bankers' books, ledgers, books, ledgers, and all and singular other the book and books of account of the said defendant, papers and documents whatsoever, wherein are entered or contained any entry of any transaction, or dealing, or fact relating to the said bills of exchange, promissory notes, and checks; and all letters, notices, papers, and documents, containing any notice of the nonacceptance, nonpayment, or dishonour of the said bills of exchange, promissory notes, and checks, or either of them, or otherwise relating thereto; and all documents whatsoever tending to prove that the defendant received no value or consideration for his becoming a party to the bill of exchange mentioned in the declaration, and that the plaintiff knew the same, and that the plaintiff gave no value or consideration for the same bill. Dated this — day of —, A. D. 1835.

To Mr. —, the above-named plaintiff,  
and to Mr. —, his attorney.

Yours, &c. Y. Z.  
Defendant's attorney.

(q) *Dee v. Morris*, 4 Nev. & Man. 598.

(r) *Fyson v. Kemp*, 6 Car. & P. 71.



*intended defence*, where it might otherwise, on the trial, take the plaintiff by surprise, in which case if such notice had not been given, the Court would more readily set aside a nonsuit or grant a new trial, when the verdict was against the plaintiff, upon the objection which had taken him by surprise. The practice of giving notice of the defence of infancy and other matter, peculiarly within the knowledge of the defendant, was particularly recommended by Lord Mansfield and afterwards by Lord Ellenborough, who also extended the practice to defences in an action on a bill or note, on the ground of the want of consideration. (s) So where it is intended on a trial to endeavour to defeat or reduce a plaintiff's claim, on account of the inferiority of goods sold to the representation or warranted sample, or the insufficiency of work and materials, or negligence in the conduct of an action or defence in answer to an attorney's bill, it was considered fair, if not requisite, to serve a written notice of such defence. (t) But whenever, since the new rules, the plea has distinctly given notice to the opponent of the ground of defence, there cannot in general be occasion for a collateral notice of that description, unless in answer to an application for more particular information, and which should not in any case be withheld. However, when the plea is general, that the goods or materials were defective, a written notice, as in the subscribed form, may still be useful. (u)

VIII. It is most proper and commendable to save useless trouble and expense by an interchange of very candid admissions. VIII. Of admissions.

(s) See a form of notice to prove consideration, Chitty on Bills, 8th ed. 778, 779.  
(t) *Basten v. Butter*, 7 East, 479.

(u) See *Basten v. Butter*, 7 East, 479. The form of notice may be thus:—

In the ———.

Between { A. B., plaintiff,  
and  
C. D., defendant.

Notice that on the trial defendant will insist that plaintiff's work and materials were insufficient.

Take notice that on the trial of this cause the defendant will insist, that in case the plaintiff should prove that certain works and materials were done, and performed, and provided as by him alleged, then the defendant will insist and prove that the same were done and performed inartificially and in a bad and unworkmanlike manner, and that such materials were improper and inferior, and of much less value than the prices charged for the same, and that the defendant will claim and insist that deductions and allowances from the prices claimed ought on that account to be made, and in particular the subscribed list or statement of imperfections will be insisted on, besides other considerable defects and insufficiencies throughout the whole of the works and materials of the plaintiff to which this act relates. Dated the — day of —, A. D. 1835.

To Mr. J. K.  
Attorney for the plaintiff.

Yours, &c. E. F.  
Attorney for the defendant.

[Subscribe a schedule of defects or deficiencies.]

CHAP. XXVI.  
EVIDENCE AND  
WITNESSES.

sion of all facts known to exist; (x) but at the same time it is essential, before agreeing to admissions, to proceed with considerable caution; for instance, no admission of the execution of a deed or other instrument should be made by a defendant when it is important that it should be proved by the production of a witness, who must, on cross examination, admit some facts favourable to the party required to make the admissions, as in the case of fraud, gaming, usury, &c.; for then the admission would relieve the opponent from the necessity for producing the witness; and subject the defendant to the trouble and expense of subpoenaing him; besides, the difference in the mode of examining the witness, which in general may be more leading in case of a cross examination than in an examination in chief. In actions for personal injuries, as to the absolute or relative rights of persons, it is not advisable for the plaintiff unnecessarily to require or accept any admissions, because the appearance of candour on the part of a defendant may predispose a jury in his favour. If cross admissions are to be made, the plaintiff's attorney should in general require those in favour of the defendant to be distinct from, and not qualify the admissions in favour of the plaintiff, so as to compel the defendant to read the admissions in his favour as part of *his* case, without clogging or qualifying that of the plaintiff.

---

(x) See a form of *admission* under Reg. Gen. Hil. Term, 4 W. 4, T. Chitty's Forms, 130, 2d edit.

## CHAPTER XXVII.

## OF PREPARING FOR TRIAL, AND FINAL EXAMINATION OF THE EVIDENCE AND WITNESSES, AND DIRECTING THEIR CONDUCT.(a)

I. OF PREPARING FOR TRIAL, FINAL EXAMINATION OF THE EVIDENCE AND WITNESSES, AND ASCERTAINING THEIR EXACT TESTIMONY .....	839	3. Consideration of the character and temperament of each witness.....	843
1. How evidence and witnesses to be examined, and consequent utility .....	<i>ib.</i>	4. Instructions or directions to witnesses, when or not proper .....	<i>ib.</i>
2. Of releasing or removing the interest of witnesses ....	842	5. Directions to witnesses respecting their conduct just before the trial.....	845
		6. Conduct of witnesses pending and after the trial ....	<i>ib.</i>

THERE is no stage in a suit in which the zeal and ability of an attorney can be so efficiently evinced as in that of *preparing for trial or hearing*. At *Law* he has not only to prepare the *brief*, but must previously, with the utmost care, *collect, examine, condense, and arrange* the *Evidence*. In *Equity* he has to prepare the *Brief* relating to the pleadings or depositions in due order, and then give a compact and faithful analysis of all the material facts and points, and occasionally introduce appropriate observations, as well upon the *facts* as upon the *law and equity* applicable to the case.

At *Law* a formal and *full examination* of the *Evidence*, and particularly of the *Witnesses*, should at all events be effected on the behalf of a *Plaintiff* immediately after issue joined, and even before giving notice of trial, so as perfectly to ascertain whether the plaintiff can safely proceed to trial before the expenses incident to the delivery of notice of trial, and the de-

CH. XXVII.  
FINAL EXAMINATION OF WITNESSES, &c.

1. How evidence and witnesses to be examined, and consequent utility.

(a) Many of the observations in the following pages, particularly as regards the examination of witnesses previously to the trial, will be found anticipated in

the parts of the last chapter relative to witnesses. The importance of the subject, the author hopes, may excuse some repetitions in the present chapter.

CH. XXVII.  
FINAL EXAMINATION OF  
WITNESSES,  
&c.

---

fendant's proceeding thereon, have been incurred. (b) On the part of a *Defendant*, his evidence and witnesses should, if not before, at least be examined immediately after *receiving notice* of trial, as the costs of that proceeding will then be allowed against the plaintiff in case *he* should not try pursuant to his notice. The slovenly manner in which the expected evidence of witnesses is sometimes obtained, as well as stated in the brief, is extremely derogatory to the character of the profession, baneful to the client, and deserving of the strongest censure; many failures, whether in an action or defence, are entirely occasioned by culpable negligence in this respect. The deliberate statement of the client himself, whether verbal or in writing, as well of the facts as of the evidence he expects each witness will give, should undoubtedly be obtained as instructions for further inquiries, and to *assist* in preparing the brief and in examining the evidence, and generally in preparing for trial; but too many practitioners rely entirely on that information, though such negligence would subject them to an action for the consequences of their inattention. (c) The principal attorney, or a very intelligent clerk, who it is expected will afterwards attend at the consultation and trial, and be complete master of the facts and points, and proofs in support of them, should, just before the trial, again *himself personally* examine each witness *separately*, as well as to his *character, relationship, or interest*, as respecting the *exact testimony* he will give, and such examination should be deliberate, separate, and in private, *always excluding the client*, because he is too apt to interfere and *suggest* evidence to the witness, and who will at the time readily assent to the statement, though afterwards, when giving his evidence under the influence of his oath, will frequently vary materially from the former conceded statement, and will either contradict or materially qualify the same, and will consequently, as it is technically termed, *break down* on the trial, and thereby not unfrequently occasion a disastrous defeat. The client and the witnesses should also be respectively cautioned against any such conversation with each other upon the subject of the cause, that might afterwards be termed *tutoring* the witness. Again, in personally examining the witness, *leading questions* should not be put to him that would suggest or indicate a desire to have any precise negative

---

(b) It has been shown, *ante*, this volume, 117, 118, that a prudent attorney should examine the evidence and the principal witnesses, even before the com-

mencement of an action.

(c) *Ante*, vol. iii. 118; *Cliffe v. Baper*, 2 Dowl. 21.

or affirmative answer, but the questions should be so stated as merely to elicit the truth with every qualifying fact, and to ascertain that the witness knows the facts, as it is technically termed, *of his own knowledge*, and *not of hearsay*, and the *ground* of such knowledge, as *why* he thinks the facts to be as he has stated, or by what circumstances he is enabled to remember the precise day or hour or place when a fact occurred; and he should be cautioned against stating any facts which he has merely *heard of* from others, without *himself* having *seen* the transaction, or, in other words, constituting what is termed *hearsay evidence*. All the questions and the answers should be taken down *in writing* by the attorney who examines the witness. In all communication with witnesses, especially when in inferior departments, the proper eliciting questions should be put with the utmost care, to avoid the remotest hints upon the point that the client may wish to prove or disprove, or what is termed *leading questions*, such for instance as asking whether A. B. *did not say so and so*, or any question so shaped as even indirectly to suggest to the witness the wish to obtain any particular answer, because many inconsiderate persons too readily answer according to mere hasty impressions, and having once made a representation, might afterwards, for the sake of appearing consistent, improperly adhere to such extra-judicial statements. The least supposition that a witness has been *improperly tutored*, will in general disgust the judge and jury, and be disastrous to the interests of the client. A witness, however, who is to prove a conversation, may be instructed in one respect as to the mode of giving his testimony, as to state the *very words* used on the occasion, and not merely what he may deem a just inference or substantial result of a conversation; thus even a professional witness will not unfrequently swear that the defendant *admitted the debt*, without stating the very words the defendant used, and incur the displeasure of the judge for that improper mode of giving evidence. In the previous chapter we considered the conduct that a practitioner may observe towards a witness, in ascertaining the evidence he can give, and reference to those observations is requested; indeed, upon this important subject, many of the observations in this chapter may be deemed, it is hoped, pardonable repetitions.

If time will allow (and the contrary should never be attributable to the indolence or inattention of the attorney) it would be even advisable, very shortly before the trial, *to show to the witness the previous account of his evidence*, and to request him privately and deliberately to consider whether he is still posi-

CH. XXVII.  
FINAL EXAMINATION OF  
WITNESSES,  
&c.

---

CH. XXVII.  
FINAL EXAMINATION OF  
WITNESSES,  
&c.

tive that the account is accurate, and to correct or qualify the statement when incorrect, or even doubtful. (d) And there would perhaps be no objection to inform him that others have made different statements, without stating *who* or *what*, but it would be incorrect to show him the statement of evidence that will be given by other witnesses, especially if tending to confirm his own statement. (e)

After this proceeding with every witness, and after the testimony of all has been thus obtained, the statements should be compared with each other, so as to ascertain whether there are any discrepancies, the nature and extent of which must be faithfully pointed out in the brief, so that counsel may endeavour to avoid calling any one witness who might materially vary from others more favourable. (f)

2. Releasing or removing the interest of witnesses.

2. It is scarcely requisite to suggest the necessity of ascertaining whether the witness is *legally interested* in the result, either *as bail* for the defendant in the action or *otherwise*; and in due time to remove the objection, either by obtaining another bail in lieu, (g) or in certain cases by his *bonâ fide* and absolutely assigning or parting with the debt which constituted the ground of objection. (h) It is true that the recent statute, 3 & 4 W. 4, c. 42, sect. 26, removes the objection to a witness on the mere ground that the verdict or the judgment in the pending action would be admissible for or against him; but

(d) According to the case of *Wright Beckett*, 1 Mood. & Rob. 415, and *ante*, 823, this may not be objectionable, though it may be advisable not to deliver to a witness a *leading* statement of his evidence, suggesting to him what it is supposed he will swear, still less to pledge him to a statement written by himself.

(e) *Samble*, it is so in the Scotch law, *ante*, 824, note (l).

(f) As in *Wright v. Beckett*, 1 Mood. & Rob. 414, *ante*, 823, and *post*, 845. It is a well authenticated anecdote, that an eminent attorney, and whose integrity was never doubted, upon being questioned by the then chief justice of the Court of Common Pleas, Sir James Mansfield, how it was that his witnesses always appeared so intelligent, and his success so uniform? replied, "Why, my lord, you would be astonished what *dolls* my witnesses frequently are before the trial, but how intelligent they become after I have personally examined them and informed them of their duties in giving their testimony, and which I believe will account for my success. Moreover I

never try a cause, when from such my own examination of a witness I anticipate a defeat."

(g) Such change of bail may be effected by summons and judge's order at any time before or even pending the trial. See *Bailey v. Hale*, 1 Moody & M. 280; 3 Car. & P. 560, S. C.; in the case Lord Tenterden made an order for striking the name of one of the bail out of the bail piece, on the defendant's immediately paying to the associate 40s. the sum sworn to, and 50l. for costs, and the prior evidence of the witness stood, and his cross-examination proceeded, and see *Young v. Wood*, Barnes, 69 Bing. 98. In *Anonymous*, 3 Chitty's Rep. 103, on motion and rule nisi, one of the bail was struck out of bail piece, on affidavit of plaintiff having discovered that he was a material witness, and another bail justified in lieu.

(h) This must be done without reserve and without the witness in any way guaranteeing any proceeds, or being responsible in any way for the purchase-money. &c. To avoid stamps, it may be verbal.

that enactment is but of limited operation; besides, if it were otherwise, still, by actually extinguishing all interest, the effect of counsel's observations on his *credibility* would be removed. If the interest cannot be otherwise removed, then, according to the circumstances, the intended witness must either give or receive a *release* in proper terms, sufficiently comprehensive, and either general or special; and this must be executed by all proper parties, and it must be *bonâ fide* understood that it is absolutely given, without any understanding, still less stipulation, not to take advantage of such release, so that the witness may be able to swear accordingly; for otherwise, as too frequently the case, the jury may suspect that the release has been given merely *pro tempore*, and that the interest still subsists, and will influence his testimony. But the inquiry should not stop here; for it will be advisable to ascertain every circumstance respecting the witness in connexion with the cause, or otherwise, that might either conduce to or derogate from his credit in the estimation of a jury, and to communicate the same fully in the brief. It is extraordinary what small circumstances will influence the jury in this respect.

CH. XXVII.  
FINAL EXAMINATION OF  
WITNESSES,  
&c.

---

3. The quality, age, education, understanding, general behaviour, and inclination of each witness, as it may affect his expected evidence, and the credit that may probably be given to it, should be well ascertained, and afterwards concisely stated immediately under his name, in the right hand margin, or if long, then immediately under the statement of his proposed testimony, and occasionally with hints as to the best mode of examination of this or that particular witness, as presently suggested. By adopting this course, defeats, too frequently arising from calling witnesses unexpectedly adverse, or from an *inappropriate* mode of examining a favourable or adverse witness, may be avoided.

3. Consideration of the character and temperament of each witness.

4. Though the *criminal* impropriety of *tutoring* a witness, so as to induce him to alter the *substance* of his testimony, is too obvious to require observation, yet there are certain points against which every witness may *with propriety be cautioned*; and which interference should in certain cases take place, as well with reference to the respect to be paid to the judge as to prevent annoyance to the witness, and especially injury to the cause; and which will be cautions rather *against improprieties of demeanor* than tending to any deviation from truth. Thus some witnesses require to be cautioned upon the necessity for

4. Instructions or directions to witnesses when or not proper.

CH. XXVII.  
FINAL EXAMINATION OF  
WITNESSES,  
&c.

---

due *respect* towards the judge, and to observe an erect but easy posture, without even the semblance of an attitude of defiance on the one hand, or of indifference or non-chalance or flippancy on the other. His voice should be pitched with reference to the size of the Court, and the propinquity of the judge and the jury, and neither ridiculously too high, nor distressingly too low. He should direct his voice, in giving his answers to questions, if practicable, as well towards the judge as the jury, and *not* towards the questioning advocate, if the so doing would throw his voice in another direction than towards the judge and jury. This is exceedingly important, though frequently very difficult to observe, in consequence of the inconvenient structure of the Court. But if not observed, the judge may have the trouble of continually directing the witness so to act, lest the jury should not hear his testimony; and if he should continue to follow the natural propensity, to direct his voice towards the part of the Court from which the questions proceeded, the judge may be annoyed and displeased. Many witnesses also require to be particularly instructed to *give short and exact answers only to the questions put to them*, and not to indulge in a long narrative, unless particularly requested; and then to state only matters that occurred in his own presence and hearing, and not what he heard from others; but at the same time he should be informed, that as he is sworn to speak the whole truth he may and should, after the plaintiff's and defendant's counsel have finished their examinations and cross-examinations, respectfully ask the judge to be allowed to state any additional facts which he may think are material to be added in speaking the *whole* truth; for want of this caution it very frequently happens that very important facts are not disclosed in consequence of the present practice of confining the witness to mere answers to certain questions, to avoid loss of time, by a long ill-arranged narrative, much of which might be irrelevant or immaterial. He should also be particularly cautioned against any expression or manner which would evince a party feeling or interest, in which it would be improper to indulge when speaking under the solemn obligation of an oath. He should also be reminded, especially if of an irascible disposition, that the counsel when cross examining him is performing a necessary duty to endeavour to elicit truth; and that it may probably be the duty of such counsel to become seemingly personal and offensive; and that whatever may be the tone or manner in which the counsel may address him he should not become irritated, but answer in the same



tone and manner, as if he were the counsel of the party on whose behalf the witness attends; and that however provoked (even as he conceives unjustly and improperly,) at most he should only address the judge for protection, and that only upon the clearest necessity; for otherwise he would only expose himself to ridicule, and even reprimand, for not properly answering the questions, which would perhaps be as injurious to his own character or feelings as to the party in whose favour his evidence was given. On the other hand, a timid witness may with propriety be impressed with the moral obligation to speak out firmly the facts according to the best of his recollection, so that he may in observance of his oath speak the *whole* truth.

CH. XXVII.  
FINAL EXAMINATION OF  
WITNESSES,  
&c.

---

5. It may be of considerable importance that witnesses, especially females, unaccustomed to courts of justice, should for a day or two, or at least a few hours, before the expected trial, attend the Court, so that by their observance of the demeanor of others they may be better prepared to overcome the sensation of alarm which would otherwise frequently incapacitate them from giving their evidence in a proper manner.

5. Conduct of witnesses just before the trial.

6. In causes where political or local prejudices may be excited by the course of trial, it may be of the utmost consequence, and highly important, *to caution* as well the client as all his witnesses against the least expression, even momentary, of exultation at a particular seeming advantage pending the cause, or in consequence of the *general result*; for if evinced *pending the trial* they may endanger the verdict, and *if after the trial* they might occasion *a new trial*, and a great increase of expense, if not ultimate defeat. (i) Every witness should also be

6. Conduct pending and after the trial.

(i) Thus in *Doe dem. Smith v. Smart*, on 25th of April, 1835, K. B., which was an action of ejectment tried at the last assizes at Salisbury, respecting the validity of a will, and which lasted four days, and the jury found a verdict for the defendant, contrary to the opinion of the judge, Mr. Erle moved for and obtained a new trial partly on the ground that one of the witnesses for the defendant had misconducted himself in the manner disclosed in the following affidavit of Mr. Houseman, the plaintiff's attorney, which stated that Dr. Grove was called as a witness by the defendant, to prove the soundness of mind of the testatrix, and that the foreman of the jury was the brother of Dr. Grove, at whose house he resided during the pro-

gress of the trial; and also that some of the witnesses had given him, the deponent, statements, which he reduced to writing, and sent to them for correction; that they corrected their evidence, and returned it to him, and that they afterwards were called on the other side, and gave evidence differing from that which they had so corrected. He then read affidavits, stating that the Rev. Mr. Duke, who was also a magistrate, and called by and gave evidence for the defendant, was actively engaged in collecting evidence for the defendant previously to the trial, and that during the trial he dined with some of the special jurymen, and that after the verdict Mr. Duke went on horseback in procession, decorated with ribands, saying,

CH. XXVII.  
FINAL EXAMINATION OF  
WITNESSES,  
&c.

---

placed in an accessible part of the Court, and be strictly enjoined not to be absent at any instant before the verdict has been delivered, and closely to attend to the evidence given, and that if he hear any testimony that he can negative or qualify, he instantly inform the attorney who subpoenaed him to that effect.

---

"We have gained the victory, we have gained the day," and that he had since written a letter, stating that he had discovered six new witnesses to prove the competency of the testatrix.

Lord DENMAN.—Had Mr. Duke any

interest?

Mr. ERLE.—None, but this kind of feeling.

Lord DENMAN.—It is very improper conduct, whether he was interested or not, if it be true.

## CHAPTER XXVIII.

OF BRIEFS IN GENERAL (a)—MODE OF PREPARING THE SAME—  
DELIVERY OF BRIEFS—CONSULTATION WITH COUNSEL—AND  
EXCLUSION OF WITNESSES.

I. BRIEF FOR PLAINTIFF .....	847	14. Previous opinions of counsel or pleader to be stated at length, and not to be abbreviated or incorporated .....	853
1. General observations as to the modes of preparing briefs....	<i>ib.</i>	15. Analysis of proposed proofs....	854
2. Statement of the pleadings with marginal abstract.....	848	16. Mode of stating the proofs ....	<i>ib.</i>
3. Observations on the effect of the pleadings as admitting or leaving it requisite to prove certain material facts .....	<i>ib.</i>	17. Formal proofs .....	855
4. Expediency in a declaration for slander, of a statement on a separate sheet of the words declared upon with and with- out innuendoes, and why....	849	18. Evidence of the merits.....	<i>ib.</i>
5. Expediency of an early consid- eration of sufficiency of pleadings with view to imme- diate amendment.....	<i>ib.</i>	19. All the evidence to be given by the same witness to be stated consecutively .....	<i>ib.</i>
6. A copy of the pleadings, with marginal analysis, and of the particulars of demand and of set-off, for the use of the judge .....	850	20. Age, character, inclination, &c. of each witness to be stated..	856
7. Statement of the particulars of demand or set-off in the briefs with observations on the same.....	<i>ib.</i>	21. Arrangement or order of the wit- nesses .....	857
8. Great utility of a preliminary analysis of the facts of the plaintiff's case, and of the supposed defence, and of the answer to the same.....	<i>ib.</i>	22. The proofs should state in detail the whole of the facts in the words of the witness, and not merely in reference to a prior part of the brief .....	<i>ib.</i>
9. Full statement of the case.....	851	23. Proofs in a brief for a trades- man's bill.....	858
10. Statement of written documents, letters, &c. maps, plans, and models .....	852	24. Statement of the expected de- fence, and evidence and wit- nesses in support thereof, and comments upon the same....	<i>ib.</i>
11. Utility of maps and plans.....	<i>ib.</i>	25. Indorsement on the brief— <i>feces</i> , &c. ....	859
12. An analysis of the dates of all material facts to follow .....	853	II. BRIEF FOR DEFENDANT ....	<i>ib.</i>
13. Observations on facts and points of law, and evidence relating to the plaintiff's case, and on the probable defence, and proofs in support thereof, and the answer to the same .....	<i>ib.</i>	Statement of his proofs, and how obtained .....	861
		When defendant's counsel to be required to give evidence ..	862
		III. WHEN A DIFFERENT STRUC- TURE OF BRIEFS NECESSARY ..	<i>ib.</i>
		IV. BRIEF MERELY TO WATCH PLAINTIFF'S PROCEEDINGS..	863
		V. DELIVERY OF BRIEFS TO COUNSEL.....	<i>ib.</i>
		VI. OF THE CONSULTATION JUST BEFORE THE TRIAL .....	864
		Witnesses not to be present, and why .....	865
		VII. OF NEW DISCOVERIES JUST BEFORE THE TRIAL, &c. ....	<i>ib.</i>

1. THE *brief*, (so termed from its being an *abbreviated* statement of the pleadings or affidavits at law, or of the bill, answer, and other proceedings in equity, with a concise narrative of the facts, and object of the suit, and statement of the proposed evidence,) frequently requires very considerable skill in framing the same. The party preparing it should be perfectly master of the client's case, and, as far as practicable, even of that of his

CH. XXVIII.  
BRIEF FOR  
PLAINTIFF.1. General ob-  
servations.

(a) I have prepared for publication a collection of Briefs, with appropriate observations in most of the usual actions,

as settled by different eminent counsel, and probably shall publish the same with other Forms.

CH. XXVIII.  
BRIEF FOR  
PLAINTIFF.

adversary, and be able as well to *arrange as compress*, without any material omission. As a preliminary general recommendation applicable to *all* briefs, they should, before they have been delivered to counsel, be *full and complete*, and not with any blanks as to sums, time, or otherwise, so that the counsel may on the *first* reading be in possession of all the facts, which would probably escape observation if inserted after the first reading; and where there are several counsel the briefs for each should correspond in the contents of each page and be pagged alike.

2. Statement of  
the pleadings.

2. With respect to the very essential statement of the *pleadings*, as since the recent rules they have become more concise, with only one count or plea upon each cause of action or subject-matter of defence, the best course, as a general rule, will be to state *the whole of the nisi prius record verbatim, without any abbreviation*; by which it will appear, not only when the action was commenced, but also when the declaration was delivered, and not even a word in the pleadings or record will be left to conjecture, as has been too often the case when abbreviations have been attempted.

In the *margin*, even with the commencement of each technical division or parts of the pleadings, there should be an *analysis of the substance* of each count, plea, replication, rejoinder, or surrejoinder, &c. This analysis should be sketched by the junior barrister or by the pleader. Great confusion and trouble sometimes arises from mistakes in the misdivision of the counts or pleas, as by placing the words, "second," "third," or "fourth count," to a passage which only forms *part* of a count previously commenced, and one mistake in this respect will in general mislead throughout the whole of the pleadings. It is also advisable at the conclusion of the pleas, replications, &c. to state the names of the counsel who signed them, the same as we have seen is required by express rule in demurrer books. (b)

3. Observations  
on the effect of  
the pleadings as  
admitting or  
leaving it requi-  
site to prove  
certain material  
facts.

3. When the pleadings are *special* or *complex* it is very expedient, after thus setting them out verbatim, to give a *distinct abstract* and statement of what *facts*, as far as respects the *pleadings*, are thereby admitted, or must still be proved or disproved by the plaintiff or defendant; (c) and if any point of

(b) *Ante*, 759.

(c) As, for instance, in an action on the case for an injury to a watercourse, it may be stated that the plea of not guilty has not put in issue the *inducement in the declaration* of the plaintiff's possession of a mill, and of his right to the benefit of

a watercourse, which the defendant obstructed, but merely the *fact of the defendant's obstruction*, though in some degree the inducement was part of the description of the injury. See *Franklin v. Earl of Falmouth*, 4 Nev. & Man. 350; 1 H. & W. 1; 6 Car. & P. 329; *ante*, 757.

law can arise at nisi prius respecting the *pleadings* it may be expedient to state them, and the reasons and authorities applicable; and where there is a doubt whether a particular count (as in an action for verbal slander) can be sustained in point of law, it is highly expedient to state such doubt, and to request the leading as well as junior counsel to take the verdict on the *other counts*, if the evidence will warrant, and not on the questionable count, lest the judgment should be arrested or a writ of error sustained, when by taking the verdict separately upon a valid count the difficulty would be avoided. It has been not unfrequent for pleaders, in cases of the least doubt, to insert one or more counts more general than the preceding, so as to take all chances of no objection being taken at nisi prius, but upon which it would be imprudent to take the verdict if it can be obtained on the others, and to which point at least the junior counsel should attend. However, that danger has been considerably diminished by the rule of Court prohibiting the use of more than one count on the same transaction. But the same observation may still apply in actions for words where several counts for different words spoken on other occasions are admissible.

CH. XXVIII.  
BRIEF FOR  
PLAINTIFF.

---

4. In actions for *Verbal Slander* it is also advisable, especially when the counts are numerous, to state on a *separate sheet* the slanderous words in each count; *first*, with the innuendos as stated in the declaration, and, *secondly*, without them; so that the counsel, as well for the plaintiff as for the defendant, may, whilst the witness for the former is under examination, be able readily to ascertain whether the substance of the words or part of the words stated in either count has or not been proved. In the hurry of a nisi prius trial it is often difficult, where the words are to be found stated in several parts of the brief, readily to ascertain whether or not the declaration has been proved; and yet it is often very important to be able to perceive *at an instant* whether the words have been proved, so as to avoid the danger of calling another witness, whose cross examination might contradict the former as to the words used, or otherwise prejudice the plaintiff's case. A fair copy of such separate sheet should be ready for the leading counsel to hand up to the judge if he think fit. It will be prudent also, when the action is on a guarantee or written document, to set forth a copy thereof immediately after the pleadings.

4. Expediency in a declaration for slander of a statement on a separate sheet of the words declared upon, with and without innuendos, and why.

5. It should be one of the first objects of the junior counsel (and indeed of each at the consultation) to consider whether,

5. Expediency of an early consideration of su

CH. XXVIII.  
BRIEF FOR  
PLAINTIFF.

iciency of the pleadings, with view to immediate amendment.

with reference to the facts of the case and the evidence, the *pleadings are sufficient*, or require amendment; and to consider the expediency of any *immediate* amendment, which although recent enactments have authorized several amendments *during the trial*, yet as they are attended with trouble and expense, and uncertainty whether the judge will permit an amendment at that late stage, it is always advisable to anticipate. (d)

6. A copy of the pleadings, and an analysis, and of the particulars of demand and set-off for use of the judge.

6. It is also expected of the attorney for the plaintiff to make a very fair compact copy of the pleadings, now in effect of the *nisi prius* record, *for the judge*, with the same marginal analysis of each part as before suggested, and also a copy of the particulars of the plaintiff's demand and of the defendant's set-off, if any, and which we have seen must be annexed to the record. (e) This copy of the pleadings should not be accompanied with any observations as to facts; though, perhaps, the parts most material to the case might without impropriety be underlined.

7. Statement of the particulars of demand or set-off in the briefs, and observations upon the same.

7. Whenever particulars of the *plaintiff's demand*, or of the *defendant's set-off*, have been delivered, and especially when they have been annexed to the *nisi prius* record, in pursuance of Reg. Gen. Trinity T. 1 W. 4, (f) exact copies of each should be inserted *in the brief*, immediately after the pleadings and the above suggested observations on the same. If it be supposed that such particulars limit, or in any respect affect the claim of either party, it will be proper, immediately after copying such particulars, to introduce a few appropriate observations, with references to authorities in support of them. (g)

8. Great utility of a preliminary analysis of the facts of the plaintiff's case, and of the expected defence, and of the proposed answer to the same. (h)

8. After the draft of the statement of the facts, with observations and proofs, has been settled, then the principal attorney should most carefully and clearly *analyse and state in three or more distinct paragraphs, concisely, first, the plaintiff's case, and very distinctly every item of the plaintiff's claim; secondly, the expected defence; and thirdly, the best answer; perhaps*

(d) The consideration of the expediency of amending, or of obtaining further evidence, forms a strong reason in favour of the *earliest delivery* of the brief, and a consultation very soon after.

(e) By Reg. Gen. Trin. T. 1 W. 4, copies of the particulars of plaintiff's demand and of defendant's set-off are to be annexed to the *nisi prius* record, *ante*, 613 to 618; but still the same, in a more

compact and disannexed state, will be more accessible, as the parchment record is not usually handed up to the judge unless in case of doubt as to its contents.

(f) *Ante*, 613 to 618.

(g) See an instance, *Breckon v. Smith*, 1 Adol. & Ell. 488; *ante*, 615, note (s).

(h) See suggestions to the same effect in Lee's Prac. Dict. tit. Brief, 2d ed. page 298.

the form in the note might be adopted. (i) These three paragraphs, very legibly written, should form the commencement of the brief immediately after the statement of the pleadings, and should not exceed a few lines. Every well prepared brief, however voluminous the subsequent full statement may necessarily be, should contain such a *preliminary statement* or analysis of the *substance* of the plaintiff's case, and of the supposed attempted defence and its answer. This prepares and enables the counsel to *anticipate* what will probably be the most material facts of the case, and to *read* the subsequent detail with more rapidity and advantage, by paying more attention to what he has thus collected, will be the more important points, and consequently more deeply to impress them on his memory; whereas if the counsel be left to draw his own analysis *after reading the whole brief*, he will frequently have wasted time upon less important circumstances, from want of being *previously* apprised of the real points in the cause. It is well known that a most distinguished leader at the common law bar, now justly elevated to one of the highest judicial stations, would from a mere momentary perusal of such an abstract, when the press of multifarious business rendered it impracticable for him to read the entire brief, conduct a very heavy cause with comparative facility and success. At all events, a counsel of considerable experience, having an accurate analysis before him, can in general anticipate the ordinary collateral circumstances; and consequently, after having read such a summary, can rapidly read the subsequent detailed exemplification of the facts and evidence, when without it his mind could not arrive at any conclusion until he had got through the last page of his brief. An able preliminary analysis will in general render *one* reading of a brief sufficient, whilst otherwise repeated examinations might frequently be necessary.

CH. XXVIII.  
BRIEF FOR  
PLAINTIFF.

(i) From want of some such analysis, the leading counsel might omit to open or state all the claims, and endanger the verdict pro tanto, as in *Benon v. Lee*, 2 Bos. & Pul. 330; *Pateron v. Zachariah*, 1 Stark. R. 72. The form of analysis might be thus:

1. Plaintiff claims 100*l.* insured by defendant, by policy dated — A. D. —, on ship —, on voyage from — to —, lost by stormy weather, on — day of —, A. D. —.

Suggested form  
of analysis in  
Brief.

Also claims 11*l.* 11*s.* for premium paid to defendant;

Also interest from time when payment was demanded on the — day of —, A. D. —, and refused.

2. Expected defence. Ship not seaworthy.

3. Proposed Answer. Vessel stood A. in Lloyd's books, and was aged only — years; immediately before voyage ship was thoroughly stripped and examined by four eminent ship surveyors in dry dock at —, and underwent an unlimited repair there, at expense of £ —, and was afterwards again examined and reported by four other surveyors and two merchants; and mate and crew and others, for three last voyages will swear to her seaworthiness. Not one doubtful witness, and I have personally examined each.

G. H. Plaintiff's Attorney.

CH. XXVIII.  
BRIEF FOR  
PLAINTIFF.

9. Full state-  
ment of the  
case.

9. The *Case*, or *full statement of the Facts*, with *Observations*, should properly follow the above suggested analysis, and precede the statement of the proposed proofs. It is in preparing this part of the brief principally that the skill of an attorney at common law, whether in cases at the civil or criminal bar, and of a solicitor in equity, is displayed. Innumerable causes have been lost entirely by the *imperfect brief* delivered to the counsel, not merely by the *omission* to state *material facts* that might readily have been ascertained, but by the confused and jumbled mode of statement. The facts and the evidence in support of the plaintiff's and defendant's case, and the probable opposition and expected evidence in support of each, must not only be stated, but they must be stated in clear and logical order.

The *detail of facts* should be in the *natural historical order*, stating circumstances *as they arose*, whether for or against the plaintiff. In this statement it is in general expedient to communicate the *whole of the facts*, though as yet no legal evidence may have been discovered relating to certain enumerated parts; because perhaps by putting counsel in possession of such facts, evidence of their existence may be elicited by the cross-examination of witnesses, or suggested by the defendant's own case. But then in stating such facts, the counsel should be cautioned whether or not any third person was present, or whether there is the remotest chance of proving them, and how.

10. Statement  
of written do-  
cuments, let-  
ters, &c. maps,  
plans and mo-  
dels.

10. In preparing the brief, it is in general advisable to *incorporate* all important or explanatory documents and letters, unless they be very voluminous. This is preferable to a reference to detached papers, because counsel can more readily make observations upon them in the margin of his brief, and in the crowd and hurry of *nisi prius*, detached papers cannot be so readily referred to. It will be advisable also in the margin to state the date of, and designate each by numbers or by letters, as A. B. C. &c. corresponding with the same numbers or letters indorsed on the backs of each, and in the possession of the attorney, regularly arranged in a bundle; so that the counsel may call for the originals, and they may be produced with the utmost expedition.

11. Utility of  
maps and plans.

In many cases, especially where the jury have had a view, it may be very material for both parties to have *maps*, *plans*, or even *models* of lands, watercourses, and buildings, carefully prepared, and their correctness proved by the artist, and many



important cases have, for want of the information thereby given, failed on the trial. (*k*) When opportunity occurs, it is also advisable that at least the junior counsel should examine the premises with such map, plan, or model, before the trial. Many verdicts would be saved by adopting this precautionary measure. These documents should always be disannexed from the briefs, and very fair small copies should be ready in Court to show to the judge and jury. The latter copies should not, as it is termed, "*give evidence*," i. e. no statement should be written thereon that would favour either party.

CH. XXVIII.  
BRIEF FOR  
PLAINTIFF.

12. A compact analytical table of the *dates* of every material fact, arranged in natural order, may then in general follow with utility.

12. An analysis of the dates of all material facts to follow.

13. After the statement of facts, it is generally useful to introduce some *observations* and reasonings on the *plaintiff's* case and upon the proposed evidence, and also on the expected case, and proofs on the part of the defendant. If any difficult point of law, either on the facts or on the admissibility of evidence, be anticipated, it may be useful to observe upon it, especially on the circuits, where books may not be accessible, and to make verbatim extracts from cases bearing on the subject, stating the authorities by names, as well as by reference to the pages of the works where they are reported.

13. Observations on facts and points of law and evidence relating to the plaintiff's case, and on the probable defence, and proofs in support thereof, and answer to the same.

14. It has been too commonly the practice to state the substance of the opinion of the counsel or pleader, as if the same were the observations of the attorney preparing the brief, thereby in a great measure neutralizing its utility. It will be found preferable to give an exact copy of the opinion, if not also of the case upon which it was founded, with the name of the counsel or pleader giving it, for although the observations of any sensible and experienced person, might *substantially* be of equal value, yet it may reasonably be considered by the counsel in the cause, that an opinion deliberately given by a counsel or pleader, when formally consulted, is a stronger pledge for correctness than mere observations inserted when preparing the briefs, and certainly would probably induce such counsel more

14. Previous opinions of counsel or pleader to be stated at length, and not abbreviated or incorporated.

(*k*) See an instance, Lee's Prac. Dict. tit. Brief, 2d ed. 298; and yet the expense attending experiments and plans, it seems, are not allowed in taxation, *Severn v. Olive*, 3 Brod. & Bing. 72; 6 Moore,

235, S. C. It is therefore advisable for the attorneys on each side to agree that one artist shall prepare the whole, and that the clients shall divide the expense, or that the same shall be costs in the cause.

CH. XXVIII.  
BRIEF FOR  
PLAINTIFF.

strongly to endeavour to support the opinion when favourable to his client's case, unless upon a view of the whole case it might on the trial be injudicious to adhere to such previous view.

15. Analysis  
of proposed  
proofs.

15. In an important cause, or where the documents or witnesses are numerous, it has ever been found useful, immediately before the detailed statement of the proofs, to insert a brief sheet, containing an "*Analysis of Proposed Proofs*," being merely an abstract of the following proofs, and referring to the pages where each will be found, and to be headed thus:

ANALYSIS OF PROPOSED PROOFS.

1. Fiat and petition against Y. Z. the bankrupt, page .
2. Declaration of bankruptcy and proceedings under same, *id.*
3. The trading, *id.*
4. Petitioning creditor's debt, *id.*
5. Acts of bankruptcy, page .
6. Assignment to plaintiffs as assignees, page .
7. Bankrupt's certificate, page .
8. Property in the bankrupt, page to .
9. Witnesses.

Tomkins, John. Late foreman to bankrupt, page .  
Atkinson, James. Porter to the bankrupt, page .  
Caldwell, Thomas. A carrier who removed the goods to defendant's premises, page .

*Proceeding with the statement of all the witnesses' names, however numerous, and reference to the subsequent pages where the evidence is stated.*

16. Mode of  
stating the  
proofs.

16. With respect to the *mode* of setting out the *proofs* or *evidence*, they should be stated in the *middle* of large *brief* paper, with a four inch margin on the *left* hand side for counsel to make observations or hints, and also a *right* hand four inch margin for the name of the witness, with a concise statement of his age, quality, education, understanding, general behaviour, and character, temperament, probable bias or inclination, as favourable or adverse; and all other material facts affecting his character as a witness in the cause. Sometimes this form in preparing the proofs is not adhered to, especially in country briefs, and many inconveniences ensue; viz. by naming the witness only in a narrow left hand margin, and then writing his expected evidence across the page, and leaving no right hand margin.

17. In point of *arrangement*, the best course is first to state the *formal proofs* which may be indispensable in certain causes, independently of the *merits*. These proofs are in general to be first stated and adduced, because it would be useless to go into a full investigation of the merits, if there be *any formal objection* to the action, as for want of a previous notice of action, or demand of warrant, &c.; and because it is better that the junior counsel should adduce such formal proofs whilst the leader has a small respite from his fatigue, and that the more important witnesses should be left for his examination; as was heretofore the case in actions against a sheriff for a false return, when the judgment in favour of the plaintiff, the writ of execution and return, and the warrant to the officer, were essential when the general issue was allowed; and in an action by the assignees of a bankrupt, the commission, petition and assignment to the plaintiffs, the trading, petitioning creditor's debt, and act of bankruptcy, when disputed; but the recent rules we have seen have dispensed with such proofs, unless the plea has expressly put them in issue.<sup>(1)</sup> But in actions against justices of the peace, or other public officers who are still allowed to plead the general issue, and put the plaintiff to prove every matter, the due service of a notice of action, the issuing of the writ, and his having acted illegally in the particular proceeding complained of, must be first proved.

CH. XXVIII.  
BRIEF FOR  
PLAINTIFF.

17. *Formal proofs.*

18. After these or other formal preliminary proofs, then the full proofs of the *merits*, according to the nature of the case, should be stated in natural logical order. In preparing the latter, attention should be paid to arrangement, and much judgment is frequently required.

18. Evidence of the *Merits*.

19. It has been sometimes improperly the practice, in framing the brief, to *detach* the *parts* of the evidence to be given by the *same* witness on several different points in *different parts* of the brief; and, independently of the additional trouble to counsel, it has been frequently found that were it not for the attention of the junior, who has usually more time to become master of every part of the brief, an important part of a witness's testimony has nearly escaped attention, and been lost to the cause. In practice, when a witness is placed in the box the whole of his evidence must be elicited before the cross examination commences, unless by special permission of the Court; and which

19. All the evidence to be given by the same witness to be stated *consecutively*.

(1) *Ante*, 809.

CH. XXVIII.  
BRIEF FOR  
PLAINTIFF.

should be applied for at the time he is first examined, upon the intimation of the counsel that it may be the most convenient arrangement and order of the cause, if the judge will allow the same witness again to be called to prove another point. Consequently the plaintiff's as well as the defendant's attorney, should in his brief state *consecutively* the whole of the testimony that a witness can give, with a small note in the left margin, opposite that part of his evidence, stating very concisely the different points and facts to which he can speak. And supposing that it may be necessary to call the witness again in another stage of a long cause, his name and proofs may be *repeated* in the other proper part of the brief, where the other proofs respecting that part of the subject will be found collected.

20. Age and  
character of  
each witness to  
be stated. (m)

20. The age, *character* and *temperament* of each witness, as well moral as physical, should be stated, as whether he be habitually too confident or zealous, or hasty, in which case he may require to be moderated and restrained; or whether he is timid, diffident or hesitating, when he may require to be assured and encouraged. Every peculiarity in a witness, as regards the probable mode of giving his evidence, should be well ascertained, and concisely stated in the *right* hand margin of the brief, immediately under his name, or immediately under the detail of his evidence. So if there be any imputation against his character, or any pecuniary or other interest in the cause that may affect his legal competency, or even his credibility, the particulars should be stated. If, from the witness having declined any interview, or for any other reason, the evidence of such witness will be uncertain, then under his name may be written "*doubtful*" or "*dangerous*;" and if his feeling be known, the word "*favourable*," or "*adverse*," may be subscribed. If it be known that the witness will be verbose or rambling or too rapid, or apt to crowd too much into a sentence, the counsel should be cautioned to confine the witness to mere short answers to detached questions put separately; for otherwise he might distress the judge from his inability to write fast enough to take down all his answers; or when it will certainly be so, the brief may suggest that the witness is so discreet, that he may be allowed to state the narrative slowly, and will watch the judge's pen. By adopting this prudential course, the frequent nonsuits arising from calling an adverse, or otherwise injurious or doubtful witness, may be avoided. When there are two or

(m) See further, Lee's Pract. Dict. 2nd ed. 299.

more witnesses to the same transaction, the *best* witness should be put first; because the judicious advocate may wish to make a strong impression upon the jury in the first instance, or may resolve to call no more on the point when satisfactorily proved by one, lest a subsequent witness may, as frequently occurs, destroy or weaken the case. (n) Sometimes, however, in heavy causes, as in trials of rights of way, customary rights, or pedigrees, it may be considered more judicious to call one or two of the best witnesses in the first instance, so as to establish a favourable feeling with the jury; and then to corroborate by numerous other witnesses of less weight, and to close the case by calling one or two of the *very best and most impressive witnesses*, so as to leave a *very strong and continued impression* on the minds of the jury. Perhaps there is no part of professional conduct in which superior judgment is so much evinced, as in ascertaining when it may be anticipated that the jury have been sufficiently impressed with a favourable opinion of a point that cannot probably be removed, and then to stop. (o)

CH. XXVIII.  
BRIEF FOR  
PLAINTIFF.

21. If there be a doubt whether in point of *law* any particular witness or his evidence be admissible, then in the margin, under the name, may be written, "*admissible*," or "*quare competency*;" concisely stating the decision and authority on the point and the words of the judge if short in such margin, and if long in the body of the brief.

21. Arrangement or order of the witnesses.

22. In preparing the *proofs*, it is ever to be remembered that it is extremely inconvenient in practice to refer merely to any previous statement of facts or evidence in the *body* of the brief; but that the whole of the expected testimony should be stated in the proofs in detail, with dates, and in the *very words* that, from the prior examination, it is expected the witness will *certainly* answer the questions, and also what it is only *apprehended* he may *probably* state; and as it will be recollected that counsel cannot, except in a few cases, put *leading* questions to a witness called by himself, it may be useful to suggest what unobjectionable questions may possibly lead to the eliciting a full disclosure; as by shortly touching upon some collateral incident, which may be adverted to in the margin or body of the brief, and which may rouse the memory to recollection. After

22. The proofs should state in detail the whole of the facts in the words of the witness, and not merely in reference to a prior part of the brief.

(n) As in *Wright v. Beckett*, 1 Mood. & Rob. 414, after four favourable witnesses had been called by the plaintiff's counsel a fifth was unfortunately called, who contradicted the four, and greatly endangered the verdict.

(o) As to the importance of first impressions, Lee's Prac. Dict. Brief, 2d ed. 299; see an instance of a fifth witness turning round on the plaintiff, *Wright v. Beckett*, 1 Moody & Rob. 414.

CH. XXVIII.  
BRIEF FOR  
PLAINTIFF.

exhausting all the evidence expected to be given favourable to the plaintiff, it may in some cases be advisable to state what possibly the witness may be compelled by the opponent to state on *cross-examination*, and to give instructions for *re-examination*, to explain the *prima facie* unfavourable answers that may probably have been given on such cross-examination.

23. Mode of  
stating proofs in  
a brief upon a  
tradesman's bill.

23. In the frequent actions for the amount of tradesmen's bills, as for goods delivered, or work done at different times, and which can only be proved by numerous shopmen, servants, carriers, or other witnesses, it is in general advisable to make a copy of the whole account, with the appropriate dates in due order of time, and sufficient spaces between each item; and then in the left margin, opposite each item, to write the name of the witness or witnesses who can prove of his own knowledge the order for and delivery thereof, and the value. And two or more fair copies of this should be deliberately examined by the several witnesses who can thus prove each item; and he should write his name or initial on such left margin immediately in a line with the respective items; and one of such originals, thus signed by the several witnesses, should be handed to the judge, and the other retained and shown to each of the witnesses as he is called into the witness box; and who may then be merely asked whether the signature is his, and whether he can swear to the delivery to the defendant of the items to which his signature is attached; and the counsel should examine the witnesses from a duplicate, and each witness must, by previous examination, be certainly able to swear that all the items to which his initials are placed he knows of his own knowledge were delivered, or that the work was performed; and his memory may be refreshed by producing the day-book in which he entered each item on the very day it was delivered by him.

24. Statement  
of the expected  
defence, and of  
the supposed  
evidence in sup-  
port thereof.

24. After concluding the evidence for the plaintiff, it will be proper in many cases to state more in detail than in the previous analysis the expected defence, and the evidence that will probably be adduced in support of it, with full observations upon its fallacy or weight, and the names and characters of the witnesses for the opponent, with suggestions as to questions to be put on the *voir dire*, as whether the witness is bail for the defendant, &c., and all circumstances upon which a cross-examination may be useful. But in preparing the latter the *facts* only are to be stated, leaving it in general to the counsel's discretion what *particular questions* should be put, and which

need not be stated in the brief, though sometimes useful as another mode of stating the facts.

CH. XXVIII.  
BRIEF FOR  
DEFENDANT.

25. It may appear too trifling to add any suggestion respecting the *indorsement* on the brief; but as it has occurred that the junior counsel has attended in the *wrong Court*, it is at least advisable, as well on the outside as at the head of the first page, to write the proper Court in very large legible characters. The name of the plaintiff and the defendant, the number of the cause in the general list, as well as in any particular list for the day, the names of the several counsel, the exact hour appointed for any consultation, and the name and place of abode, or temporary residence of the attorney when at a Circuit Town, should be clearly stated.

25. Indorsement on the brief and fees.

With respect to the *fees*, it is important that, at all events in this stage of an action, they should be liberal, if not handsome: not because barristers would, under any circumstances, relax their exertions on behalf of the client, however inadequate the remuneration; but because the amount of the fee is considered the criterion of the estimation in which the client or his attorney holds the talent and value of the assistance of the barrister; and it is an unconquerable incident of human nature to be gratified by a high estimate, and annoyed, if not disgusted, by one that is degrading. It is better to give no fee than one that is humiliating; and at all events the practice of giving briefs to numerous counsel in a cause, with very small fees to each, merely for the purpose of charging for several briefs and attendances in the bill of costs, is contemptible. Considering the hours that must be consumed out of Court in studying the briefs, and afterwards in attending the Court and on the trial, *nisi prius* fees are in general very inadequate.

The fees.

#### OF THE BRIEF FOR THE DEFENDANT.

The brief for the *Defendant*, although in many respects resembling that for the plaintiff, yet it must differ in some particulars. As regards the *pleadings* and any *suggestion* on the issue or *nisi prius* record, they should be copied verbatim (and not abbreviated); and copies of the particulars of the plaintiff's demand and of the defendant's set-off, if any, should follow the statement of such pleadings. In the next place should be given a concise but perspicuous *analysis* of the expected claims on the part of the plaintiff, and of the proposed grounds of defence, and how it is expected the plaintiff will attempt to

OF THE BRIEF  
FOR THE DE-  
FENDANT.

CH. XXVIII.  
BRIEF FOR  
DEFENDANT.

answer the same, (o) and then a short statement of the expected result, as well upon the merits as upon the law; this should only occupy a few lines, it being designed merely to put the defendant's counsel at one view in possession of the substance of the material points and questions, and to enable him to read with more facility and advantage the subsequent full statement of the whole facts of the case.

The *full narrative* of all the facts stated in the natural order of time, and with dates as they succeeded each other, should then be given, with occasional intimations how the facts are to be proved, or how it is expected the defendant may be able to prove them, or contradict the plaintiff's evidence.

Then should follow (when it is expected that any point of law may arise respecting the facts, or the pleadings, or the evidence,) comments on such points of law, and verbatim extracts from statutes and decisions.

In the next place, hints may be suggested as to what the plaintiff should be required to prove, and it may be stated what witnesses and evidence it is expected he will call, and the description, age, education, character, and party feeling of each, with full instructions for questions to be put to the plaintiff's witnesses on the *voire dire* as to their competency, and for cross-examination. As regards, however, the *cross-examination* of witnesses, although the brief for a defendant should contain a very full statement of all the facts on each side, with suggestions as to facts favourable to the defendant, that all or particular witnesses are supposed to know, or probably will disclose on a strict cross-examination, yet the *form* of the actual cross-examination must be left to the discretion of counsel, especially as it is well known that the exercise of that part of professional duty is perhaps the most delicate and difficult of the whole. On the one hand, if, according to the expectation of the client or a jury, certain questions are not put, blame may attach to the counsel, and perhaps the attorney; whilst on the other hand, experience teaches that more frequently cross-examinations strengthen the opponent's case, and that witnesses in general, upon a cross-examination, usually more strongly establish the case of a plaintiff in a civil action, or that of the prosecutor of an indictment, so that the case of the defendant is rendered hopeless before his counsel has even stated his case to the jury. (p) Indeed the cross-examination of the plaintiff's

(o) See the analysis in a plaintiff's brief, ante, 850, 851.

(p) In general defendants, especially in an inferior station of life, are not satisfied unless the plaintiff's witnesses are cross-

examined; a defendant's attorney should therefore explain to him, before the trial, why it is probable that his counsel may not cross-examine. The late Mr. Pooley, of the Home Circuit, a barrister distin-



witnesses should in general be left to the senior counsel for the defendant, unless the next in rank is of considerable experience. In general when a judicious counsel for the defendant, from the conduct and manner of a witness for the plaintiff, expects that he will adhere to his evidence in chief, and that he cannot by cross-examination shake his credit, he will put no question *at all*; and afterwards, in his speech for the defendant, and in the evidence subsequently given, will endeavour to establish either that the witnesses for the plaintiff have been under a singular delusion, or that the point established by them is quite beside the true question, and which his speech and sometimes the evidence he will call will demonstrate. (g)

CH. XXVIII.  
BRIEF FOR  
DEFENDANT.

The *proofs* in support of the *defence* must next be stated in the same mode as before suggested in a plaintiff's brief. It will be advisable to preface them with a statement that the defendant's attorney has himself, or his experienced clerk privately and apart from the client, examined each of the witnesses, and that he can confidently rely on the detailed evidence of each, he being in possession and ready to prove that at the time of the examination of each witness, he took down their statement of the facts as they would prove them, and that they afterwards in their own hand altered such statement, as will appear by the memoranda in his possession.

Proofs for the defendant, and statement how they were obtained.

In general when an experienced leader for the defendant has been retained, it is most judicious to leave it entirely in his

When the counsel to be requested *at all* events to give evidence for the defendant.

guished for his legal knowledge and excellent prudence, especially in his defence of prisoners, related an anecdote of himself; viz. that having defended a notorious highwayman, whose case really was desperate, but who was acquitted in consequence of the prosecutor having given very confused evidence, which the defendant's counsel thought it prudent not to cross-examine, lest he might thereby clear up the points left in doubt; such defendant called on him one evening in the Temple, and in a ruffianlike manner demanded back and obtained the fee, saying it is true I was acquitted, but no thanks to you, for you never opened your mouth for me, and I cleared myself by my own innocence.

(g) Thus in an action by the Vauxhall Bridge Company, against the purchaser of an old and very bulky vessel, to be broken up, for improperly conducting her through the bridge, and thereby damaging the crown of an arch, &c. numerous witnesses for the defendant swore to the utmost exertions to conduct the vessels through the arch without injuring the

same, and after cross-examination of two of such witnesses it was obvious that it rendered them more positive that the greatest care had been observed, and therefore further cross-examination was given up; but one of the witnesses having admitted that the day was *very windy*, and that on a calm day one man alone, in a boat a-head, might have readily towed the vessel through, the plaintiffs' counsel forcibly replied upon that admission, as entitling the plaintiffs to a verdict; because the defendants had no right to tow up so large a vessel, not usually navigating that part of the river, and merely for breaking up, on such a *windy day*, but should have waited for a proper time, when no damage would have occurred; and the judge and jury adopting that view, the plaintiffs obtained a verdict for the full damages. This case also establishes that an attorney for a defendant should well consider the validity of the *point* or *ground* of his defence, as well as the quantity of evidence in support of it.

CH. XXVIII.  
BRIEF FOR  
DEFENDANT.

discretion whether or not to give evidence for the defendant, the former entitling the plaintiff's counsel to the general reply; but still the safest course is for the attorney fully to consult the wish of his client upon the course to be adopted, and either at the head of, or immediately following the *proofs*, to state the result; as that the defendant, as well as his attorney, having entire confidence in the proposed evidence, requests the counsel to enter into the defence and examine the evidence, unless it be manifest that he will be *more secure of the verdict* by a contrary course.

SECT. IV.—WHEN A DIFFERENT STRUCTURE OF THE BRIEF  
MAY BE ADVISABLE.

SECT. IV.  
WHEN A DIFFERENT STRUCTURE OF THE BRIEF ON EITHER SIDE MAY BE ADVISABLE.

The above outlines of the modes of framing briefs suppose that the *plaintiff* is to begin and his counsel make the opening speech and then to call evidence, and that the *defendant's* counsel will afterwards state his defence and call witnesses in support of the same. But if the affirmative issues are on the *defendant*, and *he* is to begin, according to the practice stated in the next chapter, so that *he* will first call evidence, the briefs should be framed rather differently, though the variation will be inconsiderable, and consist rather of *transpositions* of parts than being different in matter. In the latter case also the briefs should begin with the *pleadings, particulars, concise analysis, and full statement of the facts*; the *differences* will be that in the *defendant's* brief (who is *then to begin*) his proposed proofs should immediately follow the full statement, and after they have been exhausted, then should follow *suggestions* upon the expected case of the plaintiff, and the evidence and witnesses he will probably adduce in support of the same, and instructions for cross-examining such witnesses. Suggestions may then follow as to any evidence in reply for the defendant, and conclude with a statement of such evidence and observations for the defendant's counsel in reply and which will close such order of brief for the defendant when *he* is to begin.

The *plaintiff's* brief, when his counsel is *not* to begin in consequence of the affirmative being on the defendant, and the action not being for a *personal injury*, as libel, slander, malicious prosecution, &c. (r) is to begin with the pleadings and the particulars, and an observation that the issues being all on the *defendant*, his counsel are to begin. Then will follow the before suggested concise analysis, and then

(r) See post, 872 to 877, next chapter, the exception, *Carter v. Jones*, 6 Car. 1 as to which party is to begin, and see P. 64; 1 Mood. & Rob. 201, 8 C.

the full statement of the whole case on both sides, the same precisely as in a brief when the plaintiff is to begin. After which follow observations on the expected evidence of the defendant, and an account of his witnesses, and instructions for their cross-examination. In the next place will follow the proofs for the plaintiff, prefaced with observations that the attorney himself has examined each witness apart from the client, and how far the counsel may be assured that their testimony in Court will correspond with the statement of the proofs in the brief, and that therefore counsel are requested to call such witnesses, unless he be quite confident that a verdict for the plaintiff will be better secured by merely observing on the defects in the defendant's case or his evidence, thereby avoiding any concluding speech of the defendant's counsel.

CH. XXVIII.  
BRIEF FOR  
DEFENDANT.

#### WHEN A WATCHING BRIEF MAY BE DELIVERED.

It is clearly settled in practice, that when there has been an irregularity in the issue or notice of trial, of which the defendant intends to take advantage, a brief may be delivered on his behalf to counsel, with instructions to *watch* the plaintiff's proceedings, and the counsel may take notes without prejudicing any subsequent motion to set aside the proceedings; (s) but such counsel must not otherwise interfere, still less cross-examine witnesses. (t)

OF A BRIEF  
MERELY TO  
WATCH THE  
PLAINTIFF'S  
PROCEEDINGS.

#### SECT. V.—OF THE DELIVERY OF THE BRIEFS TO COUNSEL, AND PROCEEDINGS THEREON.

The attorneys for the plaintiff and defendant will be justified in incurring the expense of delivering their respective briefs to counsel as soon as practicable after notice of trial. As regards a *plaintiff's attorney*, it would seem that, especially in a heavy or difficult cause, he would be justified in proceeding from time to time to prepare his brief, even before notice of trial, and might enforce remuneration for so doing from his own client. And although a *defendant's attorney* may have no right to prepare his brief *until after notice of trial*, so as to charge the opponent with the expense; yet if the cause were of much importance it might be otherwise, at least so as to charge his own client. In London, where there is a list of causes for the day, every body is expected to be ready, and the defendant's attorney must take care to deliver his brief to his counsel previous

SECT. V.  
DELIVERY OF  
THE BRIEFS TO  
COUNSEL, AND  
PROCEEDINGS  
THEREON.

(s) *Ante*, 781, 782; *Lawson v. Robinson*, *ante*, 782, n. (y); *Grosjean v. Manning*, 2 Dowl. Rep. 70, 71. 2 Tyr. 726; 2 Crump. & Jer. 635.

(t) *Doe v. Jepson*, 3 Bar. & Adol. 402;

**CH. XXVIII.  
DELIVERY OF  
BRIEF TO  
COUNSEL, &c.**

to the sitting of the Court on that day ; but that rule does not apply to the assizes, where there is a list of eighty or one hundred causes, and it would be very hard if all parties were obliged to be prepared on the first day ; and in that case it suffices for a defendant's attorney to deliver his brief, in a very short cause, a short time before the cause in its natural order would come on for trial, and a plaintiff should not take it out of its turn. (u) The early delivery of the briefs may be of the greatest importance, for even the leading counsel in the fullest business may sometimes have an opportunity of an early perusal ; but at all events, as regards the junior counsel, who may have most leisure, an early delivery may be of the greatest utility, for probably his progress in the profession will much depend on his earliest diligence and speedy communication to the client of any difficulty in the pleadings or evidence, so as to afford the first opportunity of amending either. (x) Many verdicts have been saved by such energetic attention.

**SECT. VI.—OF THE CONSULTATION IMMEDIATELY BEFORE TRIAL.**

**SECT. VI.  
CONSULTATION  
IMMEDIATELY  
BEFORE THE  
TRIAL.**

In causes of the slightest doubt or difficulty, it is highly expedient that a *Consultation* should be held between the counsel who are to conduct the trial, and the attorney or clerk, who himself examined the witnesses and prepared the brief. This should be had as soon as each counsel has had sufficient opportunity to read his brief, and *at all events* a sufficient time before the trial, so as to obtain *an amendment of the pleadings or further evidence*. In general, consultations are held too late to be of that full *utility* they might have been. They however at all events are attended with the advantage that the junior counsel may suggest to his leader any supposed difficulty in the pleadings or evidence, and it is particularly useful in enabling all the counsel and the attorney to learn from the leader his projected mode of conducting the case, and so that all may, during the trial, act in concert and not mar his superior plan of operation. In very heavy and important causes, it may be advisable to have two consultations, the first immediately after the counsel have read their briefs, and the other in the evening, or at least a short time before the trial.

(u) *Aust v. Fenwick*, 2 Dowl. 246.

(x) It is a well known fact, as regarded Lord Kenyon, and afterwards the late Mr. Marryatt, that their rapid increase of business was much attributable to their

very early attention to the examination of their briefs, so that each frequently sent off useful communication before the clerk who left the brief had returned to the office of his principal.

In consultations on a *defendant's case*, it will be of the very utmost importance, after ascertaining from his attorney how far the statement of the defence and the evidence in support of it may be depended upon, to arrange the exact course of defence, and to determine on the cross-examination of the plaintiff's witnesses, and above all whether or not evidence shall be given on the part of the defendant, or withheld, so as to avoid a reply on the part of the plaintiff. The wish of the client himself, as well as of his attorney, should certainly be consulted before it be resolved not to enter fully into the suggested defence.

CH. XXVIII.  
CONSULTATION  
BEFORE TRIAL.

It is a well established rule, that *witnesses* are not to be present at consultations (excepting professional and scientific men in explanation of patents, machinery, &c.); because if they were, they might ascertain the views of the counsel and shape their evidence upon *facts* accordingly, at least with a shade of colour or leaning, which should ever be avoided. (y)

Witnesses not  
to be present  
at consultations,  
and why.

For the same reason counsel individually should be exceedingly *cautious at all times, whether in or out of Court, to avoid any suggestion to a witness respecting his evidence*; but at most advise the *attorney* that certain facts should be further examined into, without communicating to any one the desired bearing or object. To this rule some exceptions may be permitted, according to the discretion of the counsel, and his belief in the honour and integrity of his client; such as a counsel going over a very intricate account with an accountant, who is afterwards to prove its correctness, and without which co-operation the counsel might be unable to explain such account either to the judge or jury.

#### SECT. VII.—OF NEW DISCOVERIES JUST BEFORE TRIAL.]

It frequently occurs that in consequence of the witnesses on each side associating in or near the Courts for perhaps successive days, just before the trial of the cause they converse with each other, and some material evidence is thus communicated favourable or adverse to one of the parties, but which may nevertheless be subject to just explanation and answer, if ascertained in time. For such events a zealous and intelligent attorney should always be on the look out, and should immediately endeavour to improve his case, and deliver to his counsel a proper further brief.

SECT. VII. NEW  
DISCOVERIES  
JUST BEFORE  
THE TRIAL, TO  
BE COMMUNI-  
CATED TO THE  
COUNSEL.

(y) This we have seen is an invariable rule in the Scotch law, *ante*, 824, note (1).

## CHAPTER XXIX.

## OF THE TRIAL AND ITS INCIDENTS. (a)

1. General observations on trials ..	867	be qualified .....	867
2. Necessity for the attendance of the principal attorney during the trial, his early attendance with witnesses, and of the early attendance of the junior counsel, and why.....	869	<i>Sixthly</i> , Junior counsel and attorney to observe such speech, and give hints as to omissions..	868
1. Caution not to try a cause out of turn....	870	7. Of plaintiff's giving evidence and calling witnesses, and the usual course of adducing the same .....	ib.
2. Of calling witnesses on their subpoena .....	ib.	8. Of defendant's counsel examining plaintiff's witnesses on <i>voir dire</i> , &c. and objecting to their competency or to the mode of examining them .....	869
3. Of withdrawing the record .....	ib.	9. Of the examination of evidence for the plaintiff in chief ....	890
4. Of postponing the trial	871	1. Usual course of examination .....	ib.
3. Object and utility of opening speeches, and advantage of a reply .....	ib.	2. Right of leader to take the examination out of his junior's hands....	891
4. When plaintiff's or the defendant's counsel are to begin....	872	3. Mode of examining in chief, and what questions to be put.....	891
1. In general the counsel who has to prove the <i>affirmatives of the issue</i> ..	ib.	1. They must be pertinent to issue ..	891
2. Exceptions in actions for personal injuries ....	874	2. Not leading questions and exceptions.....	ib.
3. The practice in ejectment	876	4. Order of proof .....	895
4. Incorrect ruling of the judge, as to who is to begin, is no ground of motion for a new trial	877	5. Whether counsel can discredit his own witness, and how .....	896
5. Of the junior's opening the pleadings, and his conduct in general .....	ib.	10. Of the cross-examination of witnesses, and rules respecting ..	897
6. Of the leading counsel's opening speech .....	880	1. Of the right to cross-examine, and utility thereof .....	ib.
General considerations respecting the same.....	ib.	2. What disparaging questions may be asked on cross-examination ..	899
The parts of such speech.....	881	3. Mode of cross-examination and of leading questions .....	ib.
<i>First</i> , Statement of the plaintiff's several claims and consequences of omission of a part..	ib.	11. Of the re-examination of the witnesses .....	901
<i>Secondly</i> , Statement of plaintiff's expected evidence .....	884	12. Of calling back a witness in chief.....	ib.
<i>Thirdly</i> , Anticipation of points of law .....	885	13. Of acquittal of one of several defendants at the close of plaintiff's case .....	902
<i>Fourthly</i> , Anticipation of the expected defence and evidence in support of it, and observations on the same..	886	14. The speech of defendant's counsel	
<i>Fifthly</i> , Counsel's privilege of speech, and by what consideration it should		1. In general .....	903
		2. Consideration when or	

(a) Although some of the subjects of this chapter may on first view appear to relate principally to the conduct of *counsel* during a trial, yet it will be found that they are equally essential to be known

and attentively observed by the attorneys on each side; because if any point be omitted by the counsel, the attorney will do right to give him immediate hints and assistance.

not defendant's counsel should open and call evidence in support of a defence.....	903	His directions to the jury respecting costs .....	913
3. When no statement of new facts in favour of defendant to be made .....	905	20. At what time to object to the judge's summing up .....	914
15. Of several defendants defending separately, and several counsel and separate speeches to the jury for each .....	907	Misdirection of judge, when or not a ground of motion for a new trial .....	915
16. Of examining witnesses in direct contradiction of the evidence in chief.....	908	21. Of the jury withdrawing.....	916
17. Of the plaintiff's counsel giving evidence in reply, and of the speeches and proceedings thereupon .....	909	22. Of discharging the juror .....	917
18. Of the reply or concluding speech to the jury .....	ib.	23. Of withdrawing a juror .....	ib.
Of voluntary nonsuits .....	910	24. Of the verdict .....	918
19. Of the Judge's summing up ..	911	25. Of defendant's compelling verdict in a particular count or issue.....	921
		26. Of applications to correct verdict .....	922
		27. Other occasional incidents of a trial .....	ib.
		28. Variances and amendments during trial .....	923
		28. Of judge's certificates for immediate execution .....	924

1st. THERE is not perhaps any scene in life which, though of daily occurrence, excites so many various interests and talents as a contested trial at law. (b) The *parties*, their *attornies*, and *witnesses*, the *counsel*, the *jurors*, and even the learned *Judge*, (though in very different degrees, and influenced by very different feelings and motives,) are all *deeply interested*, and *excited* either by the *matter* in question or the *manner in which it is to be conducted*. The *Parties*, at all events, are deeply interested either in the value of the *subject* in dispute, or the *costs*, or exposure of *character*, incident to public investigation. (c) The respective *Attornies* participate in the same feeling, and are influenced by the apprehension that the result of the cause may in some measure affect their professional characters, either on account of the inexpediency of the proceeding, or of the defence, or the want of skill in conducting or defending it. The *Witnesses*, whether or not (as too often the case) influenced by relationship, friendship, or secret interest, or by political or party feeling, are, at all events, anxious to acquit themselves

#### CHAP. XXIX. TRIAL AND ITS INCIDENTS.

##### 1st. General Observations.

(b) Hence the most eminent actor of modern times, who was extremely partial to attendance in Courts of justice, used to observe, that "a superior Court during a contested trial is a *perfect theatre*, in which the most talented actors perform their respective parts with perfect skill "and home to nature;" and the late Lord Erskine, in an action for seducing and afterwards deserting the plaintiff's daughter, who sank lifeless in Court, observed, "*Morality comes in cold didactic from the pulpit*, "but when the lamentable consequences of deviation from its injunctions are thus "practically illustrated and commented "upon from the seat of justice, it strikes "home to the heart." And Lord Bacon

observes, "that it is impossible there can "be anarchy or confusion in any country, "whilst the administration of justice continues to proceed with integrity and impartiality on the parts of jurors and judges."

(c) In Sir Horace Walpole's memoirs there is an interesting anecdote of a clergyman, party to a tithe cause, who had really gained his cause, but having out of joke been told the contrary, from excitement, died suddenly; and the author was only a few years ago concerned in a cause at Maidstone, which in some measure involved the honour of the son of a witness, and who, from the apprehension of the exposure, a few hours before the trial came on, put an end to his own existence.

CHAP. XXIX.  
TRIAL AND ITS  
INCIDENTS.

with credit in Court; and some instances have occurred when the self conviction of perjury has literally stricken the *witness* to the ground. (d) The *Junior Counsel* is excited in no small degree, lest his laudable desire to advance in his profession may be marred by some inadvertency in framing the pleadings, or in his examination of the witnesses, or that he may, in some stage of the cause, incur the disapprobation or displeasure of his leader, or even of the judge, which might prejudice him in subsequent causes. The *Leading Counsel*, however justly confident in his knowledge of law and great experience in *nisi prius* tact, may yet well be nervous and apprehensive that he may not present the particular case to the judge and jury in the most favourable manner for his client, or that he may omit some material point, or may miscalculate by calling *too many* or *too few* witnesses, or fail in the want of adequate energy in his address to the jury, or in some other mismanagement of the cause. Each of the *Jurors* also, if alive to his duty, should feel no inconsiderable anxiety to forget or not be influenced by any previous or sudden prejudice, and to suspend his judgment until the case has been closed and he has heard the observations of the judge. The learned *Judge*, however experienced, cannot be entirely free from apprehension that he may fail in the due fulfilment of his very arduous duties, or may misapprehend some rule of law or its application to the particular case, or may draw an incorrect conclusion as regards the evidence, or that his misstatement to the jury may mislead them and become the subject of an expensive application to the Court for a new trial, or occasion a Bill of Exceptions or a Demurrer to evidence. Again, in some causes affording an opportunity for, and perhaps even *demanding* strong observations on the misconduct of a party, or his attorney, or a witness, so as to repress and prevent a repetition of such conduct by the party or others, the judge may, on the one hand, consider himself bound to animadvert upon such misconduct, lest it should be supposed that he, standing in his exalted situation, is indifferent to the violations of morality and religion; (e) and yet he, on the other

(d) See an awful instance of the effect of conscience on a perjured witness in Chitty's Medical Jurisprudence, 365, 366, note (g). If witnesses were more frequently reminded solemnly of the terms of their oath or affirmation, and the nature of its obligation, less frequent instances of perjury would, it is believed, occur. It would be desirable if the oath were administered with more solemnity.

(e) The late Lord Kenyon and Lord Ellenborough very frequently animadverted most eloquently and powerfully upon depraved conduct, when established before them, in the course even of a criminal cause. But the late Lord Tenterden never stepped aside for the purpose, and he assigned as a reason that public animadversions on the conduct of an attorney, a party, or witness, had sometimes occa-



hand, may be apprehensive that the consequences might occasion utter ruin to the individual and his family, and which the humanity of the judge may induce him to forbear to observe upon; so that he may be assailed by numerous conflicting duties. We will proceed to give a practical outline of the course of proceedings on a trial, collected principally from decisions on the subject.

CHAP. XXIX.  
TRIAL AND ITS  
INCIDENTS.

2dly. It is advisable in all causes of the least importance or difficulty that the attorney, who has been progressively concerned throughout all stages, should attend the trial, because he will probably be most familiar with the facts and witnesses, and be ready, on any emergency pending the trial, immediately to explain to the counsel any difficulty and suggest the mode of avoiding it, and on that account the costs of his attendance ought in general to be allowed. (f) However, it has been held, that where an agent has been employed to attend the trial of a cause in London, it is matter peculiarly for the discretion of the master, whether the costs of a journey to London by the principal country attorney to attend the trial shall be allowed; (f) and where an attorney is party to a cause, he will not be allowed the costs of his attendance, unless the necessity for such attendance be established. (g)

2dly. Necessity for attendance of principal attorney during trial, his early attendance with witnesses, and of the early attendance of the junior counsel, and why.

The attorneys on each side having well *arranged and numbered their documentary evidence*, and, in town causes, sent a clerk to bring with him at least the principal witnesses, (h) should, at all events, be in Court some minutes before the arrival of the judge, and be perfectly ready to try at the commencement of the day's sittings in London or Middlesex, or at the assizes, however distant the cause may stand in the paper. He should take care to place his witnesses together in a very accessible part of the Court, and request each to observe the evidence that may be given for the opponent, and to communicate to him or his clerk known to such witnesses, when each is prepared to contradict such evidence, and how.

The *junior counsel* also should be ready a short time before the sitting of the Court to receive from the attorney any addi-

sioned utter ruin, or, at least, more severe punishment than his offence deserved, and that, therefore, he abstained from any public censure.

(f) *Parsons v. Foy*, 2 Dowl. 181.

(g) *Leaver v. Whalley*, 2 Dowl. 80.

(h) On the circuits the plaintiff is bound to have his witnesses in attendance from

the commencement of the assizes, and this as well in special jury as common jury causes, and per Parke, J., *I do not think an attorney would do his duty to his client if he had not all his witnesses in attendance from the commencement of the assizes*, *Cosgrave v. Evans*, 2 Dowl. 443; *Platt v. Green*, id. 216.

CHAP. XXIX.  
TRIAL AND ITS  
INCIDENTS.

tional information that may, as suggested in the conclusion of the last chapter, have arisen since the delivery of the brief and consultation had upon the same; and also be ready to intimate to the proper officer the inexpediency of swearing on the jury one or more named individuals, who may have been discovered to be related to one of the parties, or might be otherwise objectionable, and thus avoid the necessity for a formal challenge. It is also usual, immediately before the jury are sworn in the particular cause, to have any absent witness called three times in open Court upon his subpoena. (i) If the plaintiff's attorney be certain that he will not attend, and that without his evidence it is impossible safely to proceed, *then the record should be withdrawn*; but if there be a possibility of recovering without the evidence of the witness, then it may be expedient to proceed; and if, at length, the plaintiff should be obliged to submit to a nonsuit, the costs may be recovered from the absent witness. In case, after the jury have been sworn, the leader has not arrived, the junior should, as long as practicable, delay opening the pleadings, and then pause and request the judge to allow a few moments' indulgence until the leader has arrived; and if, at length, he be directed to begin, he should professedly only open the *formal parts* of the case and evidence in support thereof, leaving the more material points to be commented upon by the leader, in the hope that he will appear in due time to proceed with the most important statement or evidence. A junior may thus avoid the imputation of arrogance or indiscretion, which might otherwise be justly imputed to him prejudicially in the estimation of his brother barristers, as well as of his client.

Precaution not  
to try a cause  
out of order.

As a general rule, unless the opponent's counsel or attorney be present and consent, a cause should never be tried out of order, i. e. before all the previous causes have been disposed of; for even in indefensible causes any seeming irregularity in the time of trying very frequently is, for the purpose of delay, made the subject of an application either for a new trial or to set aside the verdict. (k)

Withdrawing  
record or post-  
poning the trial.

If the *plaintiff*, just before the time of trial, discover that he is not prepared in all respects, either in consequence of the unexpected absence of a material witness or otherwise, his at-

(i) *Hopper v. Smith*, 1 Mood. & Malk. 215.

(k) *Aust v. Fenwick*, 2 Dowl. 246.

torney must *withdraw the record* before the jury have been sworn, unless in case of sudden illness or accident, upon an affidavit of which, the judge will sometimes *postpone* the trial for a few days, even at the instance of the *plaintiff*, though the general rule is that he must *withdraw the record*. This can in general only be done by the plaintiff's attorney when he entered the record, and it has been decided that a counsel, although retained in the cause, cannot withdraw the record, unless his brief has been delivered; (l) so that in that case, unless the plaintiff's attorney be present and withdraw the record in time, the defendant has a right to have the jury sworn, and then to call and nonsuit the plaintiff. (l) The withdrawing the record, probably with intent to enter it again and try at a future sittings, will have the same effect, as regards the postponement of the trial, as a motion for that purpose, (m) and which is one reason why the Court will but seldom *postpone* the trial on the application of a *plaintiff*, observing that the record is in his own power, though we have seen that there are exceptions; as when a witness has been taken suddenly ill, or met with an accident immediately before the trial, and expected to recover in a day or two, in which case sometimes the judge will permit the trial to stand over.

CHAP. XXIX.  
TRIAL AND ITS  
INCIDENTS.

As a defendant cannot withdraw the record when entered by the plaintiff, the judge at nisi prius will in general, upon the production of a very satisfactory affidavit of the materiality of a witness, and that *due* enquiries and endeavours were made *in due time* to subpoena him, but without success; or that he is so ill as to be unable to attend, postpone the cause, upon the terms of the defendant undertaking to pay the costs of the day. (n) Such application should properly be made before the jury have been sworn. (o)

Postponements  
on behalf of a  
defendant. (n)

3. In *Courts of Equity* the bill, answer, and affidavits, put the Court in full possession of all the *facts* of the case, indeed, of the *points* on each side, and of the justice or injustice of

sdly. The object and utility of speeches of counsel, and considerations

(l) *Doe dem. Craik v. Brown*, 5 Car. & P. 315; *Abitbol v. Benedetto*, 2 Campb. 487; 3 Taunt. 225, S. C. This requisite of the delivery of the brief has the appearance of a regulation to secure fees to counsel, and it would therefore be a better rule that counsel should not in any case withdraw the record, the same being no part of his professional duty.

(m) *Curtis v. Barker*, 2 Car. & P. 185; *Ansley v. Birch*, 3 Campb. 333; 2 Taunt. 221.

(n) What affidavit required, *Attorney General v. Hull*, 2 Dowl. 642.

(o) *Packham v. Newman*, 3 Dowl. 166, where it was doubted whether an undersheriff could postpone a trial.

CHAP. XXIX.  
TRIAL AND ITS  
INCIDENTS.

of the supposed  
advantage of a  
reply, and the  
practical rules  
on the subject.

the claim, or its resistance, and merely require compression, arrangement, and argument, in a speech, to enable the judge to decide, and which he might be enabled to do by a mere perusal of all the documents. But *at law* neither the pleadings separately nor the entire nisi prius record affords any adequate information to enable the judge or jury to decide what ought to be the proper verdict upon the issues, and hence the absolute necessity for speeches on each side. On the part of the *plaintiff*, to put the judge and jury in possession, at least, of a *prima facie* right in his favour, and if the defendant neglect to retain counsel to cross-examine the plaintiff's evidence and state his defence; though it might be inferred that in reality he has no defence.

It will be obvious that the *judge*, who has merely the nisi prius record before him, and still less the *jurors*, who have merely received a summons to attend, and have been sworn to try an unknown issue between parties, would not be able to understand or appreciate the object or effect of the evidence adduced before them, unless previously informed, at least, of the *outline* of the facts to which such evidence is intended to apply, and hence the necessity for and utility of *preliminary speeches* of counsel for *each party* before the evidence on his behalf be given.

4thly. When the plaintiff's or the defendant's counsel is entitled to *begin*.(p)

4. In practice the question which party, i. e. whether the plaintiff or the defendant shall *begin, or first address the jury and state the facts of his case*, has much varied, and may perhaps ere long undergo further modification. It is considered important, because in general the party who *begins* will, if his opponent give any evidence, have the *general reply*, or last word to the jury, a privilege which a powerful leader can usually exercise with great advantage; and this is considered of so much importance by leading counsel, that they will sometimes condemn the pleader for not so framing the pleadings as to give him such general reply. The general rule has certainly been, that which natural reason and obvious convenience dictate, viz. that the party who alleges the *affirmative* of any proposition or *issue in fact* should prove it, *because a negative does not in general admit of the simple and direct proof of which an affirmative is capable*;(q) and, therefore, the

(p) See in general 1 Stark. Evid. 362 to 371; Tidd, 9th ed. 838 to 860; 1 Arch. K. B. 325; 1 Arch. C. P. 168.

(q) 1 Stark. Evid. 362, cites Bull. N.

P. 297; Vin. Ab. Evidence, S. a, and other cases, and where see exceptions to this rule.

party who has to maintain or prove the *only* affirmative, or *all* the affirmatives, must *begin to give the evidence*; (†) and yet it will be very obvious, that many cases may arise where it is more easy to prove the negative; as if a defendant plead in abatement that another party *jointly contracted with him*, and that he ought to have been joined, and the plaintiff reply that the contract was *not so jointly made*, he might be able to prove the negative by producing and proving the defendant's *separate* written undertaking to pay. Perhaps the better reason is, that in such a case, unless the affirmative issues be found for the plaintiff, he could not recover any damages, and that it might be a waste of time to inquire into the amount of damages until the issues have been established in favour of the plaintiff. The rule however is so clearly established, that however large may be

(†) *Cotton v. James*, 1 Moo. & Malk. 275, per Lord Tenterden—"The rule, as established in practice, is, that when the general issue is not pleaded, and the affirmative of the issue lies on the defendant, he is entitled to begin. I do not say that this is the most convenient rule. I am by no means sure that the practice is founded on the best principle, but it is established, and I do not think that I ought to depart from it." See an excellent note of the reporter's, *id.* 278 to 281.

So if in *replevin* the defendant plead property in a third person, and issue be taken thereon, the defendant is entitled to begin. Per Alderson, B. and Patteson, J. *Colstone v. Hiscolls*, 1 Moo. & Rob. 301.

So in *assumpsit* on a bill of exchange, if the issue on a plea of notice of a fact be on the defendant, he must begin. *Warner v. Haines*, 6 Car. & Payne, 666.

So where the issue was on the defendant, upon a replication to a *plea in abatement*, denying that the contracts were made by the defendant and others, it was held that the defendant was entitled to begin, because the question of *damages* or amount of claim might never arise, and at least could not arise until the issue had been determined in favour of the plaintiff, *Fowler v. Coster*, 1 Moo. & Malk. 211; 3 Car. & Payne, 463, S. C.; but see *Morris v. Lolan*, 1 M. & R. 233; and it is a general rule that the *onus* merely of *proving damages*, (which, unless where there has been a judgment by default, is merely *secondary*,) does not give the plaintiff's counsel a right to begin, because if the issue should be found against him, then all the time and trouble in inquiring into the amount of damages would be wasted and useless. 2 Stark. Evid. 2, tit. Abatement;

*Badell v. Russell*, R. & M. 293; but see *Robey v. Howard*, 2 Stark. 555; *Stansfield v. Levy*, 3 *id.* 8; and see *Atkinson v. Warne*, 6 Car. & Payne, 687; *Carter v. Jones*, *id.* 64. So in *assumpsit* for goods sold, where a plea of coverture was traversed, it was held, that if the plaintiff elect to begin, he must go into the whole of his case, though if the defendant admit the debt he is to begin. 3 Stark. Rep. 178; 2 Car. & Payne, 125; Ry. & Moo. 329, S. C.; Tidd, 859.

But where the defendant to an action by one plaintiff pleaded in abatement that the contract was made with the plaintiff and another person, who ought to have been joined, and the plaintiff replied that the promise was made with him alone, Parke, B. ruled that the plaintiff ought to begin, because the affirmative was then on him. *Davies v. Evans*, 6 Car. & Payne, 619.

In an action of *trespass for taking goods*, the defendant, without pleading the general issue, pleaded that the house of the plaintiff was "within and parcel of the parish of M.," and that he, being a constable, took the goods under a warrant of distress for parochial rates. The replication stated, that the house was not "within or parcel of the parish of M." The plaintiff's counsel claimed the right to begin, as they had to prove the demand of perusal and copy of the warrant. This the defendant's counsel offered to admit, and thereupon Denman, C. J. ruled that the defendant had the right to begin. And in the ensuing term Sir J. Scarlett having applied for a new trial, on the ground plaintiff should have begun instead of the defendant, and also upon three other grounds, a rule upon the former point was refused. *Burrell v. Nicholson*, 6 Car. & Payne, 202, 205.

CHAP. XXIX.  
TRIAL AND ITS  
INCIDENTS.

the claim for damages, and however important it may be that the plaintiff should have an opportunity of fully explaining to the jury why they should give a verdict for damages or interest, yet when the *onus probandi* of the affirmative of all the issues are on the *defendant*, he must begin.

But if there be only one affirmative issue for the *plaintiff* to prove, and several other affirmative issues for the *defendant* to prove, then the plaintiff has the preference. (x)

So if there had been *judgment by default* as to a part in an action for a libel, as the plaintiff has an indefeasible right to go into proof of his claim for damages, he has in that case a *right to begin*, though the *only issue to be tried* is on the defendant's justification; because by such judgment the plaintiff has acquired an *indefeasible* right to damages upon that part of the case, which cannot be affected by the result of the *issue*. (y)

Exceptions in  
actions for inju-  
ries to the per-  
son.

It was observed by Mr. Justice Taunton that *on principle* a defendant ought not to be allowed to begin and have the general reply, merely by pleading some plea which may be very remote from the merits. (z) Probably that reason with others induced the judges recently to introduce an *exception* to the general rule in actions for *libel, slander, malicious prosecution, and other actions for injuries to the person*; and we find from a recent case, that the fifteen judges resolved that *the plaintiff shall begin* on the trial in all actions for *injuries to the person*, as *libel and slander*, although the general issue may not have been pleaded, but only a special plea, the affirmative of which is on the defendant; (a) and Taunton, J. observed, "I do not see any hardship in the rule, (i. e. such *modification* of the *general rule*,) as it is most reasonable that the plaintiff who brings the case into Court should *be heard first* to state his complaint;" (a) and the reporters there stated in a note to the same case, that the judges were considering whether the rule should not be extended so as to entitle the *plaintiff* to begin in *all* cases. (a) And there was a subsequent case at nisi prius in which it was supposed that when a plaintiff seeks to recover damages, he has a right to begin. (b)

But the excep-  
tion is limited.

But the general rule still continues the same in all actions, excepting those strictly for injuries to *the person*, as above

(x) *Jackson v. Heaketh*, 2 Stark. Rep. 521; see observations thereon in *Cotton v. James*, 1 Moo. & Malk. 279.

(y) *Wood v. Pringle*, 1 Moo. & Rob. 277.

(z) See *Carter v. Jones*, 6 Car. & P. 65; and see observation of Lord Tenter-

den, ante, 873, note (r).

(a) *Carter v. Jones*, 6 Car. & Payne, 64, S. C.; 1 Moo. & Rob. 281, S. C.

(b) *Brescoe v. Roberts*, Kingston Assises, 3d April, 1835, coram Lord Denman, C. J.

CHAP. XXIX.  
TRIAL AND ITS  
INCIDENTS.

That exception has not as yet been extended beyond the particular instances of actions for injuries to the person, and in all other actions continues the same as ante, 872.

enumerated, and in one of the very latest cases, which was an action of *covenant* for non-performance of a contract under seal relating to the sale of an innkeeper's business, and the defendant had pleaded that the deed was obtained by fraud, upon which the only issue was joined, and the damages were unliquidated, and Wilde, Serjt. for the the plaintiff, therefore claimed the right to begin, Tindal, C. J. said, that this case was not within the above mentioned exception laid down by the judges, which only applies to actions for *libels, words, malicious prosecution*, and similar cases; and that as the affirmative was on the *defendant*, he had the right to begin; and it will be observed, that in this case the question of damages could not arise, unless the issue was found for the plaintiff, and it might, therefore, be a waste of time first to inquire into such damages. (c) So very recently it was determined, that in an action on a bill, where the defendant had pleaded that he had received no consideration, on which issue was joined, that the defendant, and not the plaintiff, should begin. (d)

So in another case, subsequent to *Carter v. Jones*, in an action on a promissory note by the payee against the maker, where the defendant had pleaded that he had not any consideration for making the note, and the plaintiff replied, that the defendant had value, Parke, B. ruled that the *defendant* should begin, because the presumption of law is that the maker has received value, and it is incumbent on him to prove the contrary; (e) and in a following case, where, in addition to a count on the bill, there was a count upon an account stated, to which non assumpsit was pleaded, and there was a plea of nonpayment in satisfaction of the bill stated in the first count, and issue thereon, the same judge ruled, that unless the plaintiff had some evidence to adduce in support of the common

(c) *Reese v. Underhill*, 6 Car. & Payne, 773; and see 9 Legal Observer, 16th April, 1835.

(d) *Jacob v. Hungate*, Exchequer, Westminster, 28th April, 1835. This was an action by the plaintiff, as last indorsee, against the defendant (Sir William Hungate) as acceptor of a bill of exchange, to which the defendant pleaded that he accepted the bill, and delivered it to the drawer for the purpose of getting it discounted, and that he received no consideration for it, and that the drawer indorsed it without consideration. The plaintiff replied that he gave consideration for the bill. At the trial before Parke, B. at Guildhall, the learned judge

held that the defendant ought to begin and prove his case before the plaintiff should be put to prove that he gave value for the bill. There was a verdict for the plaintiff, to set aside which a rule nisi was obtained last term by Mr. Humfreys, and Bompas, Serjt. showed cause against the rule which Mr. Humfreys supported; but Lord Abinger said he thought it was right that the defendant should begin, and the Court held that there was no ground for setting aside the verdict, and discharged the rule. Judgment for the plaintiff.

(e) *Homan v. Thompson*, 6 Car. & P. 717; and see *Mills v. Oddy*, 6 Car. & P. 728, 729, coram Parke, B. to the same effect.

CHAP. XXIX.  
TRIAL AND ITS  
INCIDENTS.

## In Replevin.

The practice in  
Ejectment.

count, the defendant should begin; (*f*) and if in an action on a bill the alternative of an issue be on the plaintiff as to his notice of a fact, the defendant is to begin. (*g*)

In *Replevin*, if there be merely an avowry or cognizance for rent, and a plea in bar of non tenuit, the plaintiff's junior counsel opens the pleadings, but the defendant's leading counsel states the case, as the proof of the affirmative is upon him, and no question as to the extent of damages to be recovered by the plaintiff can arise, unless the issue has been first determined in his favour; but if the affirmative is on the plaintiff, then, as in other cases, he is to begin. (*h*)

In Ejectment, as the *general issue* is always pleaded, and the issue joined always imposes the *affirmative* upon the plaintiff, he is properly to begin; but a practice has long prevailed of allowing the defendant to begin and to have the reply, *provided he will admit the whole of the lessor of the plaintiff's primâ facie case*, that is, that the plaintiff is entitled to recover, unless the defendant succeeds in establishing his particular ground of defence. But *the defendant's counsel has no right to the general reply, unless he admits the whole primâ facie case* of the lessor of the plaintiff; and therefore, where the counsel for the defendant only admitted the pedigree of the lessor of the plaintiff, and his counsel proved the seisin of the ancestor by receipt of rent, which case was answered by setting up a will, the validity of which was disputed by evidence on the part of the lessor of the plaintiff, it was held that the defendant's counsel was not entitled to the general reply. (*i*)

But where the lessor of the plaintiff claims by a title which is *entirely admitted* by the defendant as a sufficient *primâ facie* case, but the defendant claims under a different title, destructive of that of the lessor of the plaintiff, as where the latter claims as heir and the defendant as devisee under a will which is impeached by the lessor of the plaintiff, (*j*) or where the plaintiff claims under a will, and the defendant under a subsequent codicil altering such will, (*k*) the defendant, *if he admit the whole of the plaintiff's claim*, subject to be thus defeated, is to begin. (*l*) But when both parties claim as heir, and the real question is as to the legitimacy of the defendant, who is clearly heir if legitimate, although he propose to admit that unless he

(*f*) *Smart v. Rayner*, 6 Car. & Payne, 721.

(*g*) *Warner v. Haines*, 6 Car. & Payne, 666.

(*h*) *Curtis v. Wheeler*, 4 Car. & P. 196; *Williams v. Thomas*, *id.* 234.

(*i*) *Doe d. Pile v. Wilson*, 6 Car. & P.

301; 1 Mood. & R. 322; S. C. *Doe v. Banes*, 1 Mood. & R. 386.

(*j*) *Goodtitle v. Brakham*, 4 Term Rep. 497; *Jackson v. Hesketts*, 2 Stark. R. 512.

(*k*) *Doe v. Corbett*, 3 Camp. 368.

(*l*) *Robay v. Howards*, 2 Stark. 535.



be legitimate the plaintiff is entitled as heir of the person last seised, such admission will not give the defendant the right to begin, because the proposed admission does not admit the *whole* of the plaintiff's title, as in the other cases. (m) And a defendant has no right either to *begin*, or to the general *reply*, unless he admit the *whole primâ facie case* of the lessor of the plaintiff. (n) So where the plaintiff claimed as heir, which would render it essential for him to prove that his ancestor *died seised*, and the defendant only offered to admit that the plaintiff was *heir*, but relied on a conveyance executed by the ancestor, which, if valid, would establish that the latter did not die seised, it was held, that as the defendant would not admit *the whole* of the plaintiff's *primâ facie case*, he was not entitled to the reply. (o)

Where a *statute* gives the general issue, and allows the defendant to give in evidence all special grounds of defence, the plaintiff, under that plea, has *primâ facie* the right to begin, though perhaps, if the defendant's counsel will admit a *primâ facie case*, and that the plaintiff has served the requisite notice or demand, it might be otherwise.

Defence under statute giving the general issue.

Perhaps when the *pleadings* have apprized both parties that the affirmative issue is only on the defendant, it may be expedient that *he* should have the right to *begin* with his statement and the evidence in proof of that affirmative; but when, according to the *pleadings*, there is any issue or certain claim for damages that must in any event be proved by the plaintiff, it seems very inconvenient and objectionable that a defendant's counsel should, by a sudden and unexpected admission, for the first time at *nisi prius*, even of the whole of the plaintiff's *primâ facie case*, have the power of obtaining the advantage of the *first speech*. (p)

Suggested objection to a defendant's claiming to begin and reply, merely because he offers to make admissions on the trial.

It has been considered that the right to begin is so much in the discretion of the judge on the trial, that the Court in banc will not grant a new trial on the ground that he has ruled incorrectly. (q)

Incorrect ruling of the judge as to who shall begin is no ground of motion for a new trial.

5. The province of the *Junior* is to state or *open*, as it is technically termed, *the pleadings*, and which he should do

5thly. Of the junior's opening the pleadings.

(m) *Doe v. Bray*, 1 Mood. & Mal. 166.

(n) *Id. ibid*; *Doe v. Wilson*, 6 Car. & P. 301; *Doe v. Tucker*, 1 Mood. & M. 536, S. P.

(o) *Doe v. Tucker*, 1 Mood. & Mal. 536.

(p) But yet the practice in *ejectment*,

*ante*, 876; and indeed in *trespass, ante*, 873, n. (y); *Barrell v. Nicholson*, 6 Car. & P. 202, 205, seems to be established that if the defendant's counsel admit the whole of the plaintiff's *primâ facie case*, the defendant's counsel has a right to begin.

(q) *Barrell v. Nicholson*, 6 Car. & P. 203; 1 Mood. & Rob. 304.

CHAP. XXIX.  
TRIAL AND ITS  
INCIDENTS.

concisely, but very distinctly and perspicuously ; and when they are long or complex, he may properly close his statement with an enumeration of the precise issues to be tried, as thus : " On " these pleadings the issues are ; 1st. Whether the defendant " committed the trespasses in the plaintiff's land ; 2dly, Whether " the plaintiff was then in possession of such land ; 3dly. " Whether the defendant had right of common of pasture for " sheep there ; and, 4thly. Whether the plaintiff gave the de- " fendant license or leave to commit the trespasses." We have seen that in general it is not advisable to describe the *terms* of a libel or verbal slander, but merely to state " The declaration " is for a *libel*," (or for two or more libels, or for "*verbal slander*," not stating the particular words ;) " the defendant has pleaded not guilty, and a justification that the libel or words were true ; and which allegation the plaintiff has denied." This will suffice, for the statement by the junior of the terms of the libel or words, which must be afterwards proved with particularity, would be of no real utility, and might, as before observed, prejudice the case. (q) With respect to a *set-off*, a difference has existed in practice ; but the better course, whether the *set-off* has been pleaded or only notice thereof given, is equally to state the same, so that the judge and jury may know to what points they may have to direct their attention. (r)

The Junior  
counsel's other  
duties connect-  
ed with the trial.

But the junior should in no case state any fact, or attempt to encroach on the department of the leader, even in a single sentence. At the same time, he should always be master of the case, and have considered it in all its bearings, and have anticipated the possibility of illness or absence of his leader, so as to be able instantly to state and conduct the whole case without apparent embarrassment. This habit and constant preparation will always be a useful exercise, and in the course of time may become of the greatest advantage ; so he should *always be prepared to reply*, as the leader may occasionally be called away by other duties ; and these are the opportunities which sometimes make the fortune of an attentive junior : but, however talented and experienced the junior may be, his most discreet course is never to act independently of his leader, but to suggest to him every material point, whether of law or fact, and in no case without his concurrence, still less contrary to his judgment, to insist on any point, or urge any objection, until after the leader has exhausted his observations, and requested him to

(q) *Ans.* (r) And see *DeLouney v. Mitchell*, 1 Stark. 439 ; *Rees v. Smith*, *id.* 31.

state his views, if argument be absolutely required, at *Nisi Prius*, but not otherwise. Indeed, if a junior counsel at *nisi prius* take ever so well-founded an objection, but which his leader gives up, the Court in banc will not entertain it on discussing a rule for a new trial; (s) and if the leader take one line of case contrary to the opinion of the junior, the Court in banc will not permit the latter to obtain a new trial upon the ground that he was prepared with evidence to support another line of case, but which his leader disclaimed. (t)

It is a very important branch of the duty of a junior counsel to observe that the leader *has opened all the plaintiff's claims*, or when counsel for a *defendant*, *all his grounds of defence*, and to see that the evidence of each witness favourable to the client has been exhausted; and if he apprehend that the judge has not taken a full note of such evidence, he may request his leader to ascertain from the judge whether he has noticed the same. (u) The junior should also take as full notes as practicable of the heads of his leader's opening speech, and of that of the defendant's leader, and of all the evidence on each side, and all points and objections made; and as he proceeds, he should mark in the margin of his notes every material part, so as to be able at an instant to state the precise evidence to his leader, or to the judge, if required. When it is probable that a witness will afterwards be called to contradict particular terms of conversation, then the very exact words as used by the witness, and in the very tense, should be taken down. Every word of the judge's observations on the evidence, or the law applicable to the case, and in particular of his directions to the jury, should be thus secured. These may not only assist the leader during the trial, but also be most important on moving for a new trial; because we have seen that credit is given to the notes of counsel of what has occurred, (x) except, indeed, when they vary from the notes of the judge, which are always conclusive. (y) The leader and other counsel, when there are three, also take down the evidence, and indeed it is most essential, whilst a witness is under the examination of the junior, who cannot conveniently write down the evidence of a witness whilst he is examining him.

The attornies on each side will also do well, at their joint expense, to employ a short-hand writer to take down the whole of what transpires during a cause, or if the case will not afford

Taking notes,  
&c.

The attornies  
also to take  
notes.

(s) 3 Taunt. 531; 4 Taunt. 779.

(t) 4 Taunt. 779.

(u) See the necessity for this precaution, *Adams v. Bankhart and others*; post,

"Of recalling a Witness, &c.

(x) *Ante*, 535, 536.

(y) *Adams v. Bankhart and others*; post,  
"Of recalling a Witness.

CHAP. XXIX.  
TRIAL AND ITS  
INCIDENTS.

that expense, then clerks who are accustomed to write expeditiously should take full notes. When a witness for the opponent unexpectedly gives evidence unfavourable to the client, he should immediately inquire of any favourable witness, who it is expected was present at the alleged transaction, whether he can contradict such unfavourable evidence, and take care immediately to intimate the result to the leader, so as to enable him to call the witness in reply.

6thly. The  
opening speech  
for a plaintiff.<sup>(s)</sup>

The general  
consideration.

6. The *opening speech* is so entirely in the discretion of the leading counsel, and it is so important for the interests of the client that he should be very rarely *interrupted*, that it might seem to be of little utility here to notice any rules respecting it, excepting that it may be of essential importance that the junior counsel and the attorney should, immediately before the conclusion of the opening speech, hint to the leader, in the manner presently suggested, *any omission or mistatement* that, if unnoticed, might prejudice the client, and which should in that case certainly be *fearlessly* communicated, (in general by the principal attorney, who should station himself immediately under or near the leader), before he sits down as having closed his speech. (a)

In general, the leader has *first* to consider whether, from the facts and weight of evidence in support of his own case, and the nature of the expected defence, and the talent and experience of the leading counsel for the defendant, the latter *will probably give evidence* (so as to entitle the plaintiff's counsel to a reply) or will not call evidence, but rely on his speech to the jury, in the hopes of obtaining a verdict, or very materially reducing the damages, as very frequently occurs in actions for slander or assault, or other personal injury, and where, in point of law, there cannot be any complete defence. If it be expected that the defendant will, by calling evidence, *give the plaintiff the reply*, the opening speech is usually more general and less impressive; but if a reply be uncertain, it is at least *more satisfactory to the client to have his case fully and energetically pressed in the first instance*, anticipating and refuting all arguments that can be urged by the defendant's counsel in defence or mitigation of damages. Thus, in an

(s) It must be understood that the author has wholly abstained from any observations on the opening speech, except those of a practical nature.

(a) I say *fearlessly*, because, from want of firmness in this respect, some causes have been lost. I believe, without ex-

ception, the leaders of the present day are free from irascibility, but in the early part of the author's practice it was not unfrequent, when a certain leader was what he considered *improperly* interrupted, that he flooded the client with a bundle of heavy briefs.

action for crim. con., besides all other topics, the plaintiff's counsel will perhaps anticipate the argument that the defendant has no income or property, and that it would be harsh to imprison him for life by a verdict for large damages: in that case the plaintiff's counsel would entreat the jury not to be influenced by any such certainly fallacious argument and why.

CHAP. XXIX.  
TRIAL AND ITS  
INCIDENTS.

The *opening address* usually states, *first*, the full extent of the plaintiff's claims, and the circumstances under which they are made, to show that they are just and reasonable; *secondly*, at least an outline of the evidence by which those claims are to be established; *thirdly*, the legal grounds and authorities in favour of the claim or of the proposed evidence; *fourthly*, an anticipation of the expected defence, and statement of the grounds on which it is futile, either in law or justice, and reasons why it ought to fail. The general utility of such arrangement will be collected from the following observations.

The several  
parts of such  
speech.

*First*, As regards the statement of the plaintiff's claim or claims, there are several reasons why all should in the *first instance* be stated, or at least all which the form of the declaration has embraced; (b) *first*, because if any item of claim be unnoticed in the preliminary address, when it is not necessarily involved or included in the plaintiff's claim, (c) the defendant's counsel might suppose that the plaintiff, for some good reason, had resolved to abandon the subordinate unnoticed claim, and therefore would properly forbear to cross-examine the plaintiff's witnesses, or himself to give evidence to defeat such claim; and *secondly*, that the judge and jury ought also to be informed in the *first instance* what items the plaintiff proceeds for, so as to watch the evidence, and ascertain whether there be any proof adduced in support of the claim, and that the judge, having the point brought to his attention, may direct the jury upon the propriety of a verdict for or against it; *thirdly*, because it is essential that the proceedings should be conducted in due order, and that a plaintiff's counsel should not be allowed, at any stage of a cause, to bring forward a further claim: for if he were allowed to do so, and make new cases *gradatim et seriatim*, a defendant would have an equal right at any time to start a new ground of defence, and there would consequently be no end of confusion. (d) The general sound rule, therefore, cer-

First, The plain-  
tiff's claims.

(b) See the leading case of *Penson v. Lee*, 2 Bos. & Pul. 332, and the reasons there assigned by the Court.

(c) As might be the case, as to the claim to interest, in an action on a promissory note payable on the face thereof,

with interest from the date, or according to occasions, the claim to the premium paid on effecting an insurance, in case the claim for a loss should fail, because the ship turned out not sea-worthy.

(d) *Penson v. Lee*, 2 Bos. & Pul. 332.

CHAP. XXIX.  
TRIAL AND ITS  
INCIDENTS.

tainly is, that after the leading counsel has closed his opening speech, or at least after he has closed the examination of a witness, he is not to be allowed to *state* a new claim, or to *prove* it, with a view to obtain a verdict for more than he originally claimed. (e) Thus, where the leading counsel only opened a claim on a bill of exchange, the judge would not afterwards allow him to state or prove a claim for money lent under the common counts; (f) and although in an action on a policy of insurance for a total loss, with a count for money received to the plaintiff's use, the Court of C. P., after consulting Lord Kenyon, held, *that as the practice was so in insurance causes*, the plaintiff might have a verdict for the premium, although his counsel had not mentioned the claim until after the jury had retired, yet the judges considered that particular practice against *general principle*, and said, "We hope that *the plaintiff's counsel will in future demand the premium in his opening, where he means to insist upon it.*" (g) In the opening also the statement of the case should *precisely accord with the proposed proof*; and after opening and proving a *joint trespass* against all the defendants, the plaintiff cannot abandon that case and prove a *separate trespass* against some or more of them. (h) It can rarely occur that any loss to the plaintiff can ultimately be sustained by a rigid adherence to this rule; for if there really be a distinct claim omitted to be claimed, a fresh action might afterwards be sustained as regards that item. (i) However, in cases where no injustice or great inconvenience would result, and the omission has arisen not from a defect in the brief, but from the *inadvertence of counsel*, some exceptions have been allowed; (k) and a witness has been called back where a counsel inadvertently has omitted, at the proper time, to ask of him a question, though not so in general in favour of a penal action. (l)

Sometimes the leading counsel for the plaintiff, apprehensive that the setting up a claim for the return of premium, (l) or return of a deposit, might prejudice the jury against the larger

(e) *Id. ibid*; Per Le Blanc, J. in 1 East R. 614, 1 Stark. Ev. 2d ed. 370; *Rees v. Smith*, 2 Stark. R. 31; *Williams v. Davies*, 3 Tyr. 383.

(f) *Paterson v. Zachariah*, 1 Stark. R. 72 acc.; but see *Murray v. Butler*, 3 Esp. R. 105, *semble contra*.

(g) *Penson v. Lee*, 2 Bos. & Pul. 330.

(h) *Tait v. Harris and two others*, 6 Car. & P. 73; 1 Mood. & R. 318, S. C.

(i) 6 Term Rep. 607; 3 Wils. 304; 3 Bar. & Cres. 235.

(k) *Alldred v. Halliwell*, 1 Stark. R. 117; 1 Stark. Ev. 370; *Giles v. Powell*, 2 Car. & P. 259; *Southy v. Peckford*, 2 M. & P. 545, and see observations of the Court as to the propriety of indulgence to counsel in *Penson v. Lee*, 2 Bos. & Pul. 333.

(l) See observation of Lord Eldon in *Penson v. Lee*, 2 Bos. & Pul. 330.

claim for a total loss under an insurance, or for larger damages in an action against a vendor for not completing his contract of sale, will purposely omit to mention such smaller claims, upon the supposition that if they were made, the jury would infer that the plaintiff was sensible he could not sustain his larger claim; and if that motive be discovered, as there was no *inadvertence*, but a purposed omission, there is no reason why the plaintiff should be indulged. It will be observed, that in cases of this nature skilful leaders will incur neither prejudice nor hazard, but will perhaps *begin* by observing, that the sufficiency of a defence may frequently be estimated by the discretion in conducting it, and that the defendant is at all events in error, because he has not paid into Court the amount of premium, but attempts to keep that in his pocket, as well as withholding the sum insured, and that the plaintiff is at all events entitled to a verdict for such premium; but that the plaintiff puts his case principally on the higher ground, and proceeds for a total loss, and then states and *closes* his observations by fully urging the right to the full compensation for his loss, and thus, as far as observation can go, securing a verdict and avoiding all prejudice by thus very lightly adverting to the claim for the premium in the early part of his address.

When a *set-off* has been pleaded, the safest course is for the plaintiff's counsel to open the full extent of his claim, stating all the items and the evidence by which he is prepared to prove it, but proposing, subject to the directions of the learned judge, to confine *his evidence* in the first instance to the proof of items sufficient to establish the sum he seeks to recover, instead of going into full proof of every item of his whole claim, which may or not be necessary, according to the extent of proof of the defendant's *set-off*. But in such case the counsel should ascertain, before he closes his case, whether the judge will allow him to give evidence of the debt, in answer to any proved *set-off*, after the defendant has called his evidence. (m) Lord Lyndhurst, C. B. observed, "the consequence of making it imperative on the plaintiffs to produce their whole claims in the first instance would be, that if they had long accounts, containing many items, and extending over several years, the whole must be gone through, as it would afterwards appear, without occasion. One course or the other must be adopted, according to the nature of the case, and the presiding judge can form the best opinion at the time whether the evidence

CHAP. XXIX.  
TRIAL AND ITS  
INCIDENTS.

(m) *Williams v. Davis, Gent., one, &c.* 3 Tyr. R. 383; 1 Crompt. & M. 464.

CHAP. XXIX. should be admitted or rejected at the particular moment when it is offered." (n)

TRIAL AND ITS  
INCIDENTS.

When the plaintiff's claim consists only of two or three considerable items, then it may be advisable, in the first instance, to go through the full proof of such debts to the plaintiff. (n)

Moreover, when in an action of trespass the declaration contains only one count for one assault and battery, when in fact there have been two distinct assaults, the plaintiff's counsel must take care to *open* that on which he afterwards means to rely and prove; for after describing, and still more after attempting to prove, one assault, he cannot abandon it and proceed to prove another. (o)

When a counsel is perfectly satisfied that in point of law his client is not entitled to recover a particular item, and that his attempts to recover it will be futile, and only lead to a new trial and consequent delay and expense, it is *now* considered due to the judge and the administration of justice, not to attempt to obtain a verdict for it; and at all events, if the counsel knows that he has no evidence to sustain a claim, it is considered most correct not to open the same as one of the items for which he proceeds. (p)

*Secondly, Observations on the plaintiff's expected evidence.*

*Secondly,* It is usual also in the opening address to state the *substance* or outline of the *Evidence* which it is expected will be adduced in support of the plaintiff's claims, with explanations calculated to remove any doubt that might arise on the effect of such evidence; but the extent of such opening statement must vary in every case according to the particular facts and the expectation of the defendant's giving evidence, so as to entitle the plaintiff's counsel to the reply. It is considered to be in general advisable not to pledge any particular course of proof, but to leave the same as open as practicable to any evidence that may arise; because, if precise evidence be pro-

(n) *Williams v. Davis*, 1 Crom. & M. 464; 1 Dowl. 647, S. C.; *Brown v. Murray*, Ry. & M. 254; *Rees v. Smith*, 2 Stark. 31.

(o) *Stants v. Cricket*, 1 Camp. 473.

(p) But there have been exceptions in practice. The late Mr. Marryatt related an anecdote of a celebrated leader on the Western Circuit, who in consultation, in answer to Mr. Marryatt's observation that a part of the plaintiff's claim was not sustainable, for there was no *legal* evidence in support of it, replied, "Ah, my boy, I am glad to see you are a good lawyer, but I think I shall contrive to *make it evidence*

in my speech to the jury." And an eminent leader on the Home Circuit, (whose client had been nonsuited by a variance on the first trial, and paid 70*l.* costs,) by observing to the jury on the second trial, on the hardship of such nonsuit and consequent expense, notwithstanding the remonstrance of the judge upon the irregularity of the observation, induced the jury to give a verdict for damages, *including such costs*. But in the result, and on a motion for a new trial, he was obliged to give up such costs, so that such irregularity was of no avail, and certainly was derogatory of professional conduct.



mised, and there be afterwards any material deviation or failure, a jury are apt to suspect that the case is full of errors. Upon this subject some excellent observations have been made. "The counsel for a plaintiff labours under a disadvantage in commenting upon his evidence before it has been given; it is frequently hazardous to lay much stress upon facts which afterwards may not be proved; and it not unfrequently happens that the proof varies so much from the statement as to render his comments and inferences irrelevant, and sometimes even injurious;" (g) and the defendant's counsel will of course observe to the jury on the discrepancies in the plaintiff's case. In general the plaintiff's leading counsel has acquired some knowledge of the habitual accuracy or inaccuracy of the attorney, and if it be favourable, so that he can venture to conclude that such attorney has *himself* examined the evidence, he may then be more firm or explicit in his statement of the evidence, and hence the expediency of the principal attorney examining the witnesses and stating that fact accordingly in the brief, so that the counsel may know how far they can confide in his accuracy. When a distinct admission by a defendant can certainly be proved, the just weight of evidence of that nature will be fully pressed upon the jury.

*Thirdly*, Supposing that it is certain a question of law relating to the right of action or the defence must necessarily arise, and that the plaintiff's counsel expects that by *anticipation* he may induce the judge to take a favourable view of the point, he may, by very concise allusions to rather than formal argument upon authorities, endeavour to satisfy the judge in favour of the plaintiff, and at all events convince the jury that justice and reason are in his favour, and that they ought reluctantly to give effect to any adverse law. (r) But it would be indiscreet to suggest any legal difficulty that probably might not occur to the judge or opponent's counsel; and in no case should a leader in Court betray the least want of confidence in his own case, for his client has a right to his most energetic assistance, and the instances are innumerable where able leaders have obtained and retained verdicts contrary to their own expectation, not unfrequently even contrary to the opinion of the judge as regards law and justice in its application to the particular case.

*Thirdly, Anticipation of points of law.*

(g) 1 Stark. Evid. 2 ed. 365, n. (h).

(r) *Plunkett v. Cobbett*, 5 Esp. R. 136.

CHAP. XXIX.  
TRIAL AND ITS  
INCIDENTS.

*Fourthly*, Anticipation of expected defence, and evidence in support of it.

*Fourthly*, The opening speech also very much depends on the *expected line of defence*, as whether it is expected that the defendant's counsel will rely upon some legal objection, either as regards the law applicable to the plaintiff's case, or to the insufficiency of his evidence, also relying upon his own speech to the jury, and will not give any evidence for the defendant; or whether he will give evidence, and thereby entitle the plaintiff's counsel to the reply. If the former be expected, then if it be *certain* that the defendant's counsel is aware of *all the legal objections*, it may be advisable for the plaintiff's counsel to anticipate, argue against, and condemn such objections, as neither founded in law nor in justice. (s) But unless it be quite certain that a particular legal objection will be taken, it is considered most discreet not to allude to it in the opening, because it has frequently occurred that anticipations of supposed objections have suggested the same for the first time to the opponent, and have thus raised a difficulty that might never have occurred.

As regards anticipation of any *defence on facts*, and when evidence will be called by the defendant, and the plaintiff thereby entitled to a general reply, the plaintiff's counsel is at liberty, whether such defence be fully known to him or not, either in the first instance to state and enter into the whole of his case or only to make out a *prima facie* case, and to reserve his answer to the defendant's case for his reply, and in general the latter is considered the safest course; because by entering into the full defence in the opening speech and in evidence many hints useful to the defendant's counsel may be suggested, so as to enable him to improve his own case; as if the action be on a bill of exchange against the acceptor, and the expected defence be the want of consideration received by the defendant or given by the plaintiff; (t) and the plaintiff cannot answer part of the defendant's case in his opening, and reserve the next for his reply. (t) In a few cases however it may be advisable shortly to anticipate the defence and the witnesses that will be called in support of it; as, for instance, the counsel for the plaintiff may state his conjecture that though in reality there is no defence, yet he expects it will be attempted to put the plaintiff out of Court by the defendant's attorney's clerk proving

(s) The fallacy of many such defences may thus by anticipation be exposed and annihilated, when otherwise the defendant's counsel, by making an impression on the judge, he may for a time rule erroneously and render necessary an applica-

tion to the Court.

(t) *Williams v. Davies*, 1 Cr. & M. 464; *Brown v. Murray*, R. & M. 254; *Sydney v. Hall*, id. 255, overruling *Rees v. Smith*, 2 Stark. Rep. 31; 1 Arch. C. P. 169.

some admission, and state his reason for that conjecture, by observing from the cause list the name of the defendant's attorney, and that he has previously known that a clerk of that attorney has on former occasions ventured to prove some such admission, but which, after two or three attempts, previous juries have of late disbelieved; thus putting the judge and jury in possession of the probable defence, the injustice of which the jury are thus enabled to suspect and duly appreciate.

CHAP. XXIX.  
TRIAL AND ITS  
INCIDENTS.

It is essential to the due administration of justice that a counsel should be privileged and protected in the energetic discharge of his professional duty, and in stating supposed facts pertinent to the cause and stated in his brief or instructions, and in commenting fairly on the facts of the case; and he may use strong epithets, however derogatory to the character of the opponent or his attorney, or other agents, in bringing or defending the action; for if he were subject to an action for uttering such abuse, whether true or not, the mere liability to be harassed with numerous actions would cramp if not destroy the energy of counsel, so essential to the welfare of the client, and which is indeed highly useful to society, since the exposure by counsel of villainy or misconduct is very conducive to its decrease; and therefore where a counsel, in pursuance of the instructions in his brief, stated, "That the plaintiff's attorney was a fraudulent and wicked attorney," referring to the attorney's having brought the action for a sum of money to which it was insisted he knew the plaintiff was not entitled, it was held that the counsel was not liable to be sued, whether the assertion were true or false.<sup>(u)</sup> In general however it is hazardous, and may be very injurious to the client, to instruct counsel to abuse a particular individual; for the jury, and sometimes the judge, will openly express their displeasure when the abuse has not been fully warranted by the course of the cause; and it is not so much the practice as heretofore to step aside to animadvert upon the conduct of a party or his witness; and in modern times, there are very few instances of what was formerly termed *browbeating*. Indeed counsel should be always cau-

Counsel's privilege of speech.

(u) *Hodson v. Scarlet*, 1 Bar. & Ald. 232; and see very fully *Robertson v. Graham*, 3 Dow's Rep. in Lords, 273, 277, 279; 7 Bing. 459.

In *Blanchard v. Cawthorne*, Linc. Inn Hall, 30th Aug. 1831, Lord Chancellor Brougham observed, "I dismiss the motion, (i. e. dismiss the Vicechancellor's order for appointment of a receiver, &c.)

with costs, on this ground; I consider that there was considerable imputation cast upon the character of the professional defendant and gentleman (Mr. Harrison.) I do not say improperly cast, because there was something which required explanation; but nevertheless, when such imputations are cast, costs are always given, and almost of course."

CHAP. XXIX.  
TRIAL AND ITS  
INCIDENTS.

tious in avoiding what might be termed insulting a witness. Many jurors have declared that in doubtful cases, and especially when considering damages, they have frequently founded their verdict on the indiscretion of counsel alone. The judge, however, will sometimes endeavour to remove any prejudice to the client on account of any such want of judgment in his counsel.

Junior Counsel and attorney to observe the opening and be prepared with hints.

It is very important that the junior counsel and the attorney should attentively observe the opening address of the counsel, so as to shape the subsequent conduct of the cause accordingly. It will also be particularly essential that each should observe whether the leader has stated every part of the plaintiff's claim, and if it be certain that any material point has been omitted, then, but not until the instant before the leader is about to close his address, a *hint may be privately given*; but all *open interruption* should be anxiously avoided, and confidence should be reposed to the last that the leader will leave nothing incomplete. Indeed, in general, when a leader entertains the least doubt whether he has omitted any appropriate statement, he will, before he sits down, inquire of his junior, or more generally of *the attorney*, whether any thing further occurs to him to be stated. (x) If the point omitted be very concise, sometimes even a word very legibly written would suffice; as, suppose the claim for interest has been omitted, the words, "*Interest, £—*," on a slip of paper would instantly induce the leader to add that claim; or in an action on a policy of insurance on ship, with a count for money had and received, to recover back the premium, the word "*Premium £—*;" (y) or in an action against a vendor, for not making a sufficient title to the plaintiff a purchaser, with a count for money had and received, to recover the deposit, the word "*Deposit, £—*;" or where a set-off has been pleaded, if in notice, "*Further, claims to cover set-off, if proved.*"

7. Of plaintiff's counsel giving evidence and calling witnesses, and the usual course of adducing the same.

7. The opening speech having been closed, the next senior counsel begins *the examination of the evidence*. In general formal proofs are *first* adduced; *secondly*, the documentary evidence; (z) *thirdly*, examination of witnesses *under interroga-*

(z) As in general the attorney in a cause must be better informed of the *facts* than any counsel, a leader will consult him as to facts, and he ought to be able instantly to answer every question upon them; and he should place himself imme-

diately under his leader, so as to be ready to communicate.

(y) *Penson v. Lee*, 2 Bos. & Pal. 330.

(x) If there be a doubt as to the sufficiency of the stamp it is advisable, in a long town cause, to put in docu-

*stories*, and *lastly* the *viva voce* evidence by *witnesses*. With respect to documentary evidence, we have seen, that to save expense, the Reg. Gen. Hil. T. 4 W. 4, reg. 1, sect. 20, enables either party to require his opponent to agree to *admission of such documents*, or to refuse such admissions at the risk of having to pay the costs of the more expensive proofs, whatever may be the result of the cause; (a) such *admission* is therefore usually made in writing, and which is produced, and the handwriting of the opponent's attorney to the signature proved, if disputed; and then the admissions are read and the several admitted documents are handed to the officer of the Court and read, copies of each being first delivered to the judge if required. The judge's order or rule of Court for the examination of witnesses on interrogatories is put in, and the interrogatories and depositions are read. The several witnesses in chief are then successively called.

CHAP. XXIX.  
TRIAL AND ITS  
INCIDENTS.

8. As it would be an improper waste of time to permit a witness to be sworn or give evidence, and afterwards to raise an objection to his competency, the general practice is, after a witness has been called into the witness-box, and sworn or affirmed to give evidence, *immediately to make any objection* then known to exist, and which may be on *the voir dire*, or in some cases established by evidence. Formerly, the objection must have been made before the witness *was sworn* in chief; but it has now long been settled that it may be made at any time during the trial; (b) especially the objection is not discovered until the witness has himself, in the course of his examination, disclosed his incompetency. If, however, the objection be in respect of a supposed defect in the form of oath, or in the want of religious belief, it should be made at the time the oath is administered. As regards incompetency on account of the witness having been *convicted* of some crime, the record of the judgment of conviction, regularly drawn up, must be produced, (c) and even his own admission of having committed the crime will not render him incompetent without proof of his conviction; (d) but the usual objection respecting *interest* is in general established by examining the witness himself upon the

8. If defendant's counsel examine plaintiff's witnesses on voir dire, and intend objecting to the competency or the mode of their examination, when and how to object.

ments first; for if it be necessary to send the instrument to the stamp office the judge will sometimes permit the other evidence to proceed in the mean time. *Beckwith v. Benner*, 6 Car. & P. 681.

(a) *Ante*, 818, 819.

(b) *Turner v. Pearte*, 1 Term R. 717;

*Stone v. Blackburn*, 1 Esp. 37; *Peake*, Ev. 195.

(c) See 1 Stark. Ev. 2d ed. 95; *Ret v. Carsinion*, 8 East, 77; *Cook v. Maxwell*, 2 Stark. R. 183; *Sharp v. Scoging*, Holt, C. N. P. 541; *Bul. N. P.* 292.

(d) 1 Stark. Ev. 2d ed. 172.

CHAP. XXIX.  
TRIAL AND ITS  
INCIDENTS.

question. (e) It would be beyond the limits of this work to investigate this part of the subject more fully.

Whilst witnesses for either party are under examination in chief, the counsel for the opponent must carefully watch the mode of examination; and if there be even the *inception of an irregular question*, the answer to which might be prejudicial, he should instantly interrupt the counsel, because, if he wait until the whole of a leading question has been stated, the mischief may be complete, from the witness having already had suggested to him the answer he is desired to give, and will afterwards, when the question has been re-formed, give the answer accordingly. In like manner, if a witness swear to a fact or conversation, the counsel for the opponent may interpose, and inquire of the witness whether he was present and heard all that passed, or whether the matter was in writing, or whether his information is merely hearsay. (f) So he may be asked whether he speaks from recollection or from some note of the transaction, and if the latter, then inquire when it was made; for unless it was made on the very day, or very shortly after, the witness cannot refer to it even to refresh his memory; and unless he can swear that, independently of the written memorandum, he recollects the fact, the evidence will not be received.

Of the imprudence of the plaintiff's counsel persisting in examining a witness, the admissibility of whose evidence is doubtful.

If a witness for the plaintiff be objected to on account of any supposed incompetency, and which is not to be avoided by release or otherwise, the plaintiff's counsel should be well assured that his evidence is in law admissible, before he pertinaciously insists on proceeding with his examination, because if he do so, and on a motion for a new trial the Court in Banc should be in favour of the objection, a new trial will be granted. It is only where there is no other evidence to the same effect, that it is advisable to struggle for the admissibility of a witness, but rather preferable to be content with the other evidence. (g)

Examination of evidence in Chief. (h)

The leading counsel having closed his address, the *evidence*, then termed *in chief*, is to be given in support of the statement. The evidence should strictly follow and support every part of the plaintiff's case, or perhaps rather the speech should exactly anticipate and correspond with the expected evidence;

(e) *Doxon v. Haigh*, 1 Esp. 409; ante.  
(f) See *The Queen's case*, 2 Brod. & Bing. 292.

(g) *Campbell v. Richards*, 5 Bar. & Adol. 840.

(h) In 5 Bla. Com. 374, referring to Quintilian, Institut. Orat. lib. 5, chap. 7, it is observed that he lays down very

good instructions for examining and cross-examining witnesses *visa voce*, and it would be well if students for the bar would study those observations, and afterwards, when attending nisi prius trials, consider how far these rules are or are not now observed.

and care must be observed to adduce evidence to support that case which has been opened by the leader. As suppose the brief states two assaults, the one committed in August and another in September, but the leader has opened only the latter, the junior counsel, after assuring himself that the leader has advisedly so opened, must take care to confine the witness to the assault in September, because we have seen that after proving, even in part, one cause of action, the plaintiff's counsel cannot abandon it and proceed to prove another, unless the pleadings and opening extend to both. (i) So in an action of trespass against three defendants, after proving a joint trespass, the plaintiff cannot abandon that, and proceed to prove a separate trespass by one. (k) If there be three or more counsel, then the next senior to the leader begins with a portion of the evidence, and if the requisite documentary proof is voluminous and important, such second counsel usually, in pursuance of previous arrangement, takes the whole; as where assignees are plaintiffs, and the bankruptcy and their representative character has been put in issue, such second counsel proves the fiat, petitioning creditor's debt, the trading, act of bankruptcy, and assignment to the plaintiff. After the defendant's counsel has exhausted his objections, if any, to this part of the proof, and cross-examined the witnesses called to prove it, the junior counsel for the plaintiff then calls one of the least important of the witnesses for the plaintiff, and it is judicious to arrange that the leader, who has in the mean time obtained a short *respite* from his exertion, shall attend and take the most important witness in the cause. It would be extremely injudicious on the part of the junior to attempt to prevent any arrangement so conducive to the welfare of the client, and if he do, he had better suspend his practice till longevity has placed him in the lead, if any client then be found to retain him. At the same time, no leading counsel should, without urgent occasion, take a witness out of the hands of his junior.

The same observation applies to a junior counsel objecting to his leader's taking a witness out of his hands whilst he is under his examination, and which it is settled he has a right to do. (l) But after one counsel has brought his examination to

Right of leader to take the examination of a witness out of his junior's hands.

(i) *Stante v. Prickett*, 1 Camp. 473.

(k) *Tait v. Harris and others*, 6 Car. & P. 73; 1 Mood. & R. 282, S. C.

(l) *Doe v. Roe*, 2 Campb. 280; Tidd, 9 ed. 860. Certainly a junior may apprehend that bystanders may infer, from a leader's taking the examination or cross-

examination of a witness out of his hands, that he thereby insinuates that he the junior is inefficient or incompetent to the fulfilment of his professional duty, and therefore no leader should, without absolute necessity, so interfere; but there may be many occasions, as where a witness turns

CHAP. XXIX.  
TRIAL AND ITS  
INCIDENTS.

a close, no other counsel on the same side can put a question to the same witness. (m) Formerly, it was the invariable practice for the *same* counsel who had examined a witness in chief for the plaintiff or the defendant, to *re-examine* such witness; but of late it is frequently the practice for the leader to put such questions as he may think fit in reply, especially when, from the conduct of the witness, it may be requisite almost to re-examine him as an adverse witness.

Modes of exam-  
ining a witness  
in chief. (n)

1. Questions  
must be perti-  
nent to the  
issue.

2. Question  
must not be too  
leading. (o)

There are undoubtedly two principal rules to be observed in examining a witness in chief; viz. first, to ask no *impertinent* or *useless* question; and secondly, not to ask a *leading* question. The first is objectionable as wasting time; but the judge will in general, for a short time, give the counsel credit for a just object connected with the suit, and not interfere till it is obvious the succession of similar questions will not lead to any useful result. With respect to *leading questions*, the *assigned* reason in support of the rule is, that a witness usually has a strong feeling in favour of the party who has subpoenaed him, and is disposed to swear any thing that he thinks will serve that party, and that a leading question in effect suggests to the witness the answer that he is desired to give, and invites misrepresentation. (p) This reason imputes to the counsel an unworthy motive, and to every witness a supposition that he would be guilty of perjury; but perhaps the better and more comprehensive reason is, that many witnesses, either from complaisance or indolence, are too much disposed to assent to the proposition of the counsel, and answer as he may suggest, instead of reflecting, and answering after an exertion of their own memory. (q) And this last reason applies as well to *leading questions* put to an obviously favourable witness, as of one de-

round upon the party who has subpoenaed him, and requires an examination as leading and hostile in effect as a *cross-examination*, and which perhaps only the leader can readily obtain *permission of the judge* to adopt, and unless the leader interiere immediately on the spur of the occasion, the cause might be lost. A case of this nature is almost the only instance in which so open a disparagement of a junior should be tolerated, and certainly there is no excuse even in the utmost zeal and anxiety for the client, that can justify the *coarse conceited assumption* of any leader, that he alone can conduct every part of a cause with adequate ability.

(m) *Stante v. Prickett*, 1 Campb. 473; *Doe v. Roe*, 2 Campb. 280.

(n) See in general 1 Stark. Ev. 2d ed.

149, 150; Peake, Ev. 198; 1 Arch. K.B. 328; 2 Arch. C. P. 146 to 149.

(o) See illustration, *post*, 895, n. (c).

(p) See 1 Stark. Ev. 2d ed. 149, 150; Peake, Ev. 198; 1 Arch. K.B. 328; 1 Arch. C. P. 146 to 149.

(q) Thus, if the leading question were thus, "*Was not it a cold day,*" many witnesses would answer "*yes,*" or "*rather so,*" too hastily confounding the state of the weather on one day with that upon another day. And as to *complaisance*, the instances given by Shakspeare will illustrate, see Hamlet, act iii. scene 2d, and act v. scene 2d, particularly the last, where the courtier Osric complaisantly assents to Hamlet's statement of the change from cold to heat almost in an instant.



cidedly adverse or neutral, or certainly of too high character wilfully to deviate from the truth ; so that such form of question should *never* be adopted ; nor can the answer to such a question ever be so worthy of credit as an answer to a question so shaped as to *compel* the witness to answer it according to the best of his own *exerted memory*. It is true that it has been laid down, that in *cross-examination* a leading question may be asked ; but that position has been much qualified, and, as observed by Buller, J., “ you may, in cross-examination, bring the witness “ *directly* to the point, but cannot put into his mouth the very “ words it is hoped he will echo back.” (q) However, without regard to the reason upon which the objection to leading questions is founded, it is certain that objections to questions of this nature are of the highest importance ; and when a judge or jury observe that in an examination in chief, or in cross-examination, the witness is too prone to favour the party on whose behalf a leading question has been put, he will give but little credit to the testimony thus obtained ; but where the matter to which the witness is examined is *merely introductory* of that which is material, it is frequently desirable to lead the mind of the witness directly to the subject, not only by leading questions, but also by an affirmative statement of all the facts immediately preceding that upon which the witness is to be examined, thus bringing to the witness's mind *the subject of inquiry*. (r) And it will be proper in the brief concisely to mention the facts or circumstances that will most likely remind the witness of the fact particularly wished to be elicited, so as to enable the counsel to suggest a sufficient question to the witness.

However, objections of this nature ought not to be wantonly or captiously made, (s) since it is to some extent always necessary to lead the mind of the witness to the subject of inquiry. In some instances the Court will allow leading questions to be put upon an examination in chief, as where it evidently appears that the witness wishes to conceal the truth, and to favour the opposite party. (t) So where from the nature of the case the mind of the witness cannot be directed to the subject of inquiry without a particular specification of it, as where he is called to contradict another as to the contents of a particular letter which is lost, and cannot without suggestion recollect the contents, the particular passage may be suggested to him. (u)

When leading questions may be necessary or proper, or are permitted.

(q) Per Buller, J. in *Hardy's case*, 24 Howell's State Trials, 755 ; Phillips, 384 ; 1 Stark. Ev. 162, q. ; post, 898, 899.  
(r) 1 Stark. Ev. 2d ed. 149, 150.  
(s) *Nicholls v. Dowding*, 1 Stark. Rep.

81 ; 1 Stark. Evid. 2d ed. 150, n. (i).  
(t) 1 Stark. Evid. 151.  
(u) *Courteen v. Torose*, 1 Campb. 43 ; 1 Stark. Evid. 152.

CHAP. XXIX.  
TRIAL AND ITS  
INCIDENTS.

So where a witness is called to contradict the testimony of a former witness, who has stated that such and such expressions were used, or such and such things were said, it is the usual practice to ask whether those particular expressions were used or those things were said, without putting the question in a general form, by merely inquiring what was said.(x) If this were not to be allowed, it is obvious that much irrelevant and even inadmissible matter would frequently be detailed by the witness. So where a witness is called to prove a copartnership between a number of persons, whose names he cannot recollect, the list of names may be read to him, and he may be asked whether those persons are members of the firm.(y) So in order to identify a person whom the witness has already described, the person may be pointed out to him, and he may be asked in direct terms if that be the person he meant.(z)

It is certainly the practice, when the time and place of the scene of action have once been fixed, to desire the witness to *give his own account of the matter*, directing him, when not a professional person, to omit as he proceeds any account of what he has only heard from others, and not seen or heard himself, and which he is too apt to suppose is quite as material as that which he himself has seen. If a vulgar ignorant witness be not allowed to tell his story in his own way, he becomes embarrassed and confused, and mixes up distinct branches of his testimony. He always takes it for granted that the Court and jury know as much of the matter as he does himself, because it has been the common topic of conversation in his own neighbourhood, and, therefore, his attention cannot easily be drawn so as to answer particular questions without putting them in the most direct form. It is difficult, therefore, to extract the important parts of his evidence piecemeal, but if his attention be first drawn to the transaction, by asking him when and where it happened, and he be told to describe it from the beginning, he will generally proceed in his own way to detail all the facts in the due order of time.(a) In each particular case, however, it is in the discretion of the Court to regulate the mode in which a witness in chief shall be examined, in order best to answer the purpose of justice, and there is no fixed rule which binds counsel to a particular mode of examining him; for if a witness by his

(x) 1 Stark. Evid. 2d ed. 152, n. (m).

(y) *Acorro v. Petrosi*, 1 Stark. Rep. 00; 1 Stark. Evid. 2d ed. 152; Chitty

on Bills, 8th ed. 635, 634.

(z) *Rex v. Watson*, 2 Stark. Rep. 116.

(a) 1 Stark. Evid. 2d ed. 151, n. (i).

conduct shows himself decidedly adverse to the counsel who called him, it is in the discretion of the Court to allow a cross-examination. The situation of the witness and the inducements under which he may labour to give an unfair account, are material considerations in this respect. A son will not be very forward in stating the misconduct of his father, of which he has been the only witness, and a servant will not in an action against the master readily admit his own negligence. (b) And if a witness called stands in a situation which of necessity makes him adverse to the party calling him, counsel may, *as matter of right*, cross-examine him. (c).

The order of proof is in general in the discretion of the leading counsel, excepting that when once his witness has left

Order of proof.

(b) *Id. n. (k)*; see 2 Evans's Pothier, 267.

(c) Per Best, C. J., *Clarke v. Saffery*, 1 Ry. & Moo. Rep. 126; and see Peake's Evid. 198. Sir Walter Scott, in the second volume of *Heart of Mid Lothian*, in his interesting description of the trial of the sister of Jeannie Dean for child murder, has thus briefly alluded to the use of introductory questions to a witness, and observed upon objections to leading questions.

"After the advocate had conceived that by these preliminary and unimportant questions he had familiarized the witness with the situation in which she stood, he asked 'whether she had not remarked her sister's state of health to be altered during the latter part of the term when she had lived with Mrs. Saddletree?' Jeannie answered in the affirmative.

"And she told you the cause of it, my dear, I suppose?" said Fairbrother, in an easy, and, as one may say, an inductive sort of tone.

"I am sorry to interrupt my brother," said the crown counsel, rising, "but I am, in your lordship's judgment, whether this be not a leading question?"

"If this point is to be debated," said the presiding judge, "the witness must be removed." For the Scottish lawyers regard with a sacred and scrupulous honour every question so shaped by the counsel examining as to convey to a witness the least intimation of the nature of the answer which is desired from him. *These scruples, though founded on an excellent principle, are sometimes carried to an absurd pitch of nicety*, especially as it is generally easy for a lawyer who has his wits about him to elude the objection. Fairbrother did so in the present case.

"It is not necessary to waste the time of the court, my lord, since the king's counsel think it worth while to object to

the form of my question, I will shape it otherwise."

"Pray, young woman, did you ask your sister any question when you observed her looking unwell?—take courage—speak out."

"I asked her," replied Jeannie, "what ailed her?"

"Very well—take your own time—and what was the answer she made?" continued Mr. Fairbrother.

"Jeannie was silent, and looked deadly pale. It was not that she at any one instant entertained an idea of the possibility of prevarication—it was the natural hesitation to extinguish the last spark of hope that remained for her sister.

"Take courage, young woman," said Fairbrother. "I asked what your sister said ailed her when you inquired?"

"Nothing," said Jeannie, with a faint voice, which was yet heard distinctly in the most distant corner of the court-room, such an awful and profound silence had been preserved during the anxious interval which had interposed betwixt the lawyer's question and the answer of the witness.

"Fairbrother's countenance fell; but with that ready presence of mind which is as useful in civil as in military emergencies, he immediately rallied.

"Nothing? True; you mean nothing at first—but when you asked her again, did she not tell you what ailed her?"

"The question was put in a tone meant to make her comprehend the importance of her answer, had she not already been aware of it. The ice was broken, however, and with less pause than at first she now replied,

"Alack! alack! she never breathed word to me about it."

"A deep groan passed through the court," &c. &c.

CHAP. XXIX.  
TRIAL AND ITS  
INCIDENTS.

the box, he cannot recall him as to any point he had omitted, unless by leave of the judge.(d) As it is impossible to prove several facts simultaneously, the arrangement is open to the discretion of counsel, and, therefore, in an action against several defendants the plaintiff is not compellable first to prove a joint liability of all, but may first prove an admission or statement made by one, and afterwards proceed step by step to fix each of the other defendants, and ultimately connect them in joint liability, although it might be more convenient first to prove the joint liability.(e) If when an instrument be tendered in evidence it is objected that it is not sufficiently stamped, the judge will sometimes allow the parties to send it to the Stamp-office to be immediately stamped, and allow the party in the meantime to go on with the rest of his evidence; but in that case the judge will not allow the point as to stamp to be argued whilst the instrument is absent.(f)

Whether a party  
can discredit a  
witness called  
by him.(g)

It is still a disputed point whether a party can be allowed to *discredit his own witness*; as where a plaintiff having examined four witnesses in support of his cause, called a fifth, who had previously stated that he should prove the same, but on the trial quite contradicted them, and the question was, whether the plaintiff's attorney could be permitted to produce and read a paper on which he had on a previous examination of such fifth witness written down his expected evidence, and read it over to him, and which he then stated was correct, and yet on the trial contradicted. Denman, C. J. was of opinion in the affirmative, but Bolland, J. in the negative.(h) It seems, however, to be clearly established, that if a witness called by the plaintiff turn out unfavourable, the plaintiff may afterwards call *another witness* to establish the point;(i) and upon an issue whether the plaintiff was interested in goods destroyed by fire, if a witness called *by the plaintiff* state that invoices of the goods and letters of advice purporting to be written by him in Edinburgh were fabricated in London after the fire by the plaintiff's direction, it is competent to the plaintiff to call *other witnesses* to disprove the alleged fabrication, and show

(d) See ante, 855, post, 901.

(e) *Whitford v. Tutam and others*, 6 Car. & Payne, 228.

(f) Per Gurney, B., *Beckwith v. Ben-ner*, 6 Car. & Payne, 681, 683, ante, 688, n. (s).

(g) 1 Stark. Evid. 2d ed. 185, 168; 1 Arch. K. B. 4th ed. 330, 331.

(h) *Wright v. Beckett*, 1 Moo. & Rob. 414; but see *Ewer v. Ambrose*, 3 Barn. & Cress. 746; see in general 1 Stark. Evid. 185, 2d ed.

(i) 1 Stark. Evid. 185; *Alexander v. Gibson*, 2 Campb. 556; *Richardson v. Allan*, 2 Stark. Rep. 556; *Ewer v. Ambrose*, 3 Barn. & Cress. 746.

the genuineness of the documents.(k) And though it has been laid down as a general rule, that a plaintiff or a defendant shall not be allowed to disprove what his own witness has sworn;(l) yet it is admitted that where what the witness swears is *palpably false*, and it would be a great injustice to allow the party's case to be sacrificed, then an exception is to be allowed.(m)

10. Whenever a witness has been called and *sworn*, and *questioned*, and he has *actually given evidence in chief*, on behalf of the plaintiff or the defendant, it follows that the opponent has a *right to cross-examine* him, so as to endeavour to alter the effect of any evidence he has given. And even if a witness were called and sworn, though not examined or asked any questions, it was, nevertheless, held, that the opponent had thereby acquired a right (then inaccurately termed to *cross-examine*) to examine him as if he were an adverse witness, respecting any evidence he could give;(o) and it was formerly held, that if a witness had been called into the box, and inadvertently *sworn*, he might be thus examined by the opponent, although he had not been asked a question by the party who had subpoenaed and called him;(p) and it has been supposed that if a witness called merely to *produce* a document, which when in Court might be proved by any other, yet if he were sworn, though not examined on his oath, the opponent had the right to examine him.(q) But the *present practice is otherwise*, and if a witness be merely served with a subpoena duces tecum, and called in Court to produce the enumerated documents, and which he accordingly produces, and he is not examined to give evidence in chief, the opponent has no right to examine him as in cross-examination.(r) And even if the witness be *asked* a question in chief, yet if he *make no answer* the opponent then also has no right to cross-examine.(s)

It has been well observed "that the power and opportunity

19. Of the cross-examination of witnesses, and rules respecting the same.(n)

1. Of the right to cross-examine.

(k) *Friedlander v. London Assurance Company*, 1 Nev. & Man. 30; 4 Barn. & Adol. 190, S. C.

(l) 5 State Trials, 2, 764, 792.

(m) *Alexander v. Gibson*, 2 Camp. 556; 2 Stark. R. 334.

(n) See in general, 1 Stark. Ev. 2d ed. 160.

(o) *Phillips v. Eamer*, 1 Esp. R. 357; *Morgan v. Brydges*, 2 Stark. Rep. 314; *Rez v. Brook*, 2 Stark. 472; 1 Stark. Ev.

161.

(p) *Id. ibid.*; 1 Stark. Ev. 161.

(q) *Simpson v. Smith*, 1 Stark. Ev. 2d edit. 179, note (a).

(r) *Ante*, 830; *Lush v. Smith*, 1 Cr., M. & Ros. 94; *Summers v. Moseley*, *id.* 96; *Davis v. Dale*, 1 Mood. & Malk. 514; 4 Car. & P. 335, S. C.; *Simpson v. Smith*, and other cases, 1 Stark. Ev. 161, note (n).

(s) Per Gurney, B., in *Rush v. Smith*, 1 Cr., M. & Ros. 95.

CHAP. XXIX.  
TRIAL AND ITS  
INCIDENTS.

*to cross-examine* a witness called to give *evidence in chief*, either for the plaintiff or the defendant, is one of the *principal tests* which the law has devised for the ascertainment of truth, and is certainly a most efficacious test. By this means the situation of the witness, with respect to the parties and the subject of litigation, his interest, his motives, his inclination and prejudices, his means of obtaining a correct and certain knowledge of the facts to which he bears testimony, the manner in which he has used those means, his powers of discerning facts in the first instance, and his capacity for retaining and describing them, are fully investigated and ascertained, and submitted to the consideration of the jury, who have an opportunity of observing the manner and demeanour of the witness, circumstances which are often of as high importance as the answers themselves. (t) It is not easy for a witness, who is subjected to this test, to impose upon the Court; for however artful the fabrication of the falsehood may be, it cannot embrace all the circumstances to which the cross-examination may be extended, the fraud is therefore open to detection for want of consistency between that which has been invented and that which the witness must either represent according to the truth, for want of previous preparation, or misrepresent according to his own immediate invention. In the latter case the imposition must obviously be very liable to detection, so difficult is it to invent extemporaneously, *and with a rapidity equal to that with which a series of questions is proposed in the face of a Court of justice*, and in the hearing of a listening and attentive multitude, a fiction consistent with itself and the other evidence in the cause." (t)

As regards the *rapidity* here alluded to, the position seems to import a deviation from the usual slow mode of waiting between each question until the previous answer has been written down by the learned judge; and undoubtedly when a particular part of the examination of a witness is obviously, from the manner of the counsel, pursued, in order to detect falsehood, a judge may feel it essential to permit a *rapid succession* of questions, interspersed with such running comments as may be important in eliciting truth. (u) According to the

(t) 1 Stark. Ev. 2d edit. 161, cites Bac. Ab. tit. Evidence E; Hobart, 325; Hale, P. C. 253, 259; Preface to Fortescue's Rep. 2 to 4; Vaughan's Rep. 143.

(u) It was certainly the practice, when Sir W. Garrow was at the bar and cross-

examined a witness in his superior and unparalleled manner, that the judge never stopped him in the course of his examination, however rapid, but laid down his pen and waited for the entire result.

practice of the ancient Roman law, the advocates were entitled, in addition to their *general* speeches, to make a *perpetual running comment upon the testimony of the witnesses*, and even upon documentary evidence as it was adduced;(x) and although no such general practice now prevails, yet when *cross-examining* a witness who prevaricates, the counsel, in order to expose his falsehood, will frequently make a *running comment on his testimony*, so as to extract even from him a confession of his falsehood or error.

CHAP. XXIX.  
TRIAL AND ITS  
INCIDENTS.

A witness may be *asked* a question, the answer to which might subject him to prosecution and punishment, though he is not compellable to *answer* it;(y) but no counsel has a right to interpose to prevent the witness from answering. All other questions for the purpose of *disparaging or impeaching a witness's character* may not only be asked but they *must* be *answered*.(z)

What disparaging questions may be asked in cross-examination.

As regards the *mode of cross-examination*, it is a common doctrine that when a witness has been examined in chief, the counsel of the opponent, whether plaintiff or defendant, may put any question at all relevant to the cause he may think fit, and in a manner *however leading*.(a) But we have attempted to show that the principle on which objections to leading questions is founded is much more extensive, and is not confined to questions to a witness *in chief*, but equally extends to a witness when under cross-examination, unless it appear that the person is not the witness of truth, but evidently *endeavouring to conceal the truth* from the counsel who is examining him, whether for or against the plaintiff, and in which case the most leading questions ought to be permitted.(b) And in practice the position that *leading questions* may be put in cross-examination is now considerably *qualified*; for if the witness betray an anxiety to serve the party against whom he was examined as a witness in chief, a direct leading question will not then be permitted in cross-examination, and Buller, J., observed, "You may lead a witness upon cross-examination to bring him *directly to the point* as to the answer; but not go the length of *putting into the witness's mouth the very words which he is to echo back again*." (c) Indeed, it is obviously indiscreet in any case to

Mode of cross-examination, leading questions, &c.

(x) 1 Stark. Ev. 365, note (g).

(y) Per Bayley, J., in *Rex v. Holding* and another, at the Old Bayley, June, A. D. 1821.

(z) See *The Queen's case*, 2 Brod. & Bing. 311.

(a) *Dickenson v. Shee*, 4 Esp. Rep. 68; 1 Arch. K. B. 4th edit. 351.

(b) *Ante*, 892, 893.

(c) Stark. Ev. 162, note (c), in *Hardy's case*, Howell's State Trials, 24; Phillips, 284; *ante*, 893.

CHAP. XXIX.  
TRIAL AND ITS  
INCIDENTS.

obtain evidence by a leading question, which might possibly be obtained by other means, because the opponent's counsel or the judge will scarcely ever forget to suggest to the jury that evidence so obtained is suspicious, and to be little depended upon. (d) In short, leading questions should never be put but when the witness is obviously anxious to conceal the truth.

It is another rule that a witness is not to be cross-examined as to any distinct collateral fact, for the purpose of afterwards impeaching his testimony by contradicting him; (e) this is as objectionable as an impertinent question to a witness examined in chief; (f) and would render an inquiry, which ought to be confined to the matter in issue, intolerably complicated and prolix, by causing it to branch out into an indefinite number of collateral issues. (g) There may, however, be exceptions, as where collateral and immaterial questions may be put, in order to establish that the witness is insane, by his answers to certain questions showing that he is subject to mental delusions.

It seems to have been settled in the Queen's case that questions tending to *disgrace* the witness may be put, (h) and that not only a question as to an act done by the witness, the answer to which might criminate him, may be put, in order to afford a foundation for contradicting him, if he deny the fact, but the adverse party could not, without asking the question, adduce such evidence to impeach the credit of the witness. (i) If a witness voluntarily answer questions tending to criminate him on his examination in chief, he is bound to answer on cross-examination, however penal the consequence may be. (k) If a witness choose to answer a question to which he might have demurred, his answer may afterwards be used in evidence against him for all purposes. (l)

There is great risk in cross-examination, for if unfavourable evidence be thereby elicited, it seems to be a rule to take the statement most strongly against the party so cross-examining, and this, although the same evidence, if offered in chief, would not have been admissible. (m) And hence, in a case of any difficulty, a prudent junior will be obliged to his

(d) 1 Stark. Ev. 162.

(e) 1 Stark. Ev. 2d edit. 164, *ante*; but see *Harris v. Tippetts*, 3 Campb. 637; *Spenceley v. De Willeit*, 7 East, 108.

(f) *Ante*, 892.

(g) 1 Stark. Ev. 164.

(h) 1 Stark. Ev. 171, 172.

(i) *The Queen's case*, 2 Brod. & Bing.

311.

(k) 1 Stark. Ev. 2d edit. 172, cites per Dampier, J., Winchester summer assizes, 1815, Manning's Index, tit. Witness, 222.

(l) 1 Stark. Ev. 172; *Wright v. Littler*, Burr. 1244; 1 Bla. Rep. 346.

(m) See an instance in *Wright v. Littler*, Burr. 1244; 1 Bla. Rep. 346; 1 Stark. Ev. 172, note (t).



leader to take the cross-examination of all dangerous or uncertain witnesses.

Counsel has no  
right to mislead  
a witness.

It is an established rule, as regards cross-examinations, that a counsel has no right, even in order to detect or catch a witness in a falsity, *falsely to assume* or pretend that the witness had previously sworn or stated differently to the fact, or that a matter had been previously proved, when it had not. (n) Indeed, if such attempts were tolerated, the English Bar would soon be debased below the most inferior of society.

11. The counsel who first examined the witness, or indeed according to the modern practice, very frequently the leader, after the cross examination has been closed, has a right to re-examine him, to explain any part of his cross-examination that may have cast any doubt upon his evidence in chief, (o) but not upon parts of the witness's evidence in chief, upon which he was not cross-examined; because that would occasion useless repetition and trouble to the judge. (o) If, however, any *new fact* arise out of the cross-examination the witness should, on the re-examination, be fully questioned respecting it.

11. Of the re-  
examination. (s)

12. After the plaintiff's counsel has examined his witness in chief, and the witness has retired from the box, more especially when the plaintiff's case has been closed, his counsel cannot as of right call back such witness to answer another question, which inadvertently he neglected to ask in the first instance, for the order and regularity in the proceedings might be thereby greatly disturbed; but sometimes, as when the justice of the case cannot be prejudiced, the judge will permit a witness to be recalled and further examined; (q) and this even in a penal action. (r) And a judge may, in the exercise of his discretion, allow additional evidence to be given by either party at a later period of the cause. (s)

12. Of calling  
back a witness  
in chief. (p)

(n) *Hill v. Coombe*, 1 Stark. Ev. 2d edit. 162, 163.

(o) See in general, 1 Stark. Ev. 179.

(p) *Id.* 181.

(q) *Aldred v. Hallwell*, 1 Stark. Rep. 117; 1 Car. & P. 118; *Giles v. Powell*, 2 Car. & P. 259; *Soulby v. Pickford*, 2 M. & P. 545; Tidd, 859.

(r) 1 Car. & P. 206; Tidd, 9th ed. 859.

(s) *Per Bayley, B.*, in *Williams v. Davies*, 3 Tyr. 384; *Crom. & M.* 464, S. C.; *Giles v. Powell*, 2 Car. & P. 259.

*Adams v. Bankart*, tried at Leicester summer assizes, 1834, *coram* Taunton, J. After a Mr. Mills had concluded his tes-

timony, defendant's counsel having insisted that plaintiff must be nonsuited, on the ground that plaintiff had not proved a verbal agreement on the part of plaintiff's deceased partners to refer to arbitrators, and in particular the agreement of Mr. Heygate; and plaintiff's counsel having both insisted that their notes of the evidence stated that Heygate had been present repeatedly, Taunton, J. said his notes did not state any such evidence, and that his notes must be conclusive. Plaintiff's counsel then requested that Mills, the arbitrator, might be recalled; but Taunton, J. refused, saying he could not allow a witness, after he had seen

CHAP. XXIX.  
TRIAL AND ITS  
INCIDENTS.

13. Acquittal  
of one of several  
defendants  
at the close of  
plaintiff's case.  
(t)

13. The improper practice of joining several persons as defendants, with a view to exclude the evidence of either against the plaintiff, has been materially repressed by the 3 & 4 W. 4, c. 42, entitling an acquitted defendant *to costs* in every description of personal action; but still instances of such improper practice *may* again occur, and in that case the defendant's counsel may forcibly impress the injustice of the attempt upon the jury, so as to prejudice the plaintiff's case. The practice has been thus laid down, viz. that if *no evidence whatever* has been given against the person so improperly made defendant, he may be acquitted immediately the plaintiff has closed his case, and may then be examined as a witness on behalf of the other defendants; but if there be any even the *slightest evidence* to charge one defendant, he cannot be acquitted immediately, so as to enable him to give evidence for the others, but the case must go altogether to the jury; (u) and that the acquittal of one of several defendants is not a matter of right which the defendant's counsel can claim; it being discretionary with the judge at nisi prius whether he will direct the acquittal of the defendants, against whom there is no evidence, at the close of the plaintiff's case, for the purpose of making them witnesses for the co-defendants. (x) But in two late cases upon this question it was stated, that "the new rule with respect to defendants, not fixed by the evidence, is, that the verdict in their favour is to be taken at the end of the plaintiff's case, (y) after which the other defendants are entitled to call the acquitted defendant as a witness in their favour. And Parke, J., said, "It has been settled by the unanimous opinion of the judges, that if there be *no evidence* against any one defendant, at the conclusion of the case on the part of the plaintiff, such defendant is to be acquitted; so that all defendants not fixed by the plaintiff's evidence are to be acquitted before any part of the defence is gone into. This was the unanimous opinion of all the judges; before that, there was a discrepancy in the practice." (z) Where an action was brought against several defendants, and before the trial it was

where the shoe pinched, to be re-examined, unless the defendant's counsel consented, which they declining, plaintiff was nonsuited. On motion to set aside nonsuit, and for a new trial, Lord Abinger and the other barons declared that it was in the breast of a judge to permit a witness to be re-called; and they granted a new trial only on payment of costs.

(t) See in general, Tidd, 861.

(u) Tidd, 9th ed. 861; *Peake* Ev. 5th ed. 148, 149; 1 Phil. Ev. 6th ed. 68.

(x) Tidd, 9th ed. 861, and cases there cited.

(y) *Per Bosanquet, J., in Russell v. Rider*, 6 Car. & P. 418.

(z) *Child v. Chamberlain*, 6 Car. & P. 215; 1 Mood. & R. 318, S. C.

agreed with one of them that no evidence should be offered against him, because he would be wanted as a witness for the plaintiff, and he attended the trial for that purpose, and yet the verdict was taken against him with the other defendants, and the plaintiffs afterwards became bankrupts, the Court set aside the verdict, though the plaintiff's assignees resisted the application. (a)

14. When the plaintiff's counsel have closed the evidence in support of the opening speech, the *leading counsel* for the *Defendant* in his turn is to address the jury. This also necessarily varies according to the circumstances of each case, and the experience and judgment of the counsel. When a full defence is to be made as well by *speech* as by *evidence*, the course of proceeding usually is for the defendant's leader, after a few prefatory remarks on the plaintiff's claim, and the weakness in any evidence adduced in its support, to state *fully the several grounds of defence*, and the evidence in support of it; and then assuming that the defence will at least in part be proved, a comparative view of the two cases and evidence on each side is to be taken, and an impressive argument urged that the latter should preponderate; and then the evidence for the defendant will be given.

14. The speech of the defendant's counsel.  
1. What in general.

But the leading counsel for the defendant is very frequently required to exercise a very nice and difficult discretion in the conduct of the defence, and principally whether he shall *give evidence*, which always entitles the plaintiff's counsel to what is termed the *general reply*, or whether, in order to avoid the effect of such reply upon the judge or jury, he shall decline giving any evidence, and rely only upon his own speech. Sometimes the defendant's counsel undervalues his own case and evidence, and not unfrequently he either overrates the talent of his opponent, and will therefore decline offering evidence, to the mortification of his client, who, if the verdict should be unfavourable, will be apt to insist that if evidence had been given for him he would have obtained the verdict. It is difficult, if not impracticable, to state any absolute universal rule upon this subject.

2. Consideration when or not the defendant's counsel shall open a defence and call evidence.

It is in general considered that if the case of the plaintiff be doubtful in law or fact, and has not been very clearly proved

The practice in cases of this nature.

(a) *Bloomfield v. Blake*, 2 Dowl. 237.

CHAP. XXIX.  
TRIAL AND ITS  
INCIDENTS.

in evidence, then, unless a *very strong* and new ground of defence, with unquestionable evidence, be stated in the brief, the most prudent course is not to *give any evidence*, but for the defendant's counsel to address the judge and jury with his utmost force upon the weakness of the plaintiff's case *as it already stands* upon his statement, and the evidence in support of it. But if the case, as it already stands, *very manifestly preponderates* in favour of the plaintiff, and must, unless *materially altered by evidence*, be decided in his favour, and the brief for the defendant states evidence that will in all probability *turn the scale in favour of the defendant*, then his counsel should *not shrink* from the consequences of any reply, especially when it may be important to the defendant's character or feelings to clear up any ambiguity, but should fully state and prove his case, anticipating and answering, and showing the insufficiency of the probable reply. (b)

In cases of the least doubt, *i.e.* which of the two courses should be pursued, unquestionably that most satisfactory to the client is to have the whole case thoroughly investigated, *and the jury will in general expect it, or conclude that the merits will not bear further investigation, and will find their verdict accordingly.* (b) It has been well remarked, that the practice of a defendant's counsel declining to call evidence for fear of giving the reply, is attended with considerable inconvenience, *inasmuch as it frequently excludes from the view of the Court and jury, circumstances which might materially assist them in attaining to a correct conclusion in law and fact,* (c) and hence the jury may fairly draw an unfavourable conclusion against the party, who cannot venture to trust them with the full particulars of his case, and by his line of defence appears to expect an advantage to result from obscurity and want of full disclosure; and although experience has established that some leaders, from their superior talent, have *occasionally* had too much influence with a jury, yet a leader for the defendant ought to refute the supposition that it is in vain to struggle against that influence, but he should, by the ability and energy of his observations, and the judicious selection of really important evidence for the defendant, anticipate that notwithstanding the power of the reply, the judge will, by his impressive observations to the jury, dispel all prejudice, and bring

(b) Some years experience and conversation with many special and common jurors in Court, in order to ascertain their notions as to the inferences jurors in

general draw, has induced me to conclude in favour of the bolder line of defence, in most cases even of reasonable doubt.

(c) 1 Starkie on Ev. 2 ed. 363, n. (A)

them back to a cool, dispassionate, and impartial decision upon the points upon which their just verdict ought to turn.

CHAP. XXIX.  
TRIAL AND ITS  
WITNESSES.

It may be admitted that the counsel for the plaintiff, in anticipating the evidence he expects will be given for the defendant, labours under even greater difficulty than the leader for the plaintiff in stating in anticipation *his* evidence, because he can have no reply explanatory of the evidence after it has been actually given, as the counsel for a plaintiff has; and for that reason, if he resolve to give evidence, he must be *very full and impressive*, always recollecting that he speaks subject to the risk of the plaintiff's counsel commenting on any discrepancy between his statement of the defence and the expected evidence and that afterwards really given. He may, however, by anticipation, avert any unfavourable conclusion, by observing on the known difficulty in ascertaining evidence before a trial, especially where a defendant has with propriety avoided any tutoring of witnesses.

As regards technical or legal objections contrary to the merits or justice of the case, as they frequently prejudice a jury, they should be taken with great precaution; and yet if not noticed, the client might afterwards, on a motion for a nonsuit or new trial, lose the benefit of the objection. In defending an indictment for perjury, as a learned judge declared that it is *the duty of the defendant's counsel to take all supposed objections*, it may be assumed that at least in such a case the judge will direct the jury that they are not to be prejudiced by that course of defence. (d) And as regards a civil action, the defendant's counsel may take upon himself the demerit of technical objections, and take them in the early part of his address and close the same with a reliance upon the merits, though he does not consider himself authorized to lose sight of the legal objections.

As to taking  
legal objections.

In actions for *debts*, when it is possible that the learned judge would otherwise give the plaintiff liberty to issue execution immediately or very shortly after the trial, in pursuance of the authority of stat. 1 W. 4, chap. 7, sect. 2, it may be expedient to open and cursorily prove facts that would probably induce him not so to expedite the execution. (e)

If the defendant's counsel has resolved *not to give* any evidence nor to call witnesses, he must then cautiously abstain from stating that *any new facts* exist, or that he can prove so and so; for if he do, although he afterwards abstain from giving

3. When no  
statement of  
new facts in  
favour of de-  
fendant should  
be made.

(d) *Rex v. Stoveld*, 6 Car. & P. 490.

(e) See further, *post*, as to execution.

CHAP. XXIX. ing evidence, it is in the discretion of the judge to allow the plaintiff to *reply* on such unsupported statement, lest it might prejudice the jury in their not distinguishing between statement and evidence. (f)

Nor will a judge permit the defendant's counsel to make what has been figuratively termed a speech *fishing for the verdict*, as stating that he will go fully into the defence or call witnesses, or intimate a long protracted defence, unless the jury are already prepared to find their verdict against the plaintiff, on the ground that he has not made out any case, and that he, the counsel, is anxious to save time by their shortening the cause and *immediately* finding for the defendant. (g)

When affirmative pleas of justification are put on the record with the general issue, the plaintiff's counsel *may*, if he please, not only prove the facts of the declaration, but also *may*, in the first instance and before the defendant's case is gone into at all, go into any evidence which tends to negative the justification, or he may content himself with proving the trespass under the general issue, and then close his case, leaving the defendant to make out his justification as he can, and afterwards go into evidence in reply as to the justifications. But if the plaintiff's counsel, knowing by the pleas what the defence is to be, close his case and trusts to evidence in reply, he is to be restricted to such evidence as goes exactly to answer the case proved, or attempted to be proved, by the defendant in support of the justification, and he cannot be allowed to go beyond it. (h) And it was held that in an action for a libel, when the general issue has been pleaded, and also special pleas of justification, the plaintiff may in the outset give all the evidence he intends to offer to rebut such justification, or he may do so in reply to evidence produced by the defendant, but he is not entitled to give *part* of such evidence in the first instance, and to reserve the *remainder* for reply to the defendant's case. (i)

However doubtful a point of law may be in favour of the defendant as to the whole or a part of the plaintiff's claim, or in reduction of damages, it may be useful for his counsel to urge it strenuously, not only because it may induce a verdict for less amount, (k) but also because it may probably induce the judge to refuse an immediate execution.

(f) *Cramer v. Sodo*, 1 Moody & M. 85; 3 Car. & P. 10, S. C.; *Rex v. Big-nold*, 1 Dowl. & Ry. 59; 4 Dowl. & Ry. 70; and MS.; 1 Stark. Ev. 366.

(g) *Moriarty v. Brooks*, 6 Car. & P. 684.

(h) *Per Littledale, J. Pierpoint v. Shap-land*, 1 Car. & P. 447.

(i) *Brown v. Murray*, Ry. & M. 254.

(k) *As in Holtum v. Lotus*, 6 Car. & P. 726.

15. Of several defendants defending separately, and counsel for each, and several speeches for each. (l)

15. In an action against *several defendants*, unless *they have pleaded separately*, it seems to be an invariable rule that one counsel only can address the jury for all the defendants; though if they have separately retained counsel, one counsel for each defendant may cross-examine every witness. (m) But if the several defendants have appeared separately by different attorneys, and also *pleaded separately*, then one counsel for each has a right to address the jury as well as cross-examine witnesses. (n) Formerly it was held that the right to several speeches, or even cross-examinations, only applies when several defendants have *defences different or distinct from each other*; and that if they all rely on the *same ground* of defence, only one counsel can be heard to address the jury, and only one counsel can examine each witness upon the part of the defendants, in the same manner as if they had appeared and defended jointly. (o) And in ejectment when several defendants defended in the *same right*, but by different counsel, it was held that only one counsel could address the jury, though each defendant might adduce separate evidence. (p) And in trover, where two defendants defended by the same attorney, and in the *same interest*, but on the trial one appeared by counsel and the other in person, Tindal, C. J. held, that the counsel only was entitled to address the jury, though both he and the defendant appearing in person might cross-examine the witnesses. (q) But the propriety of these qualifications of the rule may be questionable, because it frequently occurs that although the general ground of defence may be the same—as, for instance, a denial of partnership between the defendants, or joint liability as such—yet one or more of the defendants may suspect collusion between the plaintiff and another defendant,—and the *particular ground* or *mode* of establishing the negative of a partnership may be stronger for one defendant than the others, and it may be indiscreet to communicate such ground and evidence to the attorney for the other defendant; and therefore Parke, B. in *Ridgway v. Phillips and others*, (r) appears to have considered that the practice acted upon in the above nisi prius cases was not calculated to further the ends of justice, and that when several

(l) See in general Tidd, 9 ed. 860; 1 Arch. K. B. 4 ed. 327; 1 Arch. C. P. 169.

(m) Per Tindal, C. J. in *Bishop v. Bryant*, 6 Car. & P. 485.

(n) *Ridgway v. Phillips and another*, 1 Crom. M. & Ros. 415; 3 Dowl. 154, S. C.

(o) *Chippendale v. Masson*, 4 Campb.

174; but see *Ridgway v. Phillips*, 1 Cromp. M. & Ros. 417.

(p) *Doe v. Tindal and others*, 1 Mood. & Mal. 314; 3 Car. & P. 565, S. C.

(q) *Perring v. Tucker and another*, 1 Mood. & Mal. 391.

(r) *Ridgway v. Phillips*, 1 Crom. M. & Ros. 417; 3 Dowl. 154, S. C.; and see *Rex v. Williams*, 3 Stark. Rep. 162.

CHAP. XXIX. defendants have appeared by several attornies, and pleaded  
 TRIAL AND ITS separately, *several speeches* and cross-examinations for each  
 INCIDENTS. ought to be allowed.

In *ejectionment*, although a landlord and tenant defended by different attornies, and had different counsel, yet, as it appeared that the tenant claimed no title but what he derived from the landlord, the judge on the trial refused to allow more than *one counsel* to address the jury for the defence, though the party's counsel who did not address the jury was permitted to cross-examine and also to call witnesses; but the practice in that case is now questionable. (s)

Of the evidence for the defendants, and plaintiff's cross-examination thereof.

With respect to *evidence* on the behalf of a defendant or defendants, the rules respecting it have been anticipated. If the affirmative of *all* the issues be on the defendant, then we have seen that his leading counsel is to begin; (t) and he is first to exhaust all the evidence in support of *his* case, and which will then be considered evidence *in chief*, and subject to the same rules as to the modes of examination as when the plaintiff begins, and as we have already considered; (u) and the plaintiff's counsel has then the right to cross-examine the defendant's witnesses, subject to the rules before mentioned, which we need not here repeat. (x)

16. Of examining witnesses in direct contradiction of the evidence of previous witnesses.

16. We have seen that leading questions are objectionable not only in examinations in chief, but even in cross-examinations. (y) In some cases, however, they are permitted as almost indispensable, as where a witness in chief has sworn to a certain fact or to a certain conversation, and another is called for the purpose of contradicting him; and when it is clearly established in practice that the latter witness may be asked directly whether that fact or such conversation ever took place, stating to him the very words previously sworn. (z) Indeed when a witness has sworn positively to a fact or conversation when giving evidence in chief, it is usual for the opponent's counsel to take a note of the precise words he uses, and in cross-examination to intimate to him that there are others who will prove the contrary,—and then to ask him, whether he will venture to repeat the same story,—then reading to him the

(s) *Doe v. Tindale and another*, 1 Mood. & Mal. 314; 3 Car. & P. 565, S. C. But note, that case was decided before *Ridgway v. Phillips and others*, 1 Mood. & Mal. 417; 3 Dowl. 154, S. C.; ante, 907, note (r).

(t) *Ante*, 872 to 876.

(u) *Ante*, 890.

(x) *Ante*, 897.

(y) *Ante*, 892 to 896, 890.

(z) *Courteen v. Touse*, 1 Campb. R. 43.



very words he had sworn,—and afterwards in due order to call the witness to contradict him, and to bring the latter *directly* to the same occurrence or conversation, and ask him, in the *very words* of the previous witness, whether such a fact or conversation occurred; and yet jurors have declared, that unless some other evidence has been given to discredit the witness in chief, they attach more weight to a contradiction elicited by a less leading mode of examining the witness.

CHAP. XXIX.  
TRIAL AND ITS  
INCIDENTS.

17. In all cases, after the speech and evidence of the defendant's counsel, and before a plaintiff's counsel replies, he may produce evidence to disprove any part of the defence set up by the defendant, but not evidence merely to strengthen or confirm the plaintiff's original case. On such fresh evidence on the part of the plaintiff the defendant's counsel has a right again to address the jury, but his observations must be confined to the evidence thus last given by the plaintiff, and the reply of the plaintiff's counsel is then to close the case.

17. Of the plaintiff's counsel giving evidence in reply, and of the cross-examinations, speeches, and proceedings thereon.

Where the defendant's counsel after his speech gives evidence not only to impeach the plaintiff's case but also in support of an entire new case, in defence the plaintiff is of right entitled to controvert the latter by evidence; after which the defendant's counsel may make observations on the last-mentioned evidence of the plaintiff, but in so doing he must confine himself to the same, and cannot comment on the original case or evidence of the plaintiff, because he has already observed upon the same, or had the opportunity in proper time of so doing. In such a case the plaintiff has the general reply. (c)

18. In considering which party is to *begin*, we necessarily anticipated many of the rules relative to the reply. In ordinary cases, where the *plaintiff* begins, if the defendant do not adduce any evidence, nor open any facts as capable of proof, the plaintiff in a civil action is not entitled to any reply, though he is entitled to comment upon any *legal authority* quoted by the defendant's counsel in his speech. (e) But if the defendant's counsel *adduce any evidence*, then the plaintiff's counsel is entitled as of *right* to the reply; as if the defendant prove a payment disputed by the pleadings even by producing the particulars of the plaintiff's demand; (f) and even if the defendant's counsel state

18. Of the Reply of plaintiff's counsel. (d)

(a) *Rex v. Hilditch*, 5 Car. & P. 299.

(b) 1 Arch. K. B. 332, 333.

(c) *Stark. Ev.* 384; *Meagoe v. Simmons*, 3 Car. & P. 76.

(d) See in general Tidd, 9 ed. 858;

1 Arch. K. B. 4 ed. 332.

(e) *Fairlie v. Denton*, 3 Car. & P. 103.

(f) *Rymer v. Cook*, 1 Mood. & Mal. 86.

CHAP. XXIX.  
TRIAL AND ITS  
INCIDENTS.

that he shall prove certain facts, and do not afterwards call evidence to prove the same, or if he open facts but call no evidence, though a reply is not in practice a *strict right*, yet the judge may in his discretion permit the plaintiff's counsel to reply, lest any prejudice should remain upon the jury in consequence of the counsel's statement. (g) But the defendant's counsel merely reading and commenting upon parts of a book already in evidence will not entitle the plaintiff to a reply. (h) Sometimes a defendant's counsel will avoid this consequence of a direct statement and the risk of reply by merely *suggesting* to the jury the *probability* of a *supposed state of facts having existed prejudicial to the plaintiff*, and showing why the defendant may nevertheless be unable to prove the same, but which the jury may suppose and give equal effect to.

Before the plaintiff's counsel replies, he may produce evidence to disprove any part of the defence set up by the defendant, but it must be *new* evidence, not merely confirmatory of the original case; (i) and on such fresh evidence the defendant's counsel is entitled to comment, but his observations must be strictly confined to the same, excepting as regards the application of such new evidence to the previous evidence; and finally the plaintiff's counsel is to *reply* on the whole case. (k)

If the defendant's counsel, in consequence of all the affirmative issues being on him, has begun, (except in cases of injuries to the person,) then, if the plaintiff afterwards calls evidence in answer to the defendant's case, the defendant's counsel is entitled to the general reply. (l)

Of Voluntary  
Nonsuits.

If the plaintiff's counsel, after hearing the arguments and evidence on both sides, perceives that the judge and jury are decidedly against the plaintiff, or he apprehends that, owing to the absence of material evidence, it is probable that he will be able, on a future occasion, to establish a better case, he usually, at this stage, *elects to be nonsuited*; but if the case be not capable of improvement, and there is any chance of obtaining a verdict for the plaintiff or the withdrawing of a juror, (so that each party may pay his own costs), he does not interfere. A nonsuit must always be *voluntary*, i. e. by the plaintiff's counsel submitting to the same or not ap-

(g) *Rex v. Bignold*, 4 Dowl. & R. 70; *Crerar v. Sodo*, 1 Mood. & Mal. 85; 3 Car. & P. 10. So in criminal cases, unless the defendant defend in person, see *Rex v. Bignold*, 4 Dowl. & Ryl. 70.

(h) *Pullen v. White*, 3 Car. & P. 454.

(i) *Rex v. Hilditch*, 5 Car. & P. 299.

(k) *Id. ibid.*; 1 Arch. K. B. 333.

(l) Tidd, 9 ed. 859.

pearance, and in no case can it be adverse or without implied consent. (n)

19. The learned Judge then proceeds to *sum up* (as it is termed) to the jury, and which the leading counsel in particular is attentively to observe, as it may be necessary, whilst the judge proceeds, or at least at the conclusion of his summing up, to call his attention to any *material omission* or *misstatement of facts* or *law* that might mislead the jury and prejudice the client, and so as to afford the judge an opportunity of correcting his remarks before the jury have been directed to consider their verdict. The junior counsel and attorneys on each side are equally bound to observe the summing up; and if either perceive any defect, he should immediately communicate the same to the leader; for all objections should be made through him.

19. Of the judge's summing up, and other incidental proceedings.

In summing up, the learned judge concisely states the precise issues joined between the parties, and the affirmative or negative of which the jury must now, since the recent rules, *expressly* find by their verdict (though by the directions of the judge, on the trial of a *feigned issue*, or in case of a *variance* on the trial of any issue, under the 3 & 4 W. 4, c. 42, s. 24, the jury *may find the facts according to the evidence*, and without regard to the terms of the pleadings or issue.) The judge then states the *substance* of the plaintiff's claim and of the defendant's grounds of *defence*. He then, from his notes, (sometimes reading them *verbatim*) states the *evidence* adduced for each party, pointing out as he proceeds to which material question or issue this or that particular part of the evidence may apply, and commenting occasionally on the nature of the evidence and circumstances which attach credit to it. If any question of law be, as is frequently the case, *mixed up* with, or applicable to, questions of fact, he states *the rule of law according to which the jury ought to decide*, and informs them that *they* are particularly to decide upon the *credibility* of the evidence and witnesses, though he will probably observe upon the manner and conduct of each, so as to *assist*, if not in a degree *influence* the jury in their decision upon credibility. (n) When he states positions of *law*, he speaks *authoritatively*, and as the jury are *bound* to decide. When he observes on *credibility*, he is merely an unbiased adviser of superior knowledge and experience, and consequently his observations and reasoning on credibility and other subjects are entitled to the greatest weight.

Outline of a summing up.

(m) *Dower v. Purday*, 4 Nev. & Man. 653.

(n) 3 Bla. Com. 375; 1 Stark. Ev. 472.

CHAP. XXIX.  
TRIAL AND ITS  
INCIDENTS.

In an *action* for a libel, he will inform the jury that they are only to consider whether the publication and the innuendoes have been proved, and are not to decide whether or not the matter be libellous, that being matter of *law*, on which the *judge* is to decide, and that he is of opinion that the publication is, in point of law, libellous, and that malice must be *inferred*, and that they are bound to find for the plaintiff accordingly, if they are of opinion that the defendant published the libel, and in the sense imputed in the declaration. (o) So in an action for a malicious prosecution, the judge is to state to the jury his opinion in point of *law*, whether or not there was *probable cause* for the previous proceeding complained of, after which (as the question of probable cause is a mixed proposition of law and fact) the *jury* are to find their verdict upon the whole matter, nevertheless giving full weight to the judge's observations upon the *law*. (p)

When there are several distinct issues, or it may be material to have *separate findings* on different parts of the case, as *some* damages upon one count for a libel, and *other* damages on another count, the learned judge may direct the jury accordingly; and as to the form of their finding in the affirmative or negative on different parts of the record. (q) So if in an action of trespass for false imprisonment, occasioned by the charge of the defendant, and partly occurring before the plaintiff was taken before a magistrate, and partly afterwards, if it be insisted by the defendant's counsel that he is not liable in that form of action to pay any damages for the imprisonment under the directions of the magistrate, the judge will direct the jury to find their damages, if any, separately in respect of each part of the imprisonment; so that the question of legal liability for the *subsequent* imprisonment may be reserved and discussed in the Court above, without disturbing the verdict for damages in respect of the *previous* trespasses. (r) When the case is short, the question simple, and the evidence concise, the judge will sometimes consider any summing up unnecessary, or at least he will not read his notes, but merely state the *effect* of the evidence. (s)

(o) See *Levy v. Milne*, 4 Bing. 195; 12 Moore, 418, S. C., and *ante*, vol. i. 45, 46.

(p) *Vengra v. Johnson*, 6 Car. & P. 53; *Mitchel v. Jenkins*, 5 Bar. & Adol. 588; qualifying *Taylor v. Williams*, 2 Bar. & Adol. 845, 857, *ante*, vol. i. 50, note (f).

(q) 1 Arch. K. B. 4 ed. 333, 334; and see *Desbrow v. Weatherley*, 6 Car. & P.

761.

(r) *Holtam v. Lotun*, 6 Car. & P. 726; and see *Desbrow v. Weatherley*, 6 Car. & P. 761.

(s) 1 Arch. K. B. 4 ed. 333, 334; and see *Desbrow v. Weatherley*, 6 Car. & P. 761; and see the summing up of Tindal, Ch. J. in *Desbrow v. Weatherley*, 6 Car. & P. 760.

It is the practice for the judge at nisi prius not only to state to the jury all the evidence that has been given, but to comment on its bearing and weight, and to state the legal rules upon the subject and their application to the particular case, and even to *advise them as regards the verdict they should give*, so that it may accord with his view of *the law and justice*; so that in effect, in general, the jury only give their opinion on the *existence of facts*, and even then, in general, they follow the advice of the judge, and therefore, in substance, the verdict is found or anticipated by the *judge's direction*, except, indeed, as regards the *amount of damages*, and which also are greatly influenced by the observations of the judge, or may be corrected, if excessive or too small, by the Court in Banc. Indeed, without this assistance from the learned judge, few juries would, in a contested cause, be able to come to an unanimous opinion, being frequently left in a state of great perplexity by the influence of the speeches of the contending leaders. The accuracy of the summing up of the judge is therefore of the very utmost importance, because if the jury, after hearing the evidence and the powerful arguments which probably have been urged in favour of quite opposite views of the question, were entirely left to decide for themselves, without impartial direction, what just and legal weight ought to be attached to this or to that view of the case, it would be difficult, if not impracticable, for them to come to a *just conclusion*; and hence, in the administration of civil justice, it is incumbent on the judge correctly to state *the law* upon the case, as well as *the evidence*, and the *bearings of the latter*; and he may and ought to direct the jury that they should find a named verdict, if *they believe* the testimony adduced for one of the parties, either generally, or the evidence on a particular point. (†)

In actions of trespass and on the case for torts, when the jury think the case trifling, and that the plaintiff is entitled to but *small damages*, they will very frequently ask the judge what amount of damages will carry or entitle the plaintiff to his *full costs*. Here the practice has varied. *Some judges* will immediately inform the jury what will be the consequences of their verdict as regards costs, as that the plaintiff will be entitled to no more costs than damages, unless they find a verdict for at least forty shillings damages, or that if they find less than that sum, then he has power to certify, so as to deprive the plaintiff of costs. But other judges consider that

Directions to a jury respecting costs.

(†) 1 Starkie on Evidence, 472.

CHAP. XXIX.  
TRIAL AND ITS  
INCIDENTS.

the jury ought to find their verdict *for such damages as they really think the plaintiff has sustained, and wholly without regard to collateral consequences, which ought not to affect their verdict.* In a recent action for false imprisonment, where the defendant had pleaded not guilty and a licence, and the jury inquired of the learned judge what was the *largest* amount of damages they could give without entitling the plaintiff to costs, Alderson, B., said, he doubted whether he ought to inform them, as it was rather a matter of law. But he afterwards added, "the smallest damages will carry costs, unless I do something," whereupon the jury found a verdict for 40s. (u)

20. When and how to object to the judge's summing up.

20. Perhaps for practical purposes it may be here advisable to consider *when and how objections to the judge's summing up* should be taken, and when an imperfection may be the ground of any and what application for relief. As a general rule, objections to the summing up should be taken in the *first instance*, and *immediately* the objection occurs, or, at all events, *before* the judge has closed his observations, and before the jury have retired. The most prudent course is for the leader to interpose before the judge has *stated the whole* of his unfavourable view to the jury, and so as to afford him an opportunity of *altering* his misstatement of facts, or *qualifying* his observations on matters of law, rather than afterwards *contradicting* them; and the high station of the judge demands that the observations (*in effect a correction*) should not have that appearance in Court. (x) If the judge *incorrectly reject* a competent witness, or *admit* the evidence of one that is incompetent, or misstate the *law*, or *misdirect* the jury in any respect, so that the client might be prejudiced, it is the *duty* of the leading counsel *immediately to state the objection*, and if he do

(u) *Peters v. Starway*, 6 Car. & P. 740, 741.

(x) Thus, suppose that in summing up in an action for not taking or paying the price of potatoes, or other crop of annuals, sold whilst in the ground, the learned judge should observe to the jury, that unless they think, upon the whole of the evidence, that there has been a *written contract for the purchase signed by the defendant*, they will, under the statute against frauds, be bound to find for the defendant; the plaintiff's counsel should *immediately* respectfully, and as if apologising for his own omission in his opening address, in not alluding to the recent decisions, which

qualify the previous law, and establish that a *growing crop of potatoes, turnips, &c.* is not regarded as a contract for the sale of an interest in *land*, within the 29 Car. 2, c. 3, s. 4, but rather a contract for the sale of goods, which might have been affected by the 17th section, but which will not affect the present case, because it has been proved, that earnest was paid to bind the bargain. This interruption would render it essential for the judge to correct his observation to the jury, or would be ground for tendering a bill of exceptions, or, as more usual, of a motion for a new trial.

not, the Court will not, on motion, grant a new trial; (y) and, therefore, however painful the duty, and in some cases heretofore perhaps dangerous (as regards the subsequent observations of the judge on the merits), yet it is imperative on counsel, if at all, *to object at the time*, or lose the effect of the objection, and be precluded from supporting a motion for a new trial. (y) At the same time it suffices merely *to suggest* the objection to the judge, and to present the point very concisely, supported by the last or best legal authority, and *without pertinaciously pressing it*; for even if the counsel should afterwards *tacitly submit*, without *expressly concurring* in the present opinion of the judge, he will not thereby be precluded from moving for a new trial; for otherwise the useless struggle against the opinion of the judge would not only waste time, but occasionally lead to unpleasant and unbecoming controversy, always to be avoided at nisi prius, where it is the interest of all to maintain the dignity and importance of the Judge. (z) The usual course with that excellent and prudent judge, the late Lord Tenterden, was, if the point were in his opinion *debateable*, or in the least doubtful, though contrary to *his* opinion, immediately it was suggested to give the counsel leave to move either for a nonsuit, or to enter the verdict, and if the point appeared very important, and fit to be more formally decided, he would then suggest a *special case*, and sometimes even with liberty to turn the case, when of sufficient value and importance to justify the expense, into a *special verdict*, or he would suggest the tendering a *bill of exceptions*, (a) so as to enable either party to take the opinion of a *Court of Error*; so that no time was ever lost in arguments on the trial.

The requisites of a correct summing up, and the sustainable objections to the same, have in the principal work on practice by Mr. Tidd been collected and arranged under the head of motions for new trials, and been thus stated. One of the

(y) Per Buller, J., in *Appleton v. Sweetapple*, 3 Douglas's Rep. 137 — 141; 1 Taunt. 10; *Robinson v. Cook*, 6 Taunt. 386; 1 Stark. Ev. 469; 3 Taunt. 229; 9 Price, 291; *Ritchie v. Bousfield*, 7 Taunt. 309.

(z) See *Alexander v. Barker*, 2 Tyr. 140; 2 Crompt. & J. 133, S. C.; but see *Elworthy v. Bird*, 13 Price, 222.

(a) See the observations of Eyre, C. J., on this admirable constitutional remedy, in *Gibson v. Hunter*, 2 Hen. Bla. 187; and Chitt. Col. Stat. tit. Bills of Exceptions, p. 117 (a); and one of the latest instances of the utility of a bill of excep-

tions, in *Bulkeley v. Butler*, 2 Barn. & Cress. 434. Unquestionably, if it should occur again, as in former times, that an arbitrary judge, having overwhelming influence in his own Court, should try a cause, and against law reject or admit evidence, or misdirect the jury upon matter of law, and refuse to submit to any other investigation, the only *safe course* would be to tender a bill of exceptions, or demur to improper evidence, so as to secure due examination of the matter in a superior Court of Error. In *Appleton v. Sweetapple*, 3 Dougl. Rep. 137, it was considered the duty of counsel to adopt that remedy.

CHAP. XXIX.  
TRIAL AND ITS  
INCIDENTS.

principal grounds of motion for a *new* trial is the *misdirection* of the judge, (b) or his admitting or refusing evidence contrary to law. (c) But it is not a misdirection, if the judge refer the jury to their own knowledge of any particular facts which have been proved as matter of *illustration* only, and not as matter of *evidence*; (d) and the expressions of a judge at nisi prius are not to be measured with exactness, and a judge's direction is not to be objected to on account of particular expressions, if it be such as on the whole and in substance would lead to a just conclusion. (e) So, the Courts will not set aside a verdict on account of the admission of evidence, which ought not to have been received, provided there be sufficient without it to authorize the finding of the jury; (f) nor is it any ground for granting a new trial, that a witness called to prove a certain fact, was rejected on a supposed ground of incompetency, when another witness, who was called, established the same fact, which was not disputed by the other side, and the defence proceeded upon a collateral point on which the verdict turned; (g) and for the same reason, viz. that the misdirection has not really been prejudicial, the Court will not grant a new trial on account of a misdirection, unless it appear that the jury acted upon the same. (h) So, the Courts will set aside a nonsuit, on the ground that the case ought to have been submitted to the jury, unless that was desired on the part of the plaintiff at the trial of the cause. (i) And if, upon the judge's directing the jury to give nominal damages, the plaintiff elect to be nonsuited, the Court of Common Pleas will not set aside the nonsuit and grant a new trial, on the ground of the misdirection of the judge; (k) and we have seen, that if a junior counsel at nisi prius take a well founded objection, which his leader gives up, that Court will not entertain it in discussing a rule for a new trial, or nonsuit on another ground. (l)

21. Of the jury  
Withdrawing to  
deliberate on  
their verdict.

21. The judge having completed his summing up, the jury are then directed by the officer of the Court to "consider of their verdict." They have a right, if they desire, to *withdraw* from the bar, i. e. jury-box, to a private room, there to deli-

(b) Tidd, 907, and cases there cited.  
(c) *Denham v. Stevenson*, 6 Mod. 242.  
(d) *Rex v. Sutton*, 4 Maule & S. 532;  
and see *Carstairs v. Stein*, id. 192; 1 Man.  
& Ryl. 198.

(e) *Gascoyne v. Smith*, 1 M'Clel. & Y.  
338.

(f) *Horford v. Wilton*, 1 Taunt. 12.

(g) *Edwards v. Evans*, 3 East, 451.

(h) *Twigg v. Potts*, 1 Crom., M. & R. 89.

(i) *Kindred v. Bagg*, 1 Taunt. 10; and  
see *Robinson v. Cook*, 6 Taunt. 336; Tidd,  
860.

(k) *Butler v. Dorant*, 3 Taunt. 229; and  
see 9 Price, 291.

(l) *Ante*, 878, 879; *Winter v. Mair*, 3  
Taunt. 531; and see *Pickering v. Downes*,  
4 Taunt. 779; Tidd, 860, 908.



berate on their verdict, but they cannot take with them any *documents*, although they have been proved and read in evidence, without leave of the judge, and in some cases of both parties; *(m)* and where in a penal action the jury retired, and took with them the act of parliament, under which the penalty sued for was supposed to have been forfeited, the Court granted a new trial, although the verdict had been for the defendant, upon the ground that probably the jury had improperly assumed to construe the act, and had thereby come to a wrong conclusion, whereas they ought to have taken the law only from the summing up of the judge, and that the judge's permitting the jury to take the act with them was in effect equivalent to a *misdirection*. *(n)*

22. If the jury cannot, after having retired from the Court for a considerable time, (as for an entire night,) agree upon their verdict, the judge has a right to discharge them rather than suffer them, by undergoing great prostration of strength and longer privation of food, to endanger their health. *(o)* The effect of such discharge is, that neither party pays costs, or rather each bears his own, *(p)* and that the plaintiff may bring a fresh action; *(q)* but although he succeed in such second action, he is not entitled to the costs of the first. *(q)*

22. Of Discharging the jury.

The judge may in an undefended cause, even after some evidence has been given, discharge the jury, and allow the plaintiff to withdraw his record, if it appear that the plaintiff cannot proceed further from want of complete proof. *(r)* So if it be discovered that there is no proper issue, as a plea of non assumpsit to a declaration in trover, the judge may discharge the jury, unless both parties will consent to an immediate amendment. *(s)*

23. Another mode of releasing the jury, when after a considerable time has elapsed they cannot agree upon their verdict, is for the counsel of the respective parties to agree to *withdraw a juror*, i. e. to require one of the twelve to leave the jury box, by which means the proceedings on the trial are in effect determined without any verdict or other proceeding.

23. Of Withdrawing a juror.

*(m)* Tidd, 867.

*(n)* Gregory v. Tuffs, 2 Dowl. 711.

*(o)* A judge may also discharge the jury in a criminal case, as where a material witness, as a surgeon, is absent, *Rex v. Stokes*, 6 Car. & Payne, 151.

*(p)* Vallance v. Evans, 3 Tyr. 865; *Seally v. Powis*, 3 Dowl. 372; 1 Harr. &

Wol. 118.

*(q)* *Seally v. Powis*, 3 Dowl. 372; 1 Har. & Wol. 118; *Everet v. Youells*, 3 Barn. & Adol. 349.

*(r)* *Bonsor v. Clement*, 6 Car. & Payne, 230.

*(s)* *Bent v. Benyon*, 6 Car. & Payne, 217.

**CHAP. XXIX.**  
**TRIAL AND ITS**  
**INCIDENTS.**

This arrangement usually takes place at the recommendation of the judge at any time pending the action, when the action is doubtful, or it is on any ground unfit that it should proceed further. In this case each party pays his own costs,<sup>(t)</sup> and a defendant, by consenting to withdraw a juror, waives any supposed right he may have to claim his costs from the attorney for the plaintiff, on the ground of the action having been brought without the consent of the latter.<sup>(u)</sup> However, although it is in general understood and expected that there are not to be any further proceedings, yet in point of law the plaintiff may commence a fresh action;<sup>(x)</sup> and, therefore, a defendant's counsel should require a written engagement, signed by the plaintiff or his attorney, in consideration of the defendant's consenting to withdraw a juror, that the plaintiff will not institute any further proceedings in relation to the subject-matter of that suit.

**23. The Verdict.**

By what consideration to be governed.

**24. The Verdict.**—Each juror is sworn to “well and truly try the issue (or issues) joined between the parties, and a true verdict give according to the evidence. So help him God.” The term *issue* here imports the *question* or affirmative and negative between the parties, as it appears on the face of the pleadings on the record;<sup>(y)</sup> and the term *evidence* means the proofs adduced to the jury in *Court*, and precludes them from taking into consideration any knowledge, and still more hearsay information, acquired by any juror out of *Court*, and upon which it would be a violation of his oath to act.<sup>(z)</sup>

As regards the *issue* it will be observed, that when the pleadings conclude in an affirmative and negative upon a *single* fact, the jury are by their oath confined to the finding of that particular fact, and cannot assume to inquire into facts admitted by the pleadings on the record;<sup>(a)</sup> but when the declaration contains many allegations and the general issue is allowed, as in actions of ejectment and in actions against justices and numerous public officers, who are allowed to plead the general issue, and give the special matter in evidence, then numerous facts are referred to the jury. But the excellent recent pleading rules have introduced material improvements in this

(t) *Stodhart v. Johnson*, 3 T. R. 657.

(u) *Hammond v. Thorpe*, 2 Dowl. 781;  
 1 Crom. Mee. & Ros. 64, S. C.

(x) *Sanderson v. Nestor*, R. & M. 402;  
*Eorrett v. Youells*, 3 Barn. & Adol. 349.

(y) See further 1 Stark. Evid. 477,  
 2d ed.

(z) 3 Bla. Com. 374; 1 Stark. Evid.

13, 14, 477; Trials per Pais, 209, 279;  
 1 Vent. 67; And. 321; 1 Salk. 403;  
 4 Maule & Sel. 538. The ancient policy  
 of our ancestors was however otherwise,  
 and before the statute of Anne and 6 G. 4,  
 there must have been hundreds on the  
 jury.

(a) 1 Stark. Evid. 477.

respect, by either abolishing the general issue or limiting its operations. Thus in an action on a bill or note non assumpsit cannot be pleaded, and in other actions most defences *must* be pleaded specially, and in case, trover, and trespass, not guilty only puts in issue the *wrongful* act, conversion or trespass, and other matters must be pleaded; (b) and when a party sues or is sued in a *particular character*, unless it be particularly traversed, it is in effect admitted. (c) These rules greatly *limit the power of the jury*; and a counsel, who finds that the terms of the particular issue, coupled with the proof, are in his favour, should take care and remind the jury that by their oath they are limited to this or that particular inquiry, stating it, and are bound to find expressly in the language of the issue. Of course, in order to create a feeling towards his client, all parts of the case will be represented to the jury in the most favourable view, but in many cases the strongest ground to rely upon will be the *precise terms of the issue*. Whilst the *abuse* of the plea of non assumpsit or other general issue was permitted, the jury, according to their general view of the *whole* of the plaintiff's or the defendant's case, or even their unjust *prejudice*, used frequently to find their verdict for the plaintiff or the defendant generally, without assigning, or, perhaps, being able to assign, one adequate reason or ground, or stating on what particular point they found. But now when issues are so much more precise, and limited to the existence of one particular fact, a different result must be experienced; and if the jury should find a perverse verdict, contrary to the evidence and the judge's direction, their misconduct can be more readily detected and remedied on a motion for a new trial. (d)

It will be observed, that with respect to *damages* the oath Dan. of the jurors is silent, unless in cases where the defendant has suffered judgment by default as to a part, or one of several defendants in an action for a tort has suffered judgment by de-

(b) *Ante*, 723 to 729.

(c) *Ante*, 723.

(d) Thus, suppose an action on a bill of exchange, and the defendant has pleaded that he accepted the bill without consideration, and that it was obtained from him by the drawer and the plaintiff by fraud and covin, and the replication traverse that the bill was obtained by the drawer and the plaintiff by fraud and covin, upon which the issue has been joined; and suppose that the proof only establishes that the drawer was guilty of

the fraud and covin, but the plaintiff cannot be implicated in the original fraud by the evidence, and yet it is proved that the plaintiff obtained the bill from the drawer *after the bill was due*, and which, if it had been so pleaded, would have been a sufficient defence. Here, however inclined the jury may be to find for the defendant according to the real justice of the case, yet they cannot do so, they being bound by the terms of the issue, which the defendant unfortunately has not provided.

CHAP. XXIX.  
TRIAL AND ITS  
INCIDENTS.

fault, in which case the jury are sworn to assess the *damages*. In all cases, however, the jury are by the common law bound not only to find their verdict upon the issues, but to find *some* damages, except in a penal action, in which a common informer is not entitled to damages. As regards *damages*, although in actions for torts, the *amount* is much in the discretion of the jury, yet in actions on contracts it is otherwise; and if there were a contract to pay a sum certain, that *must* be considered *stipulated* damages, they must give their verdict for that sum, *(e)* unless in the case of catching bargains, when it would seem the jury may give a smaller sum; *(f)* and in an action on a covenant in a lease to pay £50 per acre as increased rent for ploughing up pasture land, the jury on the first trial having found a verdict for the real damages, the Court, on motion for a new trial, held that the jury had no discretion on the subject, but were bound by their oath to find for the full increased rent; and afterwards Lord Tenterden on the new trial again so directed the jury, and who then found accordingly. *(g)*

As to a verdict  
for Interest.

As regards a verdict for *interest*, the statute 3 & 4 W. 4, c. 42, sect. 28, introduced most important improvements in the law, by enabling a creditor for a *money demand* in most cases to recover *interest*, at 5 per cent., if payable at a time certain, under a written contract from that time, and if not so secured, then from the time of *written demand* of interest, thus taking away the too prevalent inducement to withhold payment, previously existing. We have in a previous page shown the consequent expediency in the latter case for an early service of a written notice demanding interest; *(h)* and we have seen that the 29th section enables a jury to give damages in the nature of interest beyond the value of the goods, from the time of the conversion or seizure, in all actions of trover or trespass, *de bonis asportatis*, and in actions on policies of insurance. *(i)*

Whether jury  
may state or be  
asked their  
reasons.

In practice the jury are not allowed to explain their reasons, nor are counsel suffered to ask for an explanation as to the grounds of their verdict; and where in a penal action the jury found for the defendant and wished to give their *reasons* for their verdict, the learned judge said, "I have left certain questions to you and have made such observations as I felt it my duty to make upon those questions, you have no doubt maturely considered the questions and also my observations

*(e)* *Ante*, vol. i. 872.

*(f)* *Ante*, vol. i. 112, n. (u), 458, 826, 838, 839.

*(g)* *Farratt v. Olmuis*, 3 Barn. & Ald.

692; 3 Young & Jer. 298, S. C.

*(h)* *Ante*, vol. i. 498, where see the enactments.

“you having done so, I think that *I ought not to hear the grounds on which you have found your verdict.*” (i)

TRIAL AND ITS INCIDENTS.

In that particular case of a finding for the *defendant* in a *penal action*, it accorded with general principles not to give facility to any inquiry which might subject the defendant in such an action to the risk of a different verdict; but in *ordinary cases*, not partaking of a criminal or penal nature, it might be desirable that full inquiry should be given into the circumstances under which a jury may have found their verdict, especially when *they express a desire* to explain, as in the case referred to, and in numerous other cases that almost daily occur, or in cases where they are manifestly under some misapprehension. The refusal of inquiry seems to insinuate that in legal supposition it is merely sufficient to have *a verdict* without regard to its correctness, (k) whereas in all other stages of an action each proceeding even of the judges is subject to investigation, and if erroneous may be inquired into and rectified; and it is a principle that each of the several judges in banc should state his reasons as well as his opinion. (l) At least it is submitted that the counsel on each side have *a right* to inquire when a jury find *generally* for the plaintiff or the defendant, which precise issue or issues they find in the affirmative or negative. In practice, when the counsel for either party thinks that a point of law may arise, rendering it important to ascertain on what precise point the jury have found their verdict, it is the practice for him to request the judge to put such questions to them; (m) as where the defence to an action on a bill of exchange was, that *two* alterations had been made, and the jury first found a general verdict for the defendant, Tindal C. J. in compliance with the request of the plaintiff's counsel, inquired of the jury upon which of the supposed alterations they founded their verdict, and they answered that they founded the same upon *both* the alterations. (n)

Question whether the counsel for either party has not now at least a right to know what precise issue the jury find.

## 25. When there are several counts on the same cause of

25. Of the Defendant compelling the plaintiff to enter the verdict on one count.

(i) Per Gurney, B. in *Horner v. Watson*, 6 Car. & P. 680.

(k) Probably it has been considered that to permit the grounds or reasons for any verdict to be inquired into would in practice tend to disturb innumerable verdicts and thus be very inconvenient. The unanimity of twelve men in a verdict in civil cases upon *one* and the same *just reason* and according to law, is so contrary to

experience in other transactions in life that it may be considered extraordinary that such unanimity should so frequently appear to occur; see Mr. Christian's note, 3 Bla. Com. 376.

(l) *Ante*, vol. iii. 6, 7; *Young v. Timmins*, 1 Tyr. 238.

(m) As to damages, Tidd, 869 to 896.

(n) *Desbrow v. Weatherly*, 6 Car. & P. 760, 761.

**CHAP. XXIX.**  
**TRIAL AND ITS**  
**INCIDENTS.**

action and only one cause of action has been proved, or where in a count on a bill of exchange, and another for the consideration thereof, and a third on the account stated, the defendant may, after the verdict has been given, but not before, (o) call on the plaintiff to elect on which count he will enter the verdict, and the plaintiff is not entitled to a verdict on all; and if the judge should rule that he is, then the defendant may and ought to tender a bill of exceptions; (p) and we have seen that the defendant is entitled to his costs upon the counts or issues found against the plaintiff. (q) In general an application to compel the plaintiff to enter the verdict on one of several counts should be made at the trial; (r) and where a verdict had been taken on all the counts by consent, with liberty to move to enter a nonsuit, the Court refused after that motion had been discharged to allow the defendant to confine the verdict to any particular count. (r)

So if the whole of an entire count for a libel with all its innuendos are not proved the jury may be required to separate their verdicts, and find, part for the plaintiff, and the residue for the defendant, and he will be entitled to the costs of the part found for him. (s)

26. Of applications to correct the verdict.

26. If a mistake in the entry of the verdict be discovered after the trial, an application to correct it must be to the judge who tried the cause, and not to *the Court in banc.* (t)

27. Other occasional incidents of a trial.

27. There are some *incidents* of trials that *occasionally arise*, and should be prepared for *pending* or immediately after a trial, such as where matter of defence has arisen since the last pleading, and heretofore called a *plea puis darrein continuance*; (u) *variances and amendments* thereof during the trial; and applications for the *judge's certificate*, so as to obtain *immediate* or early *execution*. Perhaps two of the *greatest improvements* in the administration of civil justice introduced by *modern acts* are those relating to *amendments during a trial* in cases of *VARIANCE*, and the allowing execution to be issued *immediately*, or very soon after the verdict

(o) *Ante*, 478; *Swinburn v. Jones*, 1 Mood. & Rob. 322; *sed vide Woodward v. Cotton*, 6 Car. & Pay. 495.

(p) *Ante*, 470; *Ward v. Bell*, 2 Dowl. 76; 1 Crom. & M. 848; *Hull v. Ashurst*, *id.* 714.

(q) *Ante*, 477.

(r) *Martin v. Coleman*, 1 Harr. & Wol. 26.

(s) *Prudhomme v. Fraser*, 4 Nev. & Man. 512; 1 Harr. & Wol. 5, 3 C.; 1 Chitty on Pl. 438.

(t) *Ante*, vol. iii. 41; *Iles v. Turner*, 3 Dowl. 211.

(u) As to these and recent rules, *see ante*, 748, 9; 4 Car. & P. 335; 1 Chitty on Pleading, Index, "*Plea Puis Darrein Continuance.*"

has been given, instead of compelling the plaintiff to wait for the fruits of his judgment during perhaps a long vacation. CH  
Tr  
]

28. Before the 9 G. 4, c. 15, no judge had power to permit 28.  
9 ( an amendment *pending* a trial, or at least *after the jury had been sworn*, and that act only authorized amendments by leave of anc  
c.  
eni  
to  
a  
of the presiding judge in cases of variances between *written documents* as proved and the *record*. But the 3 & 4 W. 4, c. 42, sect. 23, 24, is much more extensive, and authorizes a judge in *every description of variance* to permit an amendment, provided the opponent, whether plaintiff or defendant, *cannot be thereby prejudiced on the trial on the merits.*(x) The act was intended to rescue the administration of justice from the aspersion, that the Courts and judges had been disposed *too readily* to listen and give effect to *technical objections.*(y) It may be hoped and anticipated, that ere long there will be an accumulation of decisions on this act, establishing that the *most liberal and extensive effect* is to be given by every judge as regards amendments of *variances*. The power of amendment seems, however, to be confined to amendments of what may be strictly termed *variances*; and *omissions* are not within the act, as if a replication or similiter be entirely *omitted*;(z) or if in an action of trover or trespass the plea does not extend to justify the taking or converting a "handkerchief," (one of the articles mentioned in the declaration,(a)) or if in debt the sum claimed or damages are not sufficiently large, the judge cannot increase the statement, as these are not *variances.*(b) If the judge on the trial *allow* an amendment, then the statute authorizes the *Court in banc* to revise his decision; *but if he refuse* leave to amend, his decision is final and conclusive, and the Court cannot interfere.(c) *Hence it is advisable in general to allow an amendment, unless the opponent will clearly be thereby prejudiced on the merits*, or at least to direct the jury to *find the facts specially, according to the evidence*, in pursuance of the 24th section of 3 & 4 W. 4, c. 42; and thus at least afford

(x) *Hanbury v. Ella*, 1 Adolp. & Ell. 61.

(y) See observations of Alderson, B. in *Hemming v. Perry*, 6 Car. & Pa. 589, on *Jones v. Cowley*, 6 Dowl. & Ry. 533, as being a disgrace to the English law.

(z) *Rawlinson v. Reantree*, 6 Car. & Pa. 551; *Clark v. Nicholas*, id. 712. In such a case in an undefended cause the jury may be discharged, 6 Car. & P. 217; but see *Mayor of Carmarthen v. Lewis*, 6

Car. & Pa. 608, as to the introduction of the word "tolls."

(a) *John v. Currie*, 6 Car. & Pa. 618.

(b) *Watkin v. Morgan*, 6 Car. & P. 661.

(c) *Parker v. Edye*, 3 Tyrw. 364; *Hanbury v. Ella*, 1 Adol. & Ell. 64. The decision in *Doe v. Errington*, 3 Nev. & Man. 646, proceeded on a misapprehension of the judge's powers.

CHAP. XXIX.  
TRIAL AND ITS  
INCIDENTS.

the party whose pleadings have been objected to as *variant*, an opportunity of taking the opinion of the *whole Court* on the subject, rather than at *nisi prius*, by sometimes too hurried a decision, exclude the party from the inquiry. By the very ancient practice of the Courts on the trial of a *feigned issue*, the finding of the facts specially, and indorsing such finding on the *postea*, however varying from the precise terms of the pleadings and issue, was always allowed, as greatly tending to put an end to continued expensive litigation; (d) and no doubt the statute 3 & 4 W. 4, c. 42, s. 24, was intended to give the utmost latitude to that practice; for it will be observed, that the *pleading rules* of Hil. Term, 4 W. 4, were promulgated on the avowed ground that amendments of variances at *nisi prius* would be *liberally allowed*; and that *therefore* there would no longer be any necessity for several varying counts or pleas on the same cause of action or defence, previously framed, to avoid the risk of variance; and if such amendments be not *liberally allowed*, there will virtually be a breach of faith. No doubt can be entertained, that ere long a series of decisions will be established as regards the due construction of this act; and therefore it may be advisable for the present merely to give this outline. (e)

28. Of Executions immediately or soon after verdict, by leave of the judge. (f)

28. The next very important modern improvement in practice is, that since the enactment in 1 W. 4, c. 7, sect. 2, a judge has power to certify in any personal action *whatever*, (g) *that there ought to be execution immediately, or at any time he may think fit to fix*, and before the next term, to which antecedently the execution must have stood over, unless the cause had been postponed on the terms of the defendant's giving judgment of the *previous term*. The practice, however, of the judge granting a certificate for immediate or early execution, is in *general* confined to actions for *debts* due on bills of exchange, promissory notes for goods sold and work and labour, money lent, paid, or had and received, or other money claims; (h) though probably if it were made appear that the defendant was about to leave the country, to avoid payment of considerable *damages*

(d) See the numerous cases collected in Gwillim on Tithes, Index, tit. Feigned Issue.

(e) See the cases as to amendments of variances decided previous to March, A. D. 1835, collected in Chitty's Practice, as to amendments, &c. &c.

(f) See in general 1 Arch. K.B. 4 ed. 340, 376, 379, 435; 1 Arch. C. P. [103]

110, 112, 242.

(g) *Barren v. Cox*, 1 Mood. & Rob 203. In debt on simple contract, the judge may certify, *id. ibid.*; *Younge v. Crooks*, 1 Mood. & Rob. 220; *Fisher v. Davies*, 2 M. & Malk. 93; *Percival v. Alcock*, 1 M. & Rob. 167.

(h) 1 Arch. C. P. [103].



in any action whatever, immediate execution would be permitted. Where the judge considers the result as a hard case upon the defendant, as where he was fixed with liability on a bill of exchange, as executor de son tort by a small act of intermeddling, the judge on that account refused immediate execution. (i) Nor is it usual to grant such a certificate in a case where a material questionable point has arisen pending the trial, which may be arguable on a motion in the next term for a new trial or nonsuit, or in arrest of judgment; though even then, when the claim is large, (as 1000*l.*) the judge may require the defendant to bring into Court a considerable sum, as 500*l.*, within a fortnight. (k) The certificate merely expedites the execution, and does not preclude the defendant from moving for a new trial, or in arrest of judgment, or issuing a writ of error; and where a judge in pursuance of the act ordered execution within a limited time, and judgment was thereupon entered up and execution issued, it was held that the defendant was not precluded from applying in the first four days of the next term to the Court to enter a suggestion to deprive the plaintiff of costs. (l) It has been observed, that in practice it is advisable that an application for early execution on the part of a plaintiff should be made by his counsel *immediately* after the trial, (m) precisely as in special jury causes such counsel applies for a certificate that the cause was proper to be tried by a special jury. There is some contradiction as to the admissibility or utility of *affidavits* for or against the application for early execution. (n) When it is considered that a trial must be strictly confined to an inquiry into the formal issue or issues joined, and that no inquiry into collateral circumstances, (as whether or not an immediate execution would not be ruinous to a defendant, when, if reasonable time be allowed, he will be able to pay,) will be allowed, it would seem that on principle *affidavits* should be received, especially if on the part of the plaintiff it can be sworn that the defendant has declared he will leave the country, or is selling off his property apparently with that object; (o) or on the other hand, if it be sworn on the part of the defendant that he is at present unable to pay, but that he will be able and intends to pay by a named time, especially if it be shown that he has pro-

(i) Per Lord Denman, C. J. in *Seally v. Powis*, 1 Har. & Wol. 4.

(k) *Crook v. Jadis*, 6 Car. & P. 193.

(l) *Baddeley v. Oliver*, 1 Crom. & M. 219; 1 Dowl. 598, S. C.

(m) 1 Arch. C. P. [103].

(n) In *Gervais v. Burtchley*, 2 M. &

Malk. 150, Lord Lyndhurst considered an *affidavit* inadmissible. But Bayley, B. in *Ruddick v. Simmonds*, 1 M. & Rob. 184, admitted such an *affidavit*.

(o) See a form of *affidavit* in Ejectment, in order to obtain immediate execution, T. Chitty's Forms, 2 ed. 447.

**CHAP. XXIX.** party ready to be deposited, or a good debt payable in a short time that he is ready to assign for the security of the plaintiff.  
**TRIAL AND ITS INCIDENTS.**  
In cases of this nature it may be advisable for both parties to be prepared with full affidavits ready to be tendered at the trial, and if the judge should make an *ex parte* order for *immediate* or early execution, the defendant should forthwith be prepared with very full affidavits in his favour, and take out a summons so as to endeavour to obtain some modification of such order on just terms, such as immediate payment of a *part*, or the execution of good security with guarantees.

---

**Conclusion.**

I propose here, at least for the present, to conclude my observations on practice. It is true that there are some other proceedings *after the trial* of an action that frequently occur; but as they have been so fully and ably considered in other works, and as the recent alterations and decisions relating to them are at present but few, it is considered advisable to suspend any observations upon those subjects until there has been an accumulation of new materials, more particularly as the law of *execution*, especially against the *person*, will probably ere long undergo considerable alteration.

# INDEX

## TO THE WHOLE WORK.

**N.B.**—In this Index all the Parts are referred to. The References after a head thus: "Index to Parts I. II. III. and IV." import that such head will be found in the Indexes to those Parts. When particular Pages and Titles are named, they refer to the Fifth and Sixth Parts, comprised in this concluding Volume.

**ABANDONMENT.** (See Index, Part II.)

**ABATEMENT.** (See Index, Parts I. II. III.—also *Plea*.)

plea of non-joinder not allowed when defendant out of the kingdom, 398, 399.

not allowed unless residence stated, &c. 399.

affidavit verifying same, 399.

misnomer not pleadable in abatement, 170, 711.

See *Misnomer*.

defendant to proceed by summons in case of, 170, 711.

**ABATEMENT, PLEA IN.** See *Plea*.

commencement of second action after plea in, 459, 467, 711.

prescribed form of, 459.

pleading in, within what time, 500, 703.

of obtaining further time, 704.

practice relating to, 711.

when must be delivered, 711, 712.

statutes respecting, 711.

requisites of affidavit as to truth of, 711, 712.

time of swearing affidavit, 712.

general regulation respecting, 713.

form of plea, *id*.

form of affidavit, *id*.

**ABDUCTION.** (See Index, Parts I. II.)

**ABODE,**

statement of, in affidavit to hold to bail, 333.

statement of defendant's, in writ, 174.

of plaintiff's, 251.

of plaintiff's attorney,

**ABORTION.** (See Index, Part I.)

**ABROAD,**

examination of witnesses when abroad, 816.

**ABSENCE ABROAD.** (See Index, Part II.)

**ABSOLUTE RIGHTS.** (See Index, Part I.)

**ABSTRACT.** (See Index, Part I.)

**ABSTRACT OF PLEADINGS,** 848.

**ABUTTALS,**

statement of, in declaration, 460, 470, 728, 729.  
in pleas, 728, 729.

**ACCIDENTS.** (See Index, Part IV.)

**ACCOUNT.** (See Index, Parts I. II. IV.)

**ACCOUNT STATED,**

when may be added, 457, 482.

**ACKNOWLEDGMENT.** (See Index, Part II.)

**ACQUITTAL.** (See Index, Part III.)

of one defendant on trial at nisi prius, 902.

**ACRES.** (See Index, Part I.)

**ACTIO PERSONALIS MORITUR CUM PERSONA.** (See Index, Part II.)

**ACTION.** (See also Index to Parts I. II. IV.)

summary of proceedings in, when regular, 83, 84.  
preliminary steps before commencement of, 114 to 139.

writs of, under 2 W. 4, c. 49, considered, commencement of, 159, 204.

consolidation of, 643. See *Consolidating Actions*,  
pleading matter arising pending action, 748.

**ACTS OF PARLIAMENT.** (See Index, Part I.)

**ADDING BAIL,** 384. See *Bail*.

**ADDING PLEA,** 722. See *Plea*.

**ADDITION, &c.**

of defendant in affidavit to hold to bail, 333.

general regulations respecting addition of deponents, 539.

**ADJOURNMENT.** (See Index, Part III.)

**ADJUDICATION.** (See Index, Part III.)

**ADJUDICATION OF BANKRUPTCY.** (See Index, Part IV.)

**ADMINISTERING POISON.** (See Index, Pt. I.)

- ADMINISTRATION.** (See Index, Parts I. II.)
- ADMINISTRATION BOND.** (See Ind. Pt. IV.)
- ADMINISTRATION, LETTERS OF.** (See Index, Part IV.)
- ADMIRALTY COURTS.** (See Index, Part II. and IV.)
- ADMISSION IN EVIDENCE.** (See Ind., Pt. II.)
- ADMISSIONS,**  
caution to be observed before agreeing to, 837, 838.  
when or not proper to agree to, 838.  
right of counsel to begin when made on trial, 877.
- ADMITTANCE.** (See Index, Parts I. II.)
- ADULTERY.** (See Index, Part IV.)
- ADVANTAGE OF DEFECTS,**  
when or not to be taken, 510 to 512.
- ADVERSE POSSESSION.** (See Index, Parts I. II.)
- ADVERTISEMENT.** (See Ind. Pts I. II. III.)
- ADVOVSONS.** (See Index, Part I.)
- AFFIDAVIT.** (See Index, Parts II. III. IV.)  
may be made before judge of any Court, 23.  
supplementary ones not allowed on rule nisi, 36.  
when second one requisite to hold to bail, 219.  
of execution of process, 245.  
of personal service of writ of summons, 266, 267, 272.  
to set aside supposed service of process, 278.  
what it must contain, 278, 279.  
form of, to set aside pretended service of copy of summons, 279.  
the like, showing service of insufficient copy, *id.*  
the like, objecting that service not in proper county, *id.*  
hearing rule on same, *id.*  
making absolute or discharging rule, 279, 280.  
of personal service to enable plaintiff to enter appearance for defendant sec. stat. 289.  
requisites of, 289 to 292.  
usual form of personal service of regular writ, 289.  
of ineffectual search for defendant's appearance, 290.  
of personal service, but some supposed defect in writ or copy, 290, 291.  
before whom affidavit may be sworn, 292.  
swearing of, enforced, *id.*  
to enforce appearance by distringas, 298. See *Distringas*.  
requisites of affidavit, 302, 305.  
forms of, 306 to 308, 315. See *Forms*.  
to hold to bail, 331. See *Capias*.  
express requisites of, by statutes and rules, 331.  
not considered commencement of action, 332.  
title not to be in a cause, *id.*  
form and requisites of, *id.*  
title of court, *id.*  
deponent's abode, 333.
- AFFIDAVIT—(continued.)**  
addition of rank, &c. 333.  
degree, profession, &c. *id.*  
names of parties, 334.  
cause of action, *id.*  
requisite precision in statement thereof, *id.*  
principle on which precision, &c. requisite, 334, 335.  
consequences, when statement of cause of action defective, 337.  
practical proceedings with respect to, *id.*  
before whom to be sworn, 338.  
the jurat, 359.  
form of affidavit, 340.  
defects in, when to be objected to, *id.*  
of filing affidavit, 341.  
contradictory ones, when allowed, 369.  
of notice of bail, 382. See *Bail*.  
forms of, *id.* See *Forms*.  
of justification of bail, 382. See *Bail*.  
to found proceedings to outlawry on, 401. See *Outlawry*.  
for inspection of documents, 434, 435.  
form and requisites of, 435.  
to hold to bail, 515 to 517.  
objections to, when to be taken, *id.*  
on motions for irregularities, 521.  
defects in, when not waived, *id.*  
in support of or against applications by summons or motion, 535 to 554.  
1. when or not necessary, 535.  
is not in support of a judge's notes, *id.*  
or to statement by counsel, *id.*  
in most other cases necessary, 536.  
2. by whom to be made, 537.  
when by a third party, *id.*  
not by a convicted felon, *id.*  
3. title of the Court, *id.*  
must be stated correctly, *id.*  
4. title of the cause, 538.  
names to be stated in full, *id.*  
statement of character of party suing or being sued, 538.  
transposition of names fatal, 539.  
5. addition of deponent, *id.*  
what statement of, necessary, *id.*  
6. commencement of affidavit, 540.  
must be accurate, *id.*  
omission of word, "oath," fatal, *id.*  
7. body or substance of, *id.*  
facts must be stated positively, *id.*  
mere inferences not allowed, 540, 541.  
when express rules require particular points to be sworn to, 541.  
natural language of each deponent to be adhered to, *id.*  
calumnious statements to be avoided, 542.  
should be concise, *id.*  
when should state particular objections, *id.*  
when presence of other persons should be sworn to, 543.  
of swearing, in anticipation, &c. of opponent's probable statements, *id.*  
of swearing, to merits, 543 to 545.  
8. deponent's signature to affidavit, 545.  
may be signed in a foreign character, *id.*  
9. before whom sworn, 22, 23, 545.  
concurrent jurisdiction of judges, 545.  
general regulations respecting, *id.*

**AFFIDAVIT—(continued.)**

- when power of commissioners suspended, 545.
  - 10. of the jurat, 546.
    - requisites of, 339, 546.
    - when may be amended, 546.
  - 11. at what time an affidavit must be sworn, produced, and filed, *id.*
    - cannot be produced in support of rule nisi, after rule moved for, *id.*
    - if defective in form, when may be amended, 547.
    - filing of, 547, 548.
  - 12. documents to be annexed to and exhibited with affidavit, 548.
    - when dispensed with, 277 to 279, 549.
  - 13. if previously used, when must be re-sworn, 549.
  - 14. consequences of being insufficient in first instance, 549.
    - when rule allowed to be opened, 550.
  - 15. when amendment in, permitted, *id.*
    - or supplemental one received, *id.*
  - 16. when or not objection to, waived, 550.
  - 17. delivering copies to opponent, when or not advisable, 551.
    - on summonses, 563.
  - 18. of opponent taking copies, 551.
    - practice of, when deviated from, *id.*
  - 19. affidavits in answer to a summons or rule nisi, 552.
    - requisites to be observed in, 552, 554.
  - 20. time of swearing same, 553.
  - 21. if defective, when may be amended, 554.
- of service of summonses*, 562.
- form of, *id.*
  - when conflicting, how the Court or judge decide, 596.
  - requisites of, on motion under interpleader act, 625.
    - on motion to change venue, 652, 657.
    - forms of, 652.
  - in truth of plea in abatement, 711, 712.
  - of truth of plea after last pleading in banc, 749.

**AFFIRMANCE.** (See Index, Part III.)**AFTERMATH.** (See Index, Part I.)

**AGE.** (See Index, Parts I. II.)  
of witness, statement of, in brief, 856. See *Brief*.

**AGENT.** (See Index, Parts II. III.)  
relief by, under interpleader act, 620, 622.

**AGREEMENT.** (See Index, Parts I. II. III. IV.)  
staying proceedings, when action contrary to, 663.

**AGRICULTURAL PRODUCE.** (See Ind. Pt. I.)

**AIDERS AND ABETTORS.** (See Index, Part I.)

**ALEHOUSES.** (See Index, Part II.)

**ALIAS WRIT,**  
issuing of, into another county, 217, 349.  
form of, 218.  
issue of, to save stat. lim., 408.

**ALIENATION.** (See Index, Parts I. II.)

**ALIEN ENEMY,** (See Index, Part II.)

**ALIMONY.** (See Index, Parts I. IV.)

**ALLEGATIO FALSI.** (See Index, Part II.)

**ALLOWANCE OF BAIL.** See *Bail*.  
rule for, 386.  
service of same, *id.*

**ALTERATION.** (See Index, Part I.)

**ALTERNATIVE,**  
writ of *distringas* must not be in, 311.

**AMBASSADORS,**  
privilege of, from arrest, 329.

**AMBIGUITY.** (See Index, Part I.)

**AMENDMENTS.** (See Index, Part III.—also *Irregularities*.)

- formerly judge at nisi prius could not order, 42.
- though cause undefended, *id.*
- how he may order, *id.*
- cannot, after cause referred, *id.*
- what amendments may be made, *id.*
- should not be allowed, if defence on merits prejudiced, 43.
- enactments respecting, 42 to 44.
- discretionary in judge to permit, 33, 35, 43, 55.
- if refused, no appeal, 43, 923.
- otherwise, when permitted, *id.*
- decision of judge as to, when conclusive, 44.
- should be liberally permitted, *id.*
- unless just defence prejudiced, *id.* 923.
- summons for, on circuit, 45.
- order thereon, *id.*
- power of sheriff to allow, 47.
- not allowed in deviations of statutory regulations, 54.
- otherwise of rules of Court, *id.*
- of copy of *capias*, 59, 70, 233, 234.
- of name of defendants in writ, when refused, 173.
- of writ, before executed, 233.
- of writ, after executed, 234.
- of copy of writ, 234, 311.
- instances of, 235, 551.
- difference between defect in writ and copy considered, 236.
- should be liberally allowed, 480, 481.
- propriety of, after notice, 529, 534.
- in affidavits, when allowed, 550, 554. See *Affidavit*.
- in rules nisi, when, 483. See *Rules nisi*.
- of pleadings before trial, 849.

**AMICABLE ADJUSTMENT.** (See Ind. Pt. III.)

**ANCIENT LIGHTS.** (See Index, Parts I. II.)

**ANGLING.** (See Index, Part III.)

**ANIMALS.** (See Index, Part I.)

**ANNEXATIONS TO LAND.** (See Index, Pt. I.)

**ANNUITY.** (See Index, Parts I. II. IV.)  
rule to set aside, must state all objections, 581.

**ANNUITY DEED.** (See also Index, Part IV.)  
power of single judge at chambers under Annuity Act, 20.  
summons to obtain inspection of, *id.*  
or take copies, *id.*  
should be before judge at chambers, *id.*

ANSWER. (See Index, Part II.)

APOLOGY. (See Index, Parts II. III.)

APPEAL. (See Index, Parts II. III.)

under 11 G. 2, c. 19, s. 17, 45.

power of judge to allow costs of, *id.*

APPEAL, COURTS OF. (See Index, Part IV.)

APPEARANCE. (See also Index, Part IV.)

entered before declaration in court of law, 87.

otherwise in equity, 87, 88.

entry of, between 10th Aug. and 24th Oct., 96.

how enforced by *distringas*, 150, 301 to 321.

See *Distringas*.

in default of, 153.

entered sec. stat. Court will not set it aside on

suggestion of perjury, 268.

defendant's attorney's undertaking to appear, 240, 273.

how enforced, 273.

time of appearance after service, 282.

within what time, *id.*

must be within eight days of day of service, *id.*

day of service included, *id.*

mode of entering appearance by defendant, *id.*

by defendant in person, *id.*

form of, 283, 298.

by attorney for defendant, 282.

form of, 283.

by plaintiff's attorney sec. stat., 282.

form of, 283.

requisites to be observed on entering, *id.*

attorney's residence to be stated, *id.*

residence of defendant need not be, *id.*

when residence of defendant unknown, *id.*

when several defendants, 285.

fees on entering, *id.*

proposed new forms of appearance, 285, 287.

what plea or act of defendant before appearance a nullity, 285.

practical proceedings on entering, 286.

former proceedings as to warrant to defend, *id.*

minute of warrant to defend as formerly required, *id.*

offices in which to enter appearance, *id.*

fees on appearance, 285, 287.

consequences of non-appearance, 287.

must correspond with process, *id.*

when for an infant, 288.

must be by guardian, *id.*

not by attorney, *id.*

enforcing appearance by guardian, *id.*

form of appearance by guardian, *id.*

proceedings to enable plaintiff to enter, sec. stat. *id.*

affidavit of personal service requisite, 289.

requisites of affidavit, 289 to 291.

usual form of personal service of regular writ, 289.

form of affidavit of ineffectual search for defendant's appearance, 290.

of personal service where writ irregular, 290, 291.

before whom affidavit may be sworn, 292.

swearing of affidavit, how enforced, *id.*

how to enter appearance for defendant by plaintiff, *id.*

consequences of mistake in entering, 293.

time within which entry must be made, *id.*

APPEARANCE—(continued.)

course of practice on entering, 294.

form of entry, *id.*

must correspond with process, 295.

consequences of mistakes in, *id.*

of enforcing appearance by *distringas*, 150, 301 to 321. See *Distringas*.

entering appearance by plaintiff, 299.

affidavit of issuing writ of summons, *id.*

requisites to be observed on issuing writ, *id.*

when proper to enforce appearance by *distringas*, 150, 300.

practice on issuing writ, 301 to 321.

proceedings between, and conclusion of action, 421 to 428.

signing judgment for want of plea, 506.

demand of plea before, a nullity, *id.*

unless defendant's attorney undertook to appear, *id.*

irregularity in, when to be objected to, 518.

countermand of, to writ, 533.

time allowed for, before plaintiff can declare, 439.

APPEARANCE OF WITNESS. See *Witness*.  
practical proceedings to compel, 828 to 834.

APPENDANT. (See Index, Part I.)

APPOINTMENTS. (See Index, Part III.)

APPORTIONMENT. (See Index, Part I.)

APPREHENSION. (See Ind. Pta. I. II. III.)

APPRENTICE. (See Index, Parts I. II.)

APPURTENANCES. (See Index, Part I.)

ARBITRATION. (See Index, Parts I. II. III.)

ARBITRATOR. (See Index, Part III.)

ARCHDEACON'S COURT. (See Ind. Pt. IV.)

ARCHES' COURT. (See Index, Part IV.)

AREA. (See Index, Parts I. II.)

ARGUMENT,  
on demurrers, 760.

ARREAR OF WAGES. (See Index, Part IV.)

ARREST. (See Index, Parts I. II. III. IV. also *Capias*.)

may be made at any hour of night, 110, 355.

though not after 12 on Saturday night, *id.*

reasons in favour of and against, 137 to 139, 326, 327.

proviso for persons privileged from, 152, 329.

observations on the law of, 323 to 328.

when imprudent to arrest, 328.

privileges from, 329 to 331.

requisite of affidavit on which to arrest, 323, 331 to 341.

directions to officer not to arrest particular defendant, 348.

practice of obtaining warrant to arrest, 47, 350.

of arrest in general, and its incidents, 353.

consequence of arresting wrong defendant, 353, 354.

or by wrong name, *id.* Bail bond void, *Fitch v. Cechen*, 3 Dowl. 678.

place of arrest, 306.  
time of arrest, 110, 355.  
when second arrest permitted, 355.  
mode of arrest, and what amounts to, 357.  
duty of officer on arrest, *id.*  
remedy for extortions on, 359, 360.  
proper conduct of defendant on arrest, 361.  
legal modes of obtaining release from, 362 to 386.  
commencement of declaration after, 544.

**ARSON.** (See Index, Part I.)

**ARTICLED CLERKS.** (See Ind. Pts. III. IV.)

**ARTICLES OF CLERKSHIP.** (See Index, Part III.)

**ARTICLES OF THE PEACE.** (See Index, Parts II. IV.)

**ASSAULT.** (See Index, Parts I. II.)

**ASSAULT AND BATTERY.** (See Index, Part III.)

**ASSENT.** (See Index, Part I.)

**ASSESSMENTS.** (See Index, Part IV.)

**ASSETS.** (See Index, Parts I. II. III.)

**ASSIGNEES.** (See Index, Parts III. IV.)

**ASSIGNEE OF BOND.** (See Index, Part III.)

**ASSIGNMENT.** (See Index, Parts I. II.)

**ATTACHMENT.** (See *Witnesses*.)  
showing cause against rule for, at chambers, when refused, 58.  
judge's order cannot be enforced by, 33, 61.  
otherwise, if made a rule of court, *id.*  
See *Interlocutory Costs*.  
production of original rule in cases of, requisite, 583, 585.  
enforcing payment of costs by, 602.  
how to proceed by, *id.*  
rule for payment must be *absolute*, or no attachment lies, 603.  
rule must be personally served, *id.*  
requisites to be observed before issuing an attachment, 603 to 606.  
affidavit of service, and motion and rule for attachment, 606.  
when rule nisi only, *id.*  
when *absolute* in first instance, *id.*  
execution of same, 607.  
who exempt or discharged from, *id.*

**ATTEMPTS.** (See Index, Parts I. II.)

**ATTENDANCE.** (See also Index, Part III.)  
of judges at chambers, hours of, 27.

**ATTORNEY.** (See also Index, Parts I. II. III. IV. *Attorney and Solicitor*.)  
power of judge at chambers over, 20.  
admission of, must be in court, 24.

motions impugning misconduct sometimes referred to master in K. B., 38.  
otherwise in C. P., *id.*  
indorsing name of, on process, 72, 208.  
forms of, 208.  
retainer of, 114. See *Retainer*.  
obtaining instructions to sue, 117.  
to defend,  
liability of, for suing without authority, 11  
duty of, before commencing action, 125.  
issuing writ without authority of, 153.  
demand of authority to sue, 281, 275.  
form of demand, 231.  
undertaking of, to appear, 240, 273, 365,  
residence of, to be stated in appearance, 21  
privilege of, from arrest, 330.  
duty on obtaining instructions for declaration, 429 to 432. See *Declaration*.  
knowledge of pleading, why essential to, 432.  
irregularity without obtaining order for claim of, 515.  
one summons only requisite to tax bill of, 697.  
duty of, to observe instruction as to pleading, 697.  
duty of, in preparing brief, 847 to 864.  
*Brief*.  
the like, on trial at nisi prius, 866 to 926  
*Trial*.

**ATTORNMENT.** (See Index, Part II.)

**AUCTION.** (See Index, Part II.)

**AVOIDANCE,**  
matters in, must be pleaded specially, 71

**AUTHOR.** (See Index, Part II.)

**AUTHORITY.** (See Index, Part I.)

**AUTHORITY TO SUE,**  
staying proceedings for want of, 116, 62

**AUTHORITY OF JUDGES,**  
on what grounds depends, 5.  
of Practice Court, 50.

**AWARD.** (See Index, Parts I. II. III. IV.)  
rule nisi to set aside, must state all the conditions to the same, 581.

**BACHELOR OF ARTS.** (See Index, Part II.)

**BACHELOR OF LAW.** (See Index, Part II.)

**BACKSIDE.** (See Index, Part I.)

**BAIL.** See *Copias*.  
enactments respecting, 12 to 15.  
requisites of affidavit to hold to bail, 31  
331 to 341. See *Affidavit*. *Copias*.  
express requisites of, by statutes and rule must be of original cause of action, 31  
before whom made, 331.  
fee on, *id.*  
without affidavit arrest void, 332.  
omission in, when fatal, *id.*  
forms and requisites of, 332 to 34  
*Affidavit*. *Copias*.

**BAIL—(continued.)**

- when second affidavit requisite, 200, 349, 350.
- deposit with sheriff in lieu of, 66, 366. See *Sheriff*.
- may be of sum sworn to and 10*l.*, 366.
- proceedings after deposit, 367.
- payment into court in lieu of bail above, 367, 370.
- of what sum, *id.*
- undertaking of attorney to perfect bail in lieu of bail bond, 240, 367.
- should be in writing, 367.
- enforcement of, by attachment, *id.*
- form of, 368.
- motions to avoid putting in bail, 369.
- when contradictory affidavits allowed, 369, 370.
- when not, *id.*
- of putting in bail above, 370.
- consequences of neglect to put in, 200.
- deposit of sum sworn to and 20*l.* in lieu of, 370.
- time of putting in, 370.
- must be within eight days, *id.*
- or further time obtained, 370 to 372.
- eight days how calculated, 371.
- of payment of money in lieu of, *id.*
- may be within the eight days, *id.*
- in latter case defendant must enter common appearance, *id.*
- or plaintiff may for him, *id.*
- on perfecting special bail may take money out of court, *id.*
- or convert same into a payment in action, *id.*
- cannot apply same to a plea of tender, 372.
- plaintiff on obtaining verdict must set off sum paid into court, *id.*
- cannot issue execution for the whole sum recovered, *id.*
- bail must be put in and perfected though arrest between 10 Aug. and 24 Oct., 372, 396, 397.
- of obtaining further time, 372.
- of putting in bail at any time, *id.*
- either pending action, *id.*
- or before defendant charged in execution, 372, 373.
- changing bail by leave of a judge, 373.
- import of term "*putting in bail*," and several requisites, *id.*
- description of term, *id.*
- must be of two competent persons, *id.*
- unless leave for more has been obtained, 373, 377.
- bail must justify, 373.
- and notice of justification given, *id.*
- proceedings antecedent to putting in bail, 373 to 375.
- ascertaining competency of bail, 373.
- appraising them of extent of their liability, 374.
- requisites of bail, *id.*
- to what they must swear, *id.*
- form of affidavit to which bail must swear, 374, 375.
- must be housekeeper or freeholder, 375.
- sum to be sworn worth, *id.*
- summary of who may be bail, *id.*
- qualifications of, 376.
- disqualifications of, *id.*
- moral character of, *id.*
- mode of becoming bail, 377, 378.
- must testify their consent, 377.

**BAIL—(continued.)**

- offence of personating bail, 378.
- course observed on bail justifying, *id.*
- form of bailpiece, 377.
- signature by bail in Exchequer, 378.
- modes of putting in bail, *id.*
- before whom may be put in, *id.*
- for what county, *id.*
- care to be observed in putting in, *id.*
- consequences if put in wrong office, *id.*
- notice of bail having been put in, 379.
- essential to give, 373, 379.
- must be a written notice, 379.
- must be given before time expired, *id.*
- requisites of notice of bail, *id.*
- forms of notice and justification of, 379 to 382.
- See *Forms*.
- service of notice, 379.
- time of service, *id.*
- informality of notice of, 380.
- forms of notices of putting in and justifying, 380 to 383.
- of exception, 381.
- of notice of exception, *id.*
- of justification, 12, 102, 111, 381 to 383.
- may justify in vacation, 23, 92, 381.
- of affidavit to oppose, 383.
- other practical proceedings relating to bail, *id.*
- time and mode of putting in, *id.*
- four days notice of intention to justify, 383, 374, 375.
- exception thereto, 374.
- costs of exception by whom to be paid, 384.
- entry of exception, *id.*
- written notice of, *id.*
- form of notice, 381.
- of adding bail, 384.
- written notice of justification when to be served, 111, 385.
- of obtaining further time to justify, 385, 370 to 372.
- affidavit of service of notice of justification, 385.
- form of notice, 382.
- brief and motion to justify, 385.
- calling and appearance of bail to justify, *id.*
- usual hour of justification, *id.*
- opposition to bail, *id.*
- allowance of bail, 386.
- rule for service thereof, *id.*
- proceedings on bail bond, 387 to 389. See *Bail Bond*.
- proceedings against sheriff, 389 to 391.
- variance in stating venue not deemed a waiver of, 483.
- demand of plea when a waiver of, 506, 518.
- objection to notice of, 518.
- objection to affidavit of debt, 515 to 517.
- variance in declaration from writ when a discharge of, 71, 196, 469, 470.

**BAILABLE PROCESS.** See *Capias. Mene Proce.*  
 enactment of 2 W. 4, c. 39, respecting, 150.  
 indorsement of abode, &c. of defendant not now necessary, 215.

**BAIL ABOVE.** See *Bail*.

- deposit in lieu of, 367, 370 to 372.
- proceeding between and conclusion of action, 421 to 426.



**BAIL BOND.** (See also Ind. Pt. IV. *Capias*.)  
 execution of, 362, 363.  
 condition in, 363.  
 requisites of, *id.*  
 void, if arrest in wrong name, *Finch v. Cockan*,  
 3 Dowl. 678.  
 consequences of sheriff refusing proper one, *id.*  
 or taking one with insufficient sureties, *id.* 390.  
 form of, 364.  
 date of, *id.*  
 penalty in, *id.* 365.  
 should not be larger than requisite, 364.  
 two sureties are advisable, 365.  
 must have sufficient in county, 363.  
 though one will not invalidate, 365.  
 defendant should not voluntarily execute without  
 previous arrest, *id.*  
 granting indulgences after execution of, *id.*  
 duty of sureties on executing one, *id.*  
 deposit with sheriff in lieu of, 366.  
 undertaking of defendant's attorney to perfect  
 bail in lieu of, 240, 367.  
 proceedings on bail bond, 387.  
 can only ensue on neglect to put in bail above, *id.*  
 or perfect same, *id.*  
 putting in suit of, *id.*  
 assignment thereof, *id.*  
 action thereon, 65, 387.  
 cannot be commenced until bail bond forfeited,  
 387.  
 may be supported in any court, 388.  
 staying proceedings on, 67, 388.  
 enabling original defendant to try on merits, *id.*  
 on application of the bail, *id.*  
 what affidavit requisite, *id.*  
 import of term *losing a trial*, 388, 389.  
 other proceedings, *id.*

**BAILABLE PROCESS,**  
 declaring *de bene esse* on, 439.

**BAIL PIECE,**  
 form of, 377.  
 filing of, 382.

**BAILIFFS.** (See Index, Part IV.)

**BANKRUPT,**  
 when privileged from arrest, 330.

**BANKRUPTCY.** (See Index, Part I. II. IV.)

**BANKRUPTCY,** Court of. (See Index, Part IV.)

**BANKRUPTCY,**  
*cognovit* when discharged by, 669.

**BANKS, SEA.** (See Index, Part I. II.)

**BANNS.** (See Index, Part IV.)

**BAR, Plea in.** See *Plea*.  
 when further time will be given to plead in bar,  
 704.  
 forms and requisites of pleas in bar, 714 to 721.  
 See *Plea*.

**BARGAIN AND SALE.** (See Index, Part I.)

**BARONS.** See *Judges*.  
 number of, 5.  
 provision for absence of chief baron, 6.  
 proceedings of, when valid, *id.*  
 relationship or interest of, 9.  
 jurisdiction of, 11.

VOL. III.

**BARON AND FEME.** (See Index, Part I.)  
**BARRISTERS.** (See also Index, Part III.)  
 when privileged from arrest, 330.

**BASTARD.** (See Index, Part I. IV.)

**BATTERY.** (See Index, Part I. II. III.)

**BEACONS.** (See Index, Part I.)

**BEAST.** (See Index, Part III.)

**BEAST GATES AND CATTLE GATES.** (See  
 Index, Part I.)

**BEEES.** (See Index, Part I.)

**BELONGING TO.** (See Index, Part I.)

**BETTER EQUITY.** (See Index, Part II.)

**BETTER SECURITY.** (See Index, Part II.)

**BEST EVIDENCE,**  
 of the necessity to produce, 809.  
 when secondary evidence allowed, 810.

**BIGAMY.** (See Index, Part I.)

**BILL OF DISCOVERY.** (See Index, Part III.)

**BILL OF COSTS.** (See Index, Part III.)

**BILL TO PERPETUATE TESTIMONY.** (See  
 Index, Part III.)

**BILL OF SALE.** (See Index, Part I. II.)

**BILL OF EXCEPTIONS.** (See Index, Part IV.)  
 when to be tendered, 915.

**BILLS IN EQUITY.** (See Index, Part IV.)

**BILLS, other.** (See Index, Part II.)

**BILL OF EXCHANGE.** (See also Ind. Pts. I. II.)  
 falling due on Sunday, 104.  
 notice of dishonour of, on Sunday, *id.*  
 Reg. Gen. of T. T. 1 W. 4, limiting length of  
 declarations on, 452, 476.

**BILL OF INTERPLEADER.** (See also Index,  
 Part IV.) and see *Interpleader, bill of*.  
 proceedings under, 620 to 627.

**BIRDS.** (See Index, Part I.)

**BIRTH.** (See Index, Part I.)

**BLASPHEMY.** (See Index, Part IV.)

**BODY AND LIMBS.** (See Index, Part I.)

**BONA NOTABILIA.** (See Index, Part II.)

**BOND.** (See also Index, Parts II. III.)  
 form of, to indemnify nominal plaintiff, 128.

**BOOKS.** (See Index, Part II.)

**BOOKS AND DOCUMENTS.** (See Index, Pt. II.)

**BOROUGHES.** (See Index, Part I.)

**BOTES.** (See Index, Part I.)

**BOTTOMRY BOND.** (See Index, Part IV.)

BOUNDARIES OF ESTATES. (See Ind. Pt. I. II.)

BOUNDARY LINE. (See Index, Part I.)

BRAWLING. (See Index, Part IV.)

BREACHES OF CONTRACT. (See Ind. Pt. I. II.)

BREACHES,  
ascertaining on writ of inquiry, 47, 675.

BRIDGES. (See Index, Part I.)

BRIEFS AT NISI PRIUS, 847 to 865.

1. General observations respecting, 847.  
mode of preparing, *id.*
2. Statement of the pleadings, 848.
3. Observations thereon, *id.*  
what they require to be proved, *id.*  
what they admit, *id.*
4. In actions of slander, 849.  
statement of words declared on in a separate  
sheet without innuendoes, *id.*
5. Considering sufficiency of pleading, *id.*  
immediate amendment of same, 849, 850.
6. Copy of pleadings for judge, 850.  
particulars of demand, *id.*  
particulars of set off, *id.*
7. Statement of particulars of demand or set-off,  
in briefs with observations thereon, *id.*
8. Utility of analysis of plaintiff's case, *id.*
9. Full statement of plaintiff's case, 851.
10. Statement of written documents, &c. maps,  
plans, &c. 852.
11. Utility of maps, plans, &c. considered, *id.*
12. Analysis of dates of material facts, 853.
13. Observations on facts, &c.
14. Stating previous opinions of counsel and  
pleader, *id.*  
should not be abbreviated, *id.*
15. Analysis of proposed proofs, 854.  
form of analysis, *id.*
16. Mode of stating the proofs, *id.*
17. Of formal proofs, 855.
18. Evidence of the merits, *id.*
19. All the evidence of each witness to be stated  
consecutively, *id.*
20. Age and character of each witness to be  
stated, 856.
21. Arrangement or order of witnesses, 857.
22. Statement in detail of what each witness  
will prove, *id.*
23. Mode of stating proofs in brief upon a  
tradesman's bill, 859.
24. Statement of expected defence and supposed  
proof in support thereof, *id.*
25. Indorsing brief, fees, &c. 859.
26. Of the brief for the defendant, *id.*  
statement of proofs in, 861.  
giving evidence for, at all events, 862.  
of structure of brief for, in general, *id.*  
of watching brief, 863.
27. Delivery of, to counsel and proceedings  
thereon, 863.  
consultation thereon, 864, 865.

BRIEFS ON MOTIONS.—571, 590, 591.  
delivery of, to counsel on moving rule nisi, 571.  
what should consist of, 571, 572.  
the like on moving rule absolute, 590.  
on opposing rule, 591.

BRUISES. (See Index, Part I.)

BUILDINGS. (See Index, Part I.)

BULL BAITING. (See Index, Parts I. II.)

BULLWORKS. (See Index, Parts I. II.)

BURGAGE. (See Index, Part I.)

BURGLARY. (See Index, Part I.)

BURIAL. (See Index, Parts I. II.)

CALENDAR MONTH,  
how calculated, 108, 109.

CALUMNY. (See Index, Part III.)

CALUMNIOUS STATEMENT,  
should be avoided in affidavit, 542.

CANALS. (See Index, Part I.)

CANAL SHARES. (See Index, Part I.)

- CAPIAS, WRIT OF. See *Messe Process*.  
sheriff's duty on executing it, 46.  
amendment of copy of, when refused, 69, 70.  
instances of refusal, *id.*  
how to be dated, 90.  
how long to be in force, 90, 241.  
judge's order for return to, in vacation, 99.  
return to, by whom to be made, 245.  
return to, how enforced, 246, 247.  
rule to obtain return, 247.  
forms and requisites of returns to, 248, 249.  
proceedings on return of non est invenimus, 249.
1. Observations on law of arrest, 323.  
has varied at different periods of history, 324.  
formerly only for crime, *id.*  
reasons why not for debt, *id.*  
effect of statute of Marlbridge in action of  
account, *id.*  
of 25 Edw. 3, s. 5, c. 17, on actions of debt  
and detinue, *id.*  
of 19 Hen. 7, c. 9, in actions of the case, *id.*  
of 12 G. 1, c. 29, requiring affidavit of case  
of action, 324, 325.  
of 7 & 8 G. 4, c. 71, 325.  
changes in the law during these periods, 325,  
326.  
reasons for arresting, 158, 326.  
reasons against arresting, 137, 327.  
other reasons, 328 in note.
  2. Imprudence of arresting when debt doubtful,  
328.
  3. The privileges from arrest, 329 to 331.  
are absolute or limited, 329, 330.  
when absolute, 329.  
are so as to king's immediate attendants, &c.  
*id.*  
or domestic herald of king, *id.*  
on other servant on actual service, *id.*  
when Courts reluctant to relieve from, *id.*  
other persons privileged from, 329, 330.  
when limited or qualified, 330.  
in cases of witnesses, barristers, &c. 330, 331.  
when Court will relieve from, 330.  
when attorneys liable to, 330, 331.  
liabilities of attorney, &c. arresting privileged  
person, 331.  
second arrest after non proa, &c. prohibited,  
331, 332.

## CAPIAS, WRIT OF.—(continued.)

4. Requisites of affidavit to hold to bail, 324, 325, 331 to 341.
  - express requisites by statutes and rules, 331.
  - must be of *original* cause of action, 325, 331.
  - before whom made, 331.
  - fee on, *id.*
  - without affidavit arrest void, 332.
  - omission in, when fatal, *id.*
  - supplemental affidavit not allowed, *id.*
  - not considered commencement of action, *id.*
  - not to be intitled, *id.*
  - forms and requisites of affidavit, 332, 339.
    - to be intitled of the Court, 332.
    - but not in any cause, *id.*
  - deponent's abode, addition, &c. 333.
  - statement of cause of action, 334.
  - requisite precision in, *id.*
  - principle on which this proceeds, 334 to 337.
  - instances of defects in, *id.*
  - practical proceedings as to, 337.
  - before whom to be sworn, 338.
  - enactment of 12 G. 1. c. 29, s. 2, respecting, *id.*
  - does not affect foreign affidavits, *id.*
  - may be sworn before commissioner, *id.*
  - or before attorney retained in cause, *id.*
  - jurat of affidavit, 339.
  - what it must contain, *id.*
  - effect of erasure in, *id.*
  - fee on administering oath, *id.*
  - form of affidavit, *id.* See *Forms*.
  - defects in, when to be objected to, 340.
  - must be within reasonable time, *id.*
  - what deemed so, *id.*
  - delay in, when excused, *id.*
  - supplementary affidavit to supply defect prohibited, 332, 341.
  - of filing affidavit, 341.
  - duty of officer to file, *id.*
  - effect of neglect of, *id.*
  - if left in wrong office, *id.*
  - not essential to complete crime of perjury, *id.*
  - of second affidavit on concurrent process, 219, 341. See *Means Process*.
5. Of writ of *Capias* and requisites, 323 to 391.
  - See *Means Process*.
  - writ by which defendant arrested, 341.
  - by whom may be issued, 223, 341
  - form of, 135, 341 to 343.
  - indorsement on, 155, 206, 341, 343.
  - form of indorsement, 162, 244, 342, 343.
  - memoranda and warnings on, 155, 205, 342, 343.
  - full form of writ with warnings, 342.
  - king's name in, 164, 342.
  - direction to sheriff, 185 to 190, 342.
  - non omittas clause in, 190, 342.
  - name of defendant, 165 to 174, 342.
  - his residence, 174, 342.
  - addition of degree, 180, 342.
  - description of character, 182, 342.
  - where several defendants, 183, 342.
  - mistakes in, 231, 232, n. (o), 342.
  - form of action in, 194 to 199, 342.
  - description of plaintiff, 181, 199, 200, 342.
  - direction to sheriff and defendant and what each is required to do, 191, 200 to 202, 342.
  - description of Court in which defendant to put in bail, 342, 393.

## CAPIAS, WRIT OF.—(continued.)

- warning to defendant, 201, 343.
- direction to sheriff's officer, 343.
- signature of chief justice or baron, 202, 343.
- teste of, 90, 202 to 205, 343.
- signing of, 222, 343.
- sealing of, 224, 343.
- resealing of, 223, 343.
- indorsement of bail, 155, 343.
- practice to be observed in filling up blanks in, 343.
- directions when writ issued into county palatine, 185 to 190, 344.
- indorsements on writ, 344.
  1. Of sum sworn to, 160, 207, 344.
    - omission of, deemed an irregularity, 345, 207, 208, 212 to 215.
  2. Of attorney's name and place of abode, 208 to 211, 345.
    - in absence of officer may refuse warrant, 211, 345.
    - when plaintiff proceeds in person, *id.*
    - requisites to be observed as to, 208 to 212, 345.
  3. Of debt and costs claimed, 209, 212 to 215, 345.
    - consequences of omission, 212 to 215, 345.
- indorsement of day of issuing no longer requisite, 346.
- præcipe for a *capias*, 220, 346.
- form of, 221, 346.
- requisites and utility of, 320, n. (c), 346.
- defects in, when material, 347.
- 6. Practical proceedings on issuing *capias*, 222, 347.
  - of signing same, *id.*
- 7. Of sealing *capias*, 224, 347.
  - sealing no evidence of authenticity, 224, 225, 348.
  - examination of copies of, 229 to 233, 347.
- 8. Directions to officer not to arrest particular defendant, 151, 348.
  - may be subscribed or indorsed on writ, 348.
  - form of order, *id.*
  - the like by indorsement, *id.*
- 9. Of concurrent original writs into different counties, 216, 217, 348.
  - proceedings on each, 217, 218.
  - rule respecting 160, 161.
  - no second affidavit necessary, 221, 349.
  - requisites of alias and pluries writs, 217 to 219, 349.
- 10. When more than one affidavit of debt or copy to be filed, 349.
  - not requisite on issuing second process, 219, 220, 349.
  - when advisable to file copy, 219, 349, 350.
  - when fresh affidavit advisable, 350.
- 11. Of obtaining warrant to arrest, *id.*
  - practice on obtaining, 47, 350.
- 12. Form and requisite of warrant, 351.
  - under whose seal, *id.*
  - to whom addressed, *id.*
  - form of, *id.*
  - object of, 352.
  - variance between, and writ of *capias*, when immaterial, *id.*
  - when defendant may inspect, *id.*
- 13. delivery of warrant and writ and copies to officer, *id.*

## CAPIAS, WRIT OF—(continued.)

- within what time to be delivered, 352.
14. Of the arrest and several incidents, 353.
    1. consequences of arresting defendant by wrong name, *id.*, 3 Dowl. 678.
    - by initial or omitted christian name, 165 to 174, 353.
    - when may support action for false imprisonment, 353.
    - or be discharged out of custody on motion, *id.*, 3 Dowl. 678.
    - duty of officer on arresting, *id.*
    - of arresting wrong person, 354.
    - plaintiff liable to action of trespass, *id.*
    - where arrest of wrong person *collusive*, *id.*
    - discharge of defendant on ground of misnomer, *id.*, 3 Dowl. 678.
    - Court usually impose terms, *id.*
  2. Place of arrest, *id.*
    - must be within the county, *id.*
    - distinction between arrest and serviceable process, *id.*
    - exception as to places surrounded by another county, *id.*
    - when Court will interfere to discharge defendant, *id.*
  3. Time of arrest, 110, 355.
    - may be at any hour, *id.*
    - Saturday night after 12 excepted, *id.*
    - must not be on Sunday, Christmas-day or Good Friday, 355.
  4. Of second arrest, *id.*
    - allowed if undertaking not performed, *id.*
    - not after non. pros. &c. without leave of a judge, *id.*
  5. When defendant in custody, *id.*
    - proceeding by writ of detainer, *id.* See *Detainer*.
    - when in King's Bench or Fleet Prison, *id.*
    - when in custody of sheriff, *id.*
    - distinction between these cases, 356.
    - duty of officer to ascertain that first process legal, *id.*
    - his liability if illegal, *id.*
    - consequences of plaintiff colluding with third person, *id.*
  6. Mode of arrest, and what amounts to, 357.
    - no right to handcuff party, *id.*
    - unless escape attempted, *id.* Vol. I, 633, n. (s).
  7. Duty of officer thereupon, *id.*
    - must deliver copy of writ to defendant, 342, 357.
    - consequences of omission, 243, 357.
    - no amendment of copy allowed, 357.
    - must inform defendant that he may go to house of a friend for 24 hours, 358.
    - his duty in case defendant ill, *id.*
    - may return languidus, *id.*
    - form of such return, 249.
    - production of warrant to defendant, 358, 359.
    - consequences of refusal, 359.
    - must indorse on writ time of arrest, 244, 359.
    - consequences of neglect, 359.
  15. Of extortion on arrests, *id.*
    - enactments respecting, 359, 360
    - summary remedy for, 360.
    - when application must be made, *id.*

## CAPIAS, WRIT OF—(continued.)

16. Duty of officer to search for other writs, 360.
  - must do so within reasonable time, *id.*
  - what deemed such, *id.*
  - course to avoid temporary detention, 361.
17. Proper conduct of defendant on arrest, *id.*
  - demand of copy and inspection of warrant, *id.*
  - consequences of attempt to escape, if writ regular, *id.*
  - when writ irregular, *id.*
18. The several legal modes of obtaining release, 362.
  1. by deposit of sum sworn to and 10*l.* costs, *id.*
  2. by executing bail bond with 2 sureties, *id.*
  3. by attorney's undertaking, &c. *id.*
  - consequences of discharging defendant without requiring one of these, 363.
19. Of executing a bail bond. See *Bail Bond*.
  - requisites of, 363 to 366.
  - form of, 364.
20. Deposit with sheriff in lieu of bail, 366.
  - See *Bail*.
  - with whom to be deposited, *id.*
  - notice accompanying deposit, *id.*
  - proceedings after deposit, 367.
21. Payment into Court in lieu of bail above, *id.* See *Bail*.
22. Attorney's undertaking to put in bail, *id.* See *Bail*.
23. Change of officer, 368.
  - when advisable, *id.*
  - practice objectionable, *id.*
24. Proceedings for irregularities, *id.*
  - when to be taken, *id.*
  - should be at earliest opportunity, *id.*
  - consequences of delay, 369.
25. Of contradictory affidavits of non existence of debt, *id.*
  - when Court will receive, *id.* 370.
  - when not, 369.
  - instances of Court allowing them, 370.
26. Putting in bail above, &c., 370 to 386. See *Bail*.
  - declaration how effected by process of capias, 386. See *Declaration*.
  - proceedings on bail bond, 387 to 391. See *Bail Bond*.
  - proceedings against sheriff, 389 to 391.
  - proceedings to outlawry by writ of, 403.

CAPTURES. (See Index, Part I. II.)

CARNAL KNOWLEDGE, (See Index, Part I.)

CARRIERS. (See Index, Part II.)

CART BOTE. (See Index, Part I.)

CASE. (See Index, Parts II. III. IV.)

- how far plea of not guilty to operate in actions on the case, 797.
- illustrative instances, *id.*

CASE, SPECIAL. See *Special Case*.

CAT. (See Index, Part I.)

CATCHING BARGAIN. (See Index, Part I. II.)

CATTLEGATE. (See Index, Part I.)

**CAUSE OF ACTION.** (See Index, Parts II. III.)  
several counts on, not allowed, 63, 479.  
affidavit of, before arrest, 325, 331 to 341. See *Capias*.  
statement of, in affidavit to arrest, 334 to 337.  
consequences of defect in, 337.

**CAUSE LIST,**

who may interfere with, 41.

**CAVEAT.** (See Index, Part IV.)

**CERTAINTY.** (See Index, Part II.)

**CERTIFICATE OF JUDGE,**

effect of, as to second count, 458, 486.  
must be before final judgment, 486.

**CERTIFICATE.** (See Index, Parts III. IV.)

**CERTIFICATE OF BANKRUPTCY,**  
cognovit, when discharged by, 667.

**CERTIFICATED CONVEYANCER.** (See Ind.  
Part III.)

**CERTIORARI.** (See Index, Parts III. IV.)  
writ of, may be moved in Practice Court, 16.

**CESSER.** (See Index, Part I.)

**CESTUI QUE TRUST.** (See Index, Part III.)

**CHALLENGES AND FIGHTS.** (See Index, Pts.  
I. II.)

**CHAMBERS.** (See Index, Part I. and tit. *Summons*.)  
jurisdiction of single judge at, 4, 5, 19.  
attendance of judge at, 3.

1. In general, 19.

2. At common law, *id.*  
probable origin of, *id.*  
power of, in term or vacation, *id.*  
what business transacted at, *id.*  
his authority to make orders, *id.*  
considered the inceptive act of Court, *id.*  
when he should not make an order, *id.*  
should not, unless he thinks Court would  
ratify it, *id.*  
must be made a rule of Court before attach-  
ment, *id.*

party disputing may apply to Court, *id.*  
power over attorneys, 20.  
when may order attorneys to pay over  
money to client, *id.*

3. When jurisdiction to be resorted to, *id.*  
should in all cases where judge has power,  
*id.*

or application to Court censured, *id.*  
authority by statute, *id.*  
as under annuity act, *id.*  
for production of instrument, *id.*  
or take copy of same, *id.*  
in other cases, *id.*  
under 1 W. 4, c. 7, s. 1, to stay execution  
of writ of inquiry, *id.*  
under 2 W. 4, c. 39, s. 15, to compel  
sheriff in vacation to make return to  
process 20.  
in cases of omissions in writ, copy or in-  
dorsement, 21.  
under 3 & 4 W. 4, c. 42, s. 17, to order  
issues under 20l. to be tried before  
sheriff, *id.*  
or to postpone trial, *id.*

**CHAMBERS.**—(continued.)  
what jurisdiction under interpleader act, 21.  
jurisdiction increased under 2 W. 4, c. 39,  
21.

may impliedly interfere in all cases of  
irregularity, *id.*  
application should be immediate, 22.  
or may be too late, *id.*

4. Jurisdiction in matters not depending in  
his own Court, *id.*  
enactment of 11 G. 4 & 1 W. 4, c. 70,  
respecting, *id.*  
may make orders in all matters where a  
single judge may interfere, 22, 23.  
usual in term to apply to judge of Court in  
which matter depending, 23.  
in cases of habeas corpus, *id.*  
in vacation may bail party in custody on  
mesne process, *id.*  
and now may at any time, *id.*  
could not in vacation quash a defendant's  
demurrer, *id.*  
but may when sitting in Practice Court, 24.  
and now in all cases of frivolous demurrer  
under Reg. Gen. Hil. T. 4 W. 4, 755,  
756.

5. When a single judge cannot act either in  
term or vacation, *id.*  
could not when jurisdiction limited by sta-  
tute, 24, 28.  
as where debtor has been in custody twelve-  
months for debt under 20l., 24.  
application must be to full Court, *id.*  
cannot compound a penal action, *id.*  
cannot act in term time when power  
limited to vacation, *id.*  
or in matters relating to admission of at-  
tornies, *id.*  
or to take money out of Court when paid  
in under 43 G. 3, c. 46, s. 2, *id.*

6. Jurisdiction at chambers during the terms,  
25.  
former practice as to attendance, *id.*  
now altered, *id.*  
hours of attendance, 25, 27.  
evening attendance discontinued, 25.  
what matters decided before him, 25, 26.  
when he will refer matter to full Court, 26.  
cannot stay proceedings to indefinite time,  
*id.*  
but may for a time, *id.*  
as until the next term, *id.*  
or until rule nisi applied for, *id.*

7. Hours of attendance during term and va-  
cation, 27.

8. Business of term transferred to a judge  
after term, *id.*  
what business usually transferred, *id.*  
only such as justice requires, *id.*  
is considered matter of indulgence, *id.*  
when the Court will not direct cause to be  
shown at chambers, 27, 28.  
will not when party guilty of laches, 28.  
power of judge, how limited, *id.*  
has same power over costs as Court has, *id.*  
when disallowed, cannot be recovered, *id.*  
9. Judge's power at chambers to allow costs,  
29 to 32. See *Costs*.  
may give or refuse costs, 29.  
decisions in respect of, *id.*

principle on which judge has power over, 29, 30.

reasons for judge having this power, 29 to, 31.

10. When a judge's order is beyond his jurisdiction or improper, how to proceed, 32. cannot make order to pay debt by instalments, *id.*

if he do, plaintiff may treat same as a nullity, *id.*

though more prudent to apply to Court, *id.* when obtained by misrepresentation, 33. cannot interfere with cause list of another judge, *id.*

or direct order of trial, *id.*

if order inadvertently obtained may be disregarded, *id.*

11. Judge's order, how enforced, *id.* must be made a rule of Court before attachment, *id.*

when may be made a rule of Court, *id.*

when not promptly obeyed, *id.*

subsequent performance will not purge contempt, *id.*

12. Motions to Court to set aside a judge's order, *id.*

when final and cannot be set aside, *id.*

when not, 33, 34.

costs, when or not allowed on reversal, 34.

application should be made early, *id.*

if acquiesced in cannot be set aside, *id.*

delay, when excused, *id.*

sufficient objection must be stated, *id.*

should be made in presence of judge who made the order, *id.*

course when order made without jurisdiction, *id.*

when must be made a rule of Court before moving, *id.*

propriety of order cannot be impeached, 35.

costs, when allowed, *id.*

13. What orders of a judge conclusive and cannot be set aside, *id.*

are not, when power given by statute, *id.*

unless appeal to Court allowed, *id.*

under lord's act is final, *id.*

by judge of assize on remanding prisoner, *id.*

under interpleader act when not final, *id.*

over amendments in pleading, *id.*

under the pleading rules, when, *id.*

CHANCELLOR. (See Index, Part IV.)

CHANCERY, Court of. (See Index, Part IV.)

CHANGING VENUE, 646 to 658. See *Venue*.

CHAPEL. (See Index, Part I.)

CHARACTER,

description of, in writ, 181.

statement of, in affidavit, 538. See *Affidavit*.

denial of, must be pleaded specially, 723.

ascertaining character of witness, 843, 856.

CHARACTERS OF SERVANTS. (See Index, Part I.)

CHASTITY. (See Index, Part IV.)

CHILDREN. (See Index, Parts I. II.)

CHOSES IN ACTION. (See Index, Part I. II. III.)

CHRISTIAN NAME. See *Mimomcr*.

statement of, and consequences of mistake in, 165.

affidavit to account for mistake in, 166.

CHRISTMAS DAY,

when time in rule &c. expires on, 110.

CHURCH, CHAPEL AND CHURCHYARD, (See Index, Part I.)

CHURCH AND CHURCH RATE. (See Index, Parts II. IV.)

CHURCHYARD. (See Index, Part I.)

CHURCHWARDENS. (See Index, Parts II. IV.)

CIRCUIT. See "*Nisi Prius*." "*Trial*."

jurisdiction of judge on, 3, 22, 41.

one judge remains in town during, 22.

act by five several authorities, 41.

1. the commission of the peace, *id.*

2. the commission of oyer and terminer, *id.*

3. commission of gaol delivery, *id.*

4. commission of assize, *id.*

5. their authority at nisi prius, *id.*

enactments respecting, 41 to 43. powers of judge on circuit, enlarged by 1 Geo. 4, c. 55, s. 5,—42.

may make orders though cause not pending in his own Court, *id.*

when he may not, *id.*

may not after cause referred, *id.*

may permit amendments, *id.* See *Amendments*.

former practice as to, *id.*

instances of amendments, 43.

discretionary in judge to permit, *id.*

if refused, no appeal, *id.*

when permitted, party complaining may apply to Court in banc, *id.*

decision of judge, when conclusive, 44.

Court above cannot review propriety of decision, *id.*

when judge should permit amendment, *id.*

practice of summons and order on circuit, 45.

similar to practice in town, *id.*

course when amendment considerable, *id.*

authority of judge to order instant execution, *id.*

authority in cases of appeal, where justices have ordered possession of deserted premises, *id.*

time for transacting business on, 96.

CITATION. (See Index, Part IV.)

CIVILITY. (See Index, Part II.)

CIVIL TAKINGS. (See Index, Parts I. IV.)

CLAIM. (See Index, Parts I. IV.)

CLASSICAL EDUCATION. (See Index, Part III.)

CLERGY. (See Index, Parts II. IV.)

CLERKS. (See Index, Part I.)

- CLERKSHIP, ARTICLES OF.** (See *Index*, Part III.)
- CLIENT.** (See *Index*, Part III.)
- CLOSE.** (See *Index*, Part I.)
- COGNOVIT.** (See *Warrants of Attorney*.)  
 when may be given, 664.  
 proceedings thereon, *id.*  
 preferable to a warrant of attorney, *id.*  
 enactments respecting, 664, 665.  
 general regulations respecting, 665, 666.  
 advantage if given after declaration, 665.  
 time of giving, *id.*  
 terms of, when payable by instalments, 666, 667.  
 full form of, when whole debt payable on one day, 666.  
 the like where debt payable by instalments, 667.  
   execution to issue for whole on one default, *id.*  
 the like where execution to issue from time to time as instalment becomes due, *id.*  
 defeasance in, *id.*  
 stamp on, 668.  
   decisions as to, *id.*  
 must be filed within twenty-one days, 669.  
 when discharged by bankruptcy and certificate, *id.*
- COLLISION OF SHIPS.** (See *Index*, Part IV.)
- COMMENCEMENTS.** See *Declaration*.  
 of declarations, as prescribed by Reg. Gen. M. T. 3 Wm. 4,—454, 455, 459.  
 forms of, *id.*  
 description of process in, 466.  
 statements when irregular, *id.*  
 how to be objected to, 461, 466.  
 number of parties, 183 to 185, 466.  
 description by initials, 164 to 169, 464.  
 other requisites to be observed, 464 to 469.  
 of pleas, 716. See *Plea*.  
 general regulations respecting, 716, 717.  
 of affidavits. See *Affidavit*.  
   requisites of, 540.  
   omission of word "*oath*," when defective, *id.*
- COMMENCEMENT OF ACTION,**  
 preliminary steps to be observed before, 114 to 139.  
 what now considered commencement, 147, 159, 204, 332.  
 requisites to be observed to save statute of limitations, 406 to 408.
- COMMISSION.** (See *Index*, Parts II. IV. also *Evidence*.)  
 examination of witnesses by, 816.
- COMMISSION OF BANKRUPTCY.** (See *Index*, Part IV.)
- COMMISSIONERS,**  
 power of, to swear affidavits, when suspended, 545.
- COMMISSIONERS OF SEWERS.** (See *Index*, Part I.)
- COMMITMENT.** (See *Index*, Part III.)
- COMMON ASSAULT.** (See *Index*, Part III.)
- COMMON COUNTS.** See *Declaration*.  
 Reg. Gen. T. T. 1 Wm. 4, affecting, 452, 453, 476.
- COMMON JURISDICTION,**  
 meaning of term, 22, 23.
- COMMON JURORS.** See *Jury*.  
 time of summoning, 800.  
 qualification of, 795.
- COMMON OF FISHERY.** (See *Index*, Pt. I.)
- COMMON PAPER,**  
 of Practice Court, 17.  
 how disposed of, *id.*
- COMMON PLEAS, COURT OF.** (See *Index*, Part IV.)  
 number of judges in, 5.  
 business transacted in, 6.  
 Practice Court of. See *Practice Court*.  
 prothonotaries of, 38. See *Master*. *Prothonotary*.
- COMMONS.** (See *Index*, Part I.)
- COMPANY.** (See *Index*, Part II.)
- COMPENSATIONS.** (See *Index*, Parts I. II. III.)
- COMPLAINANT.** (See *Index*, Part III.)
- COMPLAINT.** (See *Index*, Part III.)
- COMPOSITION OF TITHES.** (See *Index*, Part I.)
- COMPOUNDING PENAL ACTIONS,**  
 plaintiff must agree, 693.  
 approbation of Court requisite, *id.*  
 cannot be before plea, *id.*
- COMPROMISE.** (See *Index*, Parts I. II. III.)
- COMPUTATION OF TIME.** (See *Index*, Part III.)
- COMPUTE, RULE TO,**  
 when may be obtained, 681.  
 showing cause against same, 682, 683.
- CONCEALMENT.** (See *Index*, Part III.)
- CONCEALMENT OF BIRTH.** (See *Index*, Parts I. II.)
- CONCLUDING SPEECH,**  
 of counsel at nisi prius, 909. (See *Trial*.)
- CONCLUSIONS,**  
 of declarations,  
   prescribed form of, in personal actions, 472.  
   varies in particular actions, 472, 473.  
 of pleas in bar, 719.  
 of replications, 744.
- CONCURRENT ACTIONS,**  
 staying proceedings in, 631.
- CONCURRENT WRITS,**  
 when plaintiff may issue, 216, 259.

**CONCURRENT WRITS**—(continued.)  
 forms of, 217.  
 what costs allowed on, 259.  
 proceedings thereon, 348.  
 when more than one affidavit for, requisite, 219, 220, 349.

**CONDITION PRECEDENT.** (See Index, Part II.)

**CONDITIONS OF SALE.** (See Index, Parts I. II.)

**CONDUCT OF WITNESS.** See *Witness*.  
 directing or instructing of, 845.

**CONFESSIONS.** (See Index, Part III.)  
 matters in, must be pleaded specially, 725.

**CONFIDENCE.** (See Index, Part II.)

**CONFIDENTIAL COMMUNICATIONS.** (See Index, Part III.)

**CONFIRMATION.** (See Index, Part I.)

**CONFLICTING AFFIDAVITS,**  
 how the Court, &c. decide upon, 369, 596.

**CONJUGAL RIGHTS.** (See Index, Part IV.)

**CONIES.** (See Index Parts I. II.)

**CONSENT,**  
 indorsement of, on a summons, 565.  
 staying proceedings by, 637.

**CONSISTORY COURT.** (See Index, Part IV.)

**CONSOLIDATING ACTIONS,**  
 when Court will compel plaintiff to consolidate, 643 to 646.  
 will if several actions unnecessary, 643.  
 but not if causes of action accrued at different times, *id.*  
 of suspending trial of more than one action, 643 to 645.  
 of entering into consolidation rule, 644.  
 rule binding on defendants, *id.*  
 but not on plaintiff, *id.*  
 terms of consolidation rule, *id.*  
 consent of plaintiff, when necessary, 645.  
 rule for, when allowed to be opened, *id.*  
 when to be modified, *id.*  
 when Court will interfere in favour of a defendant, *id.*  
 Gen. Reg. respecting, as to costs, *id.*  
 form of judge's order to stay trial of several actions, *id.*

**CONSTABLE.** (See Index, Part II.)

**CONSULTATION,**  
 propriety of, before trial, 864.  
 why witnesses should not be present at, 865.

**CONTEMPT.** (See *Attachment*.)  
 to bring party into, original rule must be shown to him personally, 585.

**CONTEMPTS.** (See Index, Part IV.)

**CONTINUAL CLAIM.** (See Index, Part I.)

**CONTINUANCE,**  
 notice of trial by, 778, 779.  
 form of notice, 779.

**CONTINUED WRIT,**  
 description of residence in, 179.  
 requisites to be observed to save statute of limitations, 407.

**CONTRACTION OF NAME,**  
 declaring by, 460, 461.

**CONTRACTS.** (See Index, Parts I. II. III.)

**CONTRADICTORY AFFIDAVITS,**  
 when allowed to dispute existence of debt, 369, 596.

**CONTRIBUTION.** (See Index, Part IV.)

**CONTUSIONS.** (See Index, Part I.)

**CONVENTIONAL PRACTICE,**  
 objections to, 56.  
 condemned by Court, *id.*

**CONVERSION.** (See Index, Part II.)

**CONVEYANCER, CERTIFICATED.** (See Index, Part III.)

**CONVEYANCERS.** (See Index, Part I.)

**CONVEYING WORDS.** (See Index, Part I.)

**CONVICTION.** (See Index, Parts II. III. IV.)

**COPARCENERS.** (See Index, Part I.)

**COPIES OF AFFIDAVITS.** See *Affidavit*.  
 delivery of, to opponent, when proper, 551.  
 taking of, by opponent, *id.*  
 delivery of, to counsel on moving rule nisi, 571  
 to opponent on showing cause, 568.

**COPY OF CONVICTION.** (See Index, Part III.)

**COPY OF WARRANT.** (See Index, Part III.)

**COPY OF WRIT.** See *Capias, Distraints, New Process, Summons*.  
 indorsement of service of, 258.  
 service of, how to be made, 260.  
 of what copy, *id.*  
 amendments of, 261.  
 by whom to be served, 262.  
 irregularities in, *id.*  
 on whom to be served, 263.  
 time of service of, 264.  
 place of service of, 265, 266.  
 mode of service of, 266.  
 indorsement of day of service, 244, 271.  
 irregularities in, and taking advantage of, 275.

**COPYHOLD.** (See Index, Parts I. II.)

**COPYRIGHT.** (See Index, Parts I. II.)

**CORN RENTS.** (See Index, Part I.)

**CORODIES.** (See Index, Part I.)

**CORONER,**  
 return of, to writ of habeas corpus against the writ, 27.



**CORPORAAL & INCORPORAAL PROPERTY.**

(See Index, Part I.)

**CORRECTION.** (See Index, Part I.)

**CORPORATION.** (See Index, Part II.)

issuing writ in name of, 169.  
consequences of misdescription, *id.*  
serving writ on, 263.

**COSTS.** (See Index, Parts I. II. III. IV.) also *Interlocutory Costs.*

importance of judge's decisions as to, 17, 18.  
showing cause at chambers against attachment for, 28.  
judge at chambers power over, 28, 29, 66.  
when cannot be recovered, 28.  
in cases of irregularity, 31.  
when should be allowed, *id.*  
reasons for allowance of, in certain cases, *id.*  
when refused on reversal of orders, 34, 35.  
taxing and allowance of, by master, 37.  
sheriff no power to certify when debt under 40s., 47.  
allowance of, by judges, 63.  
omission of giving day's notice of intention to tax, 73.  
disallowance of, when discretionary, 75, 78.  
refusal of, when objection trifling, 79, 80.  
discretion of Court over interlocutory costs, 80.  
liability of executor to, 118, 126.  
of letter before action, when allowed, 134 to 137.  
tender of debt without costs, when writ irregular, 275.  
payment of indorsed debt and costs, 280.  
of preparing declaration, when allowed, 440, 441.  
of application to strike out counts, 458.  
on issues tried, how allowed, 476, 477.  
Reg. Gen. H. T. 2 W. 4, r. 74, respecting, 477.  
rule how qualified, 479.  
power of judge to award, on summons, 567.  
when discretionary, 568.  
when imperative, *id.*  
allowance of, when notice of motion given, 571.  
when rule nisi refused, 577.  
praying of, in rule nisi, 582.  
of second summons for particulars of demand, 613.  
claims for, under interpleader act, when allowed, 625, 626.  
staying proceedings until security for costs given, 633 to 637.  
or until costs of former action paid, 636.  
of applications to change venue, 636, 637.  
of demurrers, 762.  
of special juries, 801, 802.  
of a view, 803.

**COSTS OF THE DAY.**

for not proceeding to trial according to notice, 782.

general regulations respecting, 782, 783.  
enactment of 14 G. 2, c. 17, s. 5, 782.  
should be moved for early, *id.*  
how allowed, 783.  
motion and rule for, *id.*  
in case of paupers, *id.*

**COTTAGE.** (See Index, Part I.)

**COUNSEL.** (See also Index, Part III.)

influence of, on judges, 7.

taking opinion of, 131.

suggested form of case for opinion of, 132.  
retainer of, 132. See *Retainer.*  
statements by, 535.

need not be corroborated on oath, *id.*

indorsements by, on brief, when conclusive, *id.*

attendance thereof on writ of inquiry, 679.

conduct of, on moving for rule nisi, 575.

on making rules absolute, 592, 594.

delivery of briefs to, on motions, 571, 589.

See *Brief.*

signature of, to pleas, when or not necessary, 720.

stating opinions of, in brief, 853.

duty of, on trial at nisi prius, 869 to 926. See *Trial.*

**COUNSEL'S OPINION.** (See Index, Part III.)

**COUNTERMAND,**

of notice of trial, 778, 779.

**COUNTIES PALATINE,**

writ of distringas into, 312.

form and requisites of, *id.*

**COUNTRY BAIL.** See *Bail.*

forms of affidavit of justification of, 382, 383.

**COUNTRY FLAT.** (See Index, Part IV.)

**COUNTS,**

rule avoiding several varying counts, 64.

**COURT OF REVIEW.** (See Index, Part IV.)

**COURTS OF LAW.** (See Index, Part IV.)

**COURT ROLLS.** (See Index, Part II.)

enforcing inspection of, 619, 620.

**COURTS.** (See Index, Parts II. IV.)

in which to proceed, 1 to .

enumeration of jurisdiction of, 2.

seal of, gives authenticity to process, 4.

particular proceedings incident to each, 86.

difference between proceedings in Courts of Law and Equity, 87.

**I. Jurisdiction and Practice of Court in Banc,**  
4 to 11.

1. in general, 4.

2. what acts must be transacted before the whole Court, 5.

3. what relationship or interest precludes a judge from acting, 9.

4. consequences of judges differing in opinion, 10.

5. limits of jurisdiction of judges, 11.

**II. Jurisdiction of one judge in Practice Court, *id.***

1. creation and jurisdiction of, *id.*

2. where holden, 15.

3. operation of 11 G. 4, and 1 W. 4, c. 70, as to the Practice Court, *id.*

4. extent of jurisdiction in K. B., *id.*

5. common and peremptory paper of this Court, 17.

6. limited expediency of this Court, *id.*

**III. Jurisdiction of a single judge at chambers, 19.**

## COURTS—(continued.)

1. in general, 17.
2. this jurisdiction at common law, 19.
3. when to be resorted to, 20.
4. when he may act in matters not depending in his own Court, 22.
5. when he cannot act, 24.
6. his jurisdiction during the term, *id.*
7. hours of attendance at chambers, 27.
8. business of terms transferred to a judge after term, *id.*
9. his power as to costs, 29.  
allowance of in certain cases, 31.
10. when judge's order beyond his jurisdiction or improper, how to act, 32.
11. his order, how enforced, 33.
12. motious to Court to set aside a judge's order, *id.*
13. what orders conclusive and cannot be set aside, 35.
- IV. Authority of the master of K. B., of prothonotary of C. P., and of master of Exchequer, 36.
  1. master on civil side of K. B., *id.*
  2. of Crown Office, 38.
  3. prothonotaries of C. P., *id.*
  4. master in Exchequer, 39.
- V. Jurisdiction of a judge at nisi prius, *id.*
  1. in Middlesex and London, in and after term, *id.*
  2. Court or single judge will not interfere with nisi prius cause list, 41.
  3. his power on the circuit, *id.*  
amendments on the circuit, 42.  
summons and order on the circuit, 45.
- VI. Jurisdiction of sheriffs and their deputies, 46.  
his power as a judicial officer,  
must appoint a deputy with an office in London, 47.  
notification of appointment of sheriff, 48.  
transfer of process and prisoners, *id.*  
functions of, executed by deputy, *id.*

## COURT OF EQUITY. (See Index, Part III.)

- course of proceeding in, 87.  
differs in practice to Court of Law, 87, 88.  
appearance in, *id.*

## COURTS, INFERIOR. (See Index, Part II.)

## COURT YARDS. (See Index, Part I.)

## COURTSHIP. (See Index, Part II.)

## COURTESY. (See Index, Parts II. III.)

COVENANT,  
plea of non est factum in, 726.

## COVENANTS. (See Index, Parts I. II. III.)

## COWS. (See Index, Part I.)

## CREDITORS. (See Index, Part I.)

## CREEKS. (See Index, Part I.)

## CRIME,

- objection to witness on account of conviction for, 810.

## CRIMES. (See Index, Parts II. IV.)

## CRIMINAL CASES. (See Index, Part IV.)

## CRIMINAL CONVERSATION. (See Ind. Pt. III.)

## CRIMINAL INFORMATION. (See Index, Parts II. IV.)

- notice of motion for, 534.  
practice as to moving for, *id.*

## CRIMINAL INJURIES. (See Index, Part I.)

## CRIMINAL PROCEEDINGS. (See Ind. Pt. III.)

## CRIMINAL TAKINGS. (See Index, Parts I. II.)

## CROPS. (See Index, Part I.)

## CROSS ACTION,

- when proper to bring, 659, 660.  
when to defend, 660.  
when plea of set-off preferable, *id.*  
setting off judgments in, *id.*  
costs of respective attorneys in, how to be paid, *id.*  
when Court will not stay proceedings in, 661.

## CROSS DEMAND,

- when proper to defend action on account of, 659, 660.  
when may be set off, 660, 661.  
bringing cross action for, 660.  
staying execution until action for, tried, *id.*

CROSS EXAMINATION OF WITNESSES, 897.  
See Trial.

## CROSS LIBELS. (See Index, Part II.)

## CROWN OFFICE,

- master of, his duty, 38.

## CROWN PROPERTY. (See Index, Part IV.)

## CRUELTY. (See Index, Parts I. II. IV.)

## CUM PERTINENTIIS. (See Index, Part I.)

## CUJUS EST SOLUM EJUS EST USQUE AD CÆLUM. (See Index, Part I.)

## CURIA CLAUDENDA. (See Index, Part I.)

## CURTILAGE. (See Index, Part I.)

## CUSTODY,

- defendant in, judge may bail in vacation, 28.  
detainer of defendant when in, 335. See Detainer.

## CUSTOM. (See Index, Part I.)

## CUSTOM HOUSE OFFICER. (See Index, Pt. II.)

## CUSTOMS AND EXCISE. (See Index, Part III.)

## CUSTOMS. (See Index, Part II.)

## DAMAGE FEASANT. (See Index, Part II.)

## DAMAGE, ILLEGAL. (See Index, Part I.)

## DAMAGE, TREBLE. (See Index, Part I.)

**DAMAGES.** (See Index, Part I. II.)  
assessment of, before sheriff, 47.  
ascertaining, on writ of inquiry, 675.

**DAMS AND FISHPONDS.** (See Index, Part I.)

**DANGER.** (See Index, Part II.)

**DANGEROUS WEAPON.** (See Index, Part II.)

**DATE OF WRIT,**  
requisites of, in writ, when issued, 152, 202.  
of process, commencement of action, 152, 159,  
204.  
statement of, in issue, 464.  
not necessary in declaration, *id.*

**DAUGHTER.** (See Index, Part III.)

**DAY.** (See Index, Part II.)  
when or not excluded, 109.  
Reg. Gen. Hil Term, 2 W. 4, respecting, 110.  
service of process at any hour of, *id.*  
fraction of, important to calculate, 110, 111.  
hour of, essential to ascertain, 110.  
service of rules, &c. limited to nine o'clock, *id.*

**DEAD BODY.** (See Index, Part I.)

**DEAD LANGUAGES.** (See Index, Part III.)

**DEATH.** (See Index, Parts II. III.)

**DEATH OF PARTY,**  
entry of, on record, 701, 804, 805.

**DE BENE ESSE,**  
declaring on serviceable process impliedly abolished, 296, 438.  
on bailable process, when, 439.  
plaintiff should declare so, when admissible, 441.  
difference when delivered, and when filed, 442.  
notice to plead, 449.

**DE BONIS ASPORTATIS,**  
in action for, how far plea of not guilty operates, 728.

**DEBT, PLEA OF,**  
plea of nil debet in actions of, abolished, 726.

**DEBT, AFFIDAVIT OF.** See *Affidavit. Copias.*  
objection to, when to be taken, 515 to 517.

**DEBT.** (See Index, Part I. II.)  
judge at chambers cannot give defendant time to pay, 28, 32.  
when under 20<sup>l</sup>. sheriff's jurisdiction, 47.  
tender of, when writ irregular, 275.  
payment of, and costs, 280.  
affidavit of, and requisites, 324 to 341. See *Copias.*

**DEBT AND COSTS.** See *Cognovit. Costs.*  
indorsement of amount of, on writ, 73, 74, 160,  
207, 212, 344.  
form of indorsement, 212, 238.  
omission to defect in, 74, 207, 208, 213, 345.  
instances of amendment of, 213 to 215.  
tender of debt, when writ irregular, 275.  
payment of, within four days, 280.  
offering to pay debt and costs to time of offer, 281.  
consequences of refusal of offer, 281.

**DEBT AND COSTS.** (Continued.)  
when Court will stay action on payment of, 660,  
661.  
giving time to pay, 663.

**DECISIONS OF JUDGES,**  
pronounced in term time, 8, 9.  
consequences of difference in, 10.  
course pursued, *id.*  
usually given seriatim, 17.  
in Banc preferred to those of a single judge, 55.  
current of, give effect to practice, *id.*  
consequences of contrary decisions, 67.

**DECLARATION.** (See Index, Part II.—*Second Counts. Irregularities.*)

- I. Instructions for, 429 to 431.  
duty of professional person, on obtaining, 429.  
should be full and in writing, 429, 430, 432.  
as well to plaintiff's cause of action as to expected defence, 429.  
two important objects to be kept in view by attorney, 430.
  1. not to be satisfied with mere statement of client, 480.  
should inquire into accuracy of statement, 430.  
and whether evidence sufficient, *id.*  
of obtaining further instructions when requisite, *id.*  
consequences of neglect, *id.*  
of leaving copies instead of original documents, 432.
  2. to examine declaration after drawn, 430.  
that same is properly drawn, *id.*  
and does not contain too many counts, *id.*  
his duty in case of doubt, *id.*
- II. Knowledge of pleading why essential to an attorney, 431, 432.  
knowledge of, saves client expense, 431.  
secures accuracy in the pleadings, *id.*  
qualifies him to draw declarations in certain cases, *id.*  
in cases of doubt to suggest alterations, *id.*  
success of action often depends on, *id.*  
when should be settled by counsel or pleader, *id.*  
when conference advisable, 432.
- III. Of enforcing inspection and copy of document to prepare declaration, 433 to 436.  
formerly bill of discovery requisite, 433.  
sometimes is so now, *id.*  
enforced by order of a judge, *id.*  
the like to have same stamped, 433, 435.  
production of, on trial, 433.  
this without terms being imposed, *id.*  
instances of applications, 453, 454.  
requisites to be observed before applying, 434.  
affidavit to ground application for, *id.*  
requisites of affidavit, 434, 435.  
form of, 434.  
of writing letter requesting inspection, *id.*  
affidavit need not state form of action, 435.  
though advisable to show that it is justly sustainable, *id.*  
application to be to judge at chambers, *id.*  
on his refusal may apply to Court, 435.

## DECLARATION—(continued.)

costs when allowed, 435.

form of summons to produce, &c. *id.*

## IV. Time of declaring, 436.

of declaring in general, *id.*difference between courts of law and equity in this respect, *id.*of ecclesiastical courts, *id.*

1. how soon formerly and at present plaintiff may declare, 437.

may as soon as rules of practice permit, *id.*formerly defendant must have appeared, *id.*cannot declare *de bene esse* on serviceable process, *id.*

on bailable may, 437, 438.

2. practice of declaring *de bene esse* on serviceable process impliedly abolished, 438.enactments respecting, *id.*now confined to bailable process, *id.*filing or delivering declaration on serviceable process, *id.*must be absolutely and not conditionally, *id.*

delivery of, before appearance, a nullity, 439.

time for appearance, *id.*3. declaring *de bene esse* on bailable process, 437 to 439.

effect of Reg. Gen. M. T. 3 W. 4, r. 11, 439.

declaration may be filed on ninth day after arrest, *id.*must not be delivered, *id.*

when several defendants and some not arrested, 440.

of declaring absolutely before appearance or bail above, *id.*when irregular to do so, *id.*what a waiver of irregularity, *id.*what a waiver of justification of bail, *id.*

4. unless debt and costs paid within four days, 440, 441.

plaintiff may *prepare* declaration, 441.costs of preparing same when allowed, *id.*when charges of *drawing* same allowed, *id.*5. should declare *de bene esse* when admissible, *id.*bail-bond or attachment will then stand as security, *id.*6. when declaration *de bene esse* becomes absolute, 442.does if bail put in and perfected, *id.*consequences of defendant's neglecting to do so, *id.*course of proceeding by plaintiff, *id.*7. difference in form of proceeding when delivered or filed *de bene esse*, *id.*form of declaration the same, *id.*of notice to plead, &c. when filed *de bene esse*, *id.*when delivered conditionally, *id.*8. cannot be delivered or filed between 10 Aug. and 24 Oct. *id.*enactments respecting, *id.*

other excepted days, 442, 443.

## DECLARATION—(continued.)

9. hour of the day when may be delivered, 443.

should be before 9 at night, *id.*delivery after that hour irregular, *id.*though not a nullity, *id.*10. within what time plaintiff must declare, *id.*consequences of neglect, *id.*of signing judgment of nonpros, *id.*when may be signed, *id.*

what time plaintiff has to declare in, 443, 444.

declaring against prisoners, 444.

Reg. Gen. of T. T. 3 W. 4, reg. 1, respecting, *id.*neglect to, when prisoner entitled to discharge, *id.*

11. time for declaring how calculated, 444, 445.

calculated from execution of writ, 444.

12. if no judgment of nonpros signed, 445, 446.

plaintiff may then declare within a year, 445.

to be computed from day of service or arrest, 445, 446.

applies to quare impedit, 445.

unless further time to declare obtained, *id.*year how computed, *id.*

delivery of, after an injunction, 446.

13. obtaining further time to declare, *id.*when he should apply for, *id.*

how to apply, 446, 447.

service of rule for, 447.

of obtaining further time, *id.*cannot be obtained against a prisoner, *id.*when one of several defendants has not been served or arrested, *id.*form of rule for time to declare, *id.*

V. Proceedings to compel plaintiff to declare, 448.

1. when no rule to compel declaration necessary, *id.*is necessary if action removed from inferior court, *id.*obtaining rule to declare peremptorily, *id.*absolute in first instance, *id.*2. written demand of, when necessary, *id.*when may be made, *id.*

propriety of making, 449.

3. form of demand of declaration, 448.

4. of signing judgment of nonpros, 449.

when may be signed, *id.*in case of several defendants, *id.*may be after expiration of four days from written demand of declaration, *id.*unless plaintiff obtain further time, *id.*defendant must have appeared, *id.*cannot be signed if declaration *in fact* delivered, 450.though attorney incompetent to act, *id.*5. of setting aside judgment of nonpros, *id.*when Court will set it aside, *id.*

requisite of affidavit, 450.

VI. Of the declaration itself, 450.  
 how affected by recent statutes and rules, *id.*  
 do not alter prior established principles, *id.*  
 altered in what respect, *id.*  
 nonobservance of rules merely an irregularity, 451.  
 cannot be taken advantage of by demurrer, *id.*  
 will be more concise than formerly, *id.*  
 statement of process in, *id.*

1. chronological statement of recent statutes and rules, *id.*
  1. of Reg. Gen. T. T. 1 W. 4, 451, 452.  
 limits the length of declarations, 452.  
 prescribes new forms of, in certain cases, *id.*  
 cases enumerated, 452, 453.
  2. of Hil. T. 2 W. 4, reg. 1 and 40, 453.  
 that venue in declaration different to that of writ should not discharge bail, 453.  
 applied only to actions by original, now abolished, *id.*
  3. of Hil. T. 2 W. 4, r. 4, *id.*  
 prohibits long recital of original writs, *id.*
  4. of M. T. 3 W. 4, r. 15, 454.  
 prescribes forms of commencement, *id.*  
 statement of title of Court, 454, 460.  
 day of filing or delivering, *id.*  
 form of commencement on a writ of summons, 454.  
 the like on a *capias*, *id.*  
 the like on a writ of detainer, *id.*  
 the like against several defendants where one arrested or detained and the other served with a copy of a *capias*, 455.  
 pledges at conclusion to be omitted, *id.*
  5. of Hil. T. 4 W. 4, reg. 1, *id.*  
 pleadings to be entitled of day when pleaded, 455, 460.  
 to be entered of record accordingly, 455.  
 unless otherwise ordered, *id.*
  6. of Hil. T. 4 W. 4, reg. 5, *id.*  
 prohibits more than one count or plea, *id.*  
 unless distinct matters of complaint or defence, *id.*  
 illustrative instances of declarations, *id.*  
*indebitatus* counts, 456.  
 when considered distinct counts, *id.*  
 account stated allowed to be added, 457.  
 several breaches admissible, *id.*  
 when or not several pleas admissible, *id.*  
 illustrative instances, *id.*  
 examples not to limit principle of rules, *id.*  
 costs of striking out same, 597.
  7. of Reg. Gen. Hil. T. 4 W. 4, r. 6, 458.  
 in enforcement of reg. 5, *id.*  
 course when reg. 5 violated, *id.*

application to strike out second count or plea, 458.  
 costs of application, *id.* 638.  
 application to whom to be made, *id.*  
 8. of Hil. T. 4 W. 4, r. 7, *id.*  
 in enforcement of reg. 5, *id.*  
 party retaining several pleas or counts, *id.*  
 liability on failing to establish same, *id.* 459.  
 certificate of judge as to costs, *id.*  
 9. of Hil. T. 4 W. 4, r. 8, 459  
 ordering when venue in margin sufficient, *id.*  
 proviso where local description requisite, *id.*  
 10. of Hil. T. 4 W. 4, reg. 20, *id.*  
 prescribing form of commencement of declaration in fresh action after plea in abatement, *id.*  
 form of, *id.*  
 11. of Hil. T. 4 W. 4, reg. 4, *id.*  
 respecting policies of insurance, *id.* 472.  
 statement of interest of assured, *id.*  
 may be in the alternative, *id.*  
 formerly otherwise, 459, 460, 472.  
 12. of Hil. T. 4 W. 4,  
 respecting trespass *quare clausum fregit*, 460, 470.  
 name or abutments must be stated, 460.  
 on failure to do so, defendant may demur specially, *id.*  
 13. alterations by 3 & 4 W. 4, c. 42.  
 s. 12, 164 to 179, 460, 464.  
 may declare by initials when, 460.  
 14. analytical summary of alterations by recent rules, *id.*

1. title of the Court, 454, 460, 463.
2. to be intitled of day of filing or delivering, 454, 455, 460, 463.
3. statement of venue, 460, 464.
4. as to the commencement, *id.*
5. statement of initials, *id.* 466.
6. declaration must correspond with process, 183 to 185, 461, 467.
7. commencement in second action after plea in abatement, 459, 461.
8. of not allowing more than one count, 461.  
 assigning several breaches, *id.*
9. prescribing form of conclusions, *id.*
10. statement of pledges, &c. to be discontinued, 456, 461.

- 15. consequences of deviating from above rules, *id.*  
 deviations deemed irregularities, *id.*  
 how to be set aside, *id.*  
 are not grounds of demurrer, *id.*  
 decisions respecting, 462.

2. Practical observations as to declarations, *id.*

## DECLARATION—(continued.)

how altered or affected by recent statutes and rules, 462.

*First*, Parts in particular, 463.

1. title of the court, *id.*

2. title as to time of filing or delivering, *id.*

applies only to personal actions, *id.*

does not to real actions, *id.*

or to scire facias or ejectment, *id.*

nor to declaration after removal from inferior Court, *id.*

deviations from rule how to be taken advantage of, *id.* 464.

statement of date of first writ in issue, 464.

not necessary in declaration, *id.*

3. stating venue in margin, *id.*

must not be repeated in body, *id.*

or in subsequent pleadings, *id.*

unless in actions where local descriptions requisite, *id.* 465.

deviations from rule no ground of demurrer, 465.

how to be objected to, *id.*

altering of, by consent, *id.*

4. the commencement of declaration, *id.*

description of the process in, 466.

former allegations now irregular, *id.*

what statements irregular, *id.*

how to be objected to, 461, *id.*

cannot be traversed by plea, *id.*

or taken advantage of by demurrer, 461, 466.

of the number of parties and their names, 183 to 185, *id.*

must correspond with the process, *id.*

description by initial when allowed, 466, 164 to 169.

commencement of second action after plea in abatement for nonjoinder, 459, 467.

when plaintiff sues in representative or other character, 467.

Reg. Gen. Hil. T. 4 W. 4, r. 21, respecting, *id.*

not necessary to state the form of action in the commencement, *id.*

therefore safer to omit same, 468.

consequences of misstatement in body of, *id.*

is not ground of demurrer, *id.*

may be set aside for irregularity, *id.*

when may be rejected as surplusage, 469.

when defendant a prisoner, and process from another court, *id.*

## DECLARATION—(continued.)

other requisites to be observed, 469, 470.

5. the body of the declaration, 470.

statement of time when material, *id.*

mistake in, aided after verdict, *id.*

demurring to, when inconsistent, 463, 470.

no statement of venue or place requisite, 470.

unless in action of quare clausum fregit, *id.*

how to be objected to, 460, 471.

striking out useless words, when proper to object to, 471.

when statement of place material, *id.*

statement of, in actions of trespass, *id.*

object of the rule in this respect, *id.*

nonobservance of, defendant may demur specially, *id.*

in actions on policies, 472.

stating interest of parties insured, *id.*

may be in the alternative, 459, 472.

other alterations as to body of the declaration, *id.*

admitting part payment on the face of declaration, *id.*

6. the conclusion, *id.*

prescribed form of, in all personal actions, *id.*

though varying in particular actions, *id.*

in actions qui tam, 473.

irregular to conclude in the exchequer quo minus, *id.*

7. statement of pledges to be discontinued, *id.*

8. other matters to be observed, *id.*

*Secondly*, Prohibitions of unnecessary length in declaration by former rules and practice, *id.*

jurisdiction of Court to strike out unnecessary matter, *id.* 474.

instances of injudicious and unnecessary statements, 474, *n.*

*Thirdly*, Impolicy of overstatements in pleading, 474.

consequences of doing so, *id.*

*Fourthly*, Origin of several counts for same cause of action, 475.

costs on, how allowed, *id.*

*Fifthly*, Alteration by Reg. Gen. Trin. T. 1 W. 4, 476.

reduced length of counts on bills, notes, &c. *id.*

in other cases, *id.*

abolished quantum meruit and valebant counts, *id.*

costs on excess of length of declaration, when and how allowed, *id.*

*Sixthly*, Alterations effected by Reg. Gen. Hil. T. 2 W. 4, r. 74, *id.*  
allowance of costs on issues, 476.  
477.  
allowed on those in which plaintiff succeeds, 477.  
to defendant on those found for him, *id.*  
rule how acted upon, *id.* 478.  
decisions respecting, 477.  
impropriety of introducing a *doubtful count*, 478.  
or stating more than can be proved, *id.*  
rule extends to the result of an award, *id.*  
inexpedient to raise an issue if evidence insufficient, *id.*  
rule how qualified, 479.  
*Seventhly*, Practical consequences affecting the structure of declaration or plea, &c. *id.*  
costs on pleading found for plaintiff or defendant, *id.*  
*Eighthly*, Effect of Reg. Gen. Hil. T. 4 W. 4, r. 5, 6, 7, *id.*  
prohibits several counts, *id.*  
unless subject-matter of complaint distinct, *id.*  
operation of prohibitory provision, *id.* 480.  
consequences of nonobservance, *id.*  
formerly only one count allowed, 479.  
when requisite to insert more than one count, 480.  
enactment of 5 & 4 W. 4, c. 42, s. 23, respecting amendments, *id.*  
variances amended on trial, *id.*  
provided other party not prejudiced on the merits, *id.*  
should be liberally allowed, 480, 481.  
above rule why promulgated, 480.  
*Ninthly*, When or not several counts may or should still be inserted, *id.*  
examples given by rule to be carefully studied, 455 to 458, 481.  
intended operation of rule thereby elucidated, *id.*  
account stated expressly excepted, 482.  
when should not be added, *id.*  
several breaches not prohibited, *id.*  
instances where several counts advisable, 482 to 485.  
meaning of words "distinct subject-matter of complaint," 482, 483, 486.  
decisions in favour of several pleas should apply to allowance of several counts, 483.  
if want of proof uncertain, two counts advisable, 484.

course to be observed on application to strike out counts, 638.  
suggestions for changing the forms of declarations in some cases, 485.  
declaring upon a *general duty*, and assigning *several breaches* thereof, *id.*  
instances when advisable to do so, *id.*  
*Tenthly*, Pleading influenced by consideration of costs, 486.  
when advisable to withdraw untenable count or plea, *id.*  
*Eleventhly*, Rule how far imperative on the judge at chambers or *nisi prius*, *id.*  
judge must make order to strike out superfluous count, *id.*  
unless sufficient cause shown, *id.*  
what deemed sufficient cause, *id.*  
consequences of failure on the trial, *id.*  
certificate of judge on trial as to second count, *id.*  
certificate must be before final judgment, *id.*  
effect of certificate, *id.*  
*Twelfthly*, Observations on the effect of these rules, 487.  
impolicy of non observance of them, 488.  
3. Other practical matters connected with declarations, 489.  
1. mode of engrossing or writing same, *id.*  
must be written in the English tongue, *id.*  
in words at length, *id.*  
penalty for abbreviation, *id.*  
other regulations, 489, 490.  
2. Number of copies in case of a prisoner, 490.  
formerly three copies requisite, *id.*  
now two sufficient, *id.*  
one to be served, the other filed, *id.*  
3. When to be delivered, 490, 491.  
4. When to be filed, 491.  
5. Notice of declaration when filed, *id.*  
how to be given, *id.*  
on whom served, *id.*  
course when residence unknown, *id.*  
of obtaining leave to stick same up in office, 491, 492.  
requisites of affidavit to obtain leave, 492.  
6. Requisites of such notice of declaration when filed, *id.*  
not materially altered by new rules, 493.  
irregularities in, how to be objected to, 494, 519.  
7. Time of pleading to be stated in

**DECLARATION—(continued.)**

- notice of declaration when filed, 494.
- consequences of giving less time, *id.*
- of giving more than defendant entitled to, 495.
- what time allowed, *id.*
- defects in, when objected to, *id.*
- 8. form of notice of declaration having been filed on serviceable process and to plead, where appearance entered sec. stat. 494.
- 9. The like *de bene esse* on bailable process, 495.
- 10. Of declaring by the bye, *id.*
- Of accompanying particulars of plaintiff's demand, when requisite, 496, 612.
- effect of Reg. Gen. T. T. 1 W. 4, r. 6, as to, *id.*
- Other points,
  - taking declaration out of office, 520, 610, 710.
  - proceedings between declaration and plea, 609 to 646.
  - reducing length of, by consent, 642.
  - of striking out second counts, 638. See *Second Counts*.
  - amendment of, when delivered in vacation, 21.
  - amendment of, when jurisdiction of judge discretionary, 33, 35.
  - how to be intitled, 62, 63, 113.
  - beginning and conclusion of, 62.
  - against a prisoner, *id.*
  - time and date of, 113.
  - in ejectment, when may be served, 100, 102.
  - in ejectment need not be dated of day served, 113.
  - delivery of, between 10th August and 24th October, 96.
  - service of notice of, on Sunday void, 105.
  - de bene esse* on writ of summons irregular, 296.
  - how affected by writ of *habeas corpus*, 386.

**DECLARING BY THE BYE, 495.****DECEIT. (See Index, Part I.)****DECOY. (See Index, Part I.)****DECREE. (See Index, Parts II. IV.)****DEED. (See Index, Parts I. III.)**

- demand of oyer of, 618.
- enforcing inspection of, 433 to 436.

**DEEDS IN GENERAL. (See Index, Part I.)****DEER. (See Index, Part I.)****DEFAMATION. (See Index, Part IV.)****DEFAMATORY WORDS. (See Index, Part IV.)****DEFAULT. See Judgment by Default.**  
judgment by, 671 to 680.**DEFEASANCE. (See Index, Part I.)****DEFECTS. (See Index, Part III.)****DEFENCE. (See Index, Part III.)****DEFENCE AGAINST INJURIES. (See Index, Part II.)****DEFEASANCE,**

- in cognovit, &c. 669. See *Cognovit*.

**DEFECTIVE UNDERSTANDING,**

- objection to witness, ground of, 810.
- improvement of, before trial, 826.

**DEFECTS. See Irregularities.**

- when to be taken advantage of, 510 to 512.

**DEFENCE. (See Pleas.)**

- several pleas on same ground of, not allowed, 63.
- want of, when defendant should stay action, 659.
- staying proceedings at law to render defence in equity available, 632.
- what defence may be pleaded, 698.
- propriety of giving notice of intended defence, 836, 837.
- form of notice, 837.
- statements of anticipated defence in brief, 835.
- See *Brief*.

**DEFENDANTS. (See Index, Part III.)**

- rule of M. T. 3 W. 4, respecting number of, 61.
- addition of, 73, 118.
- suggested questions to, before defence, 124.
- who to be defendant considered, 125, 126.
- when advisable not to arrest, 137, 138.
- when to arrest, 138, 139.
- necessity for process and notice to, considered, 141.
- direction to, in writ, 164.
- statement of name of, 165.
- form of affidavit to account for wrong name of, 166.
- omission or mistake in name of, 170, 3 Dowl. 678.
- amendment of name of, 173.
- statement of residence of, 174, 215.
- consequence of mistake in, 174.
- the like in continued writ, 179.
- addition of degree when or not necessary, 180.
- character in which sued, 181.
- names of, when several, 183.
- must be inserted in every writ, *id.*
- notice to, and consequence of non appearance, 201, 205.
- warning to, in writ, *id.*
- when not to arrest a particular defendant, 209.
- description of, in bailable process, when necessary, 215, 216.
- notice to, not to appear to process, 234.
- requisites to be observed by the defendant after process executed, 249, 250.
- forms of returns where defendant in custody, 248, 249.
- appearance to process, 282 to 296. See *Appearance*.
- residence of, how ascertained, 284.
- entry of appearance by plaintiff sec. stat. 288 to 296.



**DEFENDANT—(continued.)**

appearance to writ of *distringas*, 314. See *Distringas*.  
 when plaintiff may enter without leave, &c. 315.  
 proper conduct of, on arrest, 361.  
 legal modes of obtaining release from arrest, 362.  
 proceedings to compel defendant to plead, 497 to 508.  
 staying proceedings by, 610 to 661. See *Staying Proceedings*.  
 preparing brief for, on trial, 860. See *Brief*.  
 defending separately at *nisi prius*, 907. See *Trial*.  
 postponing trial on behalf of, 871. See *Trial*.

**DEGREE,**

statement of, in writ, 180.  
 against a peer, when necessary, 181.  
 against member of parliament, *id*.

**DELAY. (See Index, Part II.)**

what a sufficient excuse for, in not proceeding to trial, 791.  
 what not, 792.

**DELICACY. (See Index, Part III.)****DELIVERY. (See Index, Part III.)****DELIVERING DECLARATION. See Declaration.**

when to be delivered, 490.  
 objection to irregularities in, 519.

**DELIVERY OF PLEA, 772. See Plea.****DEMAND. (See Index, Parts II. III.)**

of authority of plaintiff's attorney to sue, 251.  
 form of, *id*.

**DEMANDING OYER,**

when should be made, 618.  
 form of demand, *id*.  
 practice as to, 618, 619.  
 general regulations respecting, 619.

**DEMAND OF DECLARATION,**

when necessary before signing judgment of non-pros, 448.  
 form of demand of, *id*.

**DEMAND OF PARTICULARS, 611 to 618. See Particulars of Demand.****DEMAND OF PLEA,**

general regulations respecting, 505.  
 may be made when declaration delivered, *id*.  
 when not necessary, 505, 506.  
 time of demanding, 506.  
 must not be made before appearance, *id*.  
 care to be observed before demanding, *id*.  
 when demand a waiver of bail, *id*.  
 when should not be indorsed on declaration, *id*.  
 may be made before rule to plead, *id*.  
 when demand of, expires, 507.  
 when judgment may be signed, *id*.  
 form and mode of demand must be in writing, *id*.  
 form of demand, *id*.  
 of separate demand, *id*.  
 demand of, how served, 507, 508.  
 taking advantage of irregularity, 520.  
 when material to ascertain precise instant of demand, 111.

VOL. III.

**DEMURRER.****I. Of demurrers in general, 752, 753.**

when or not advisable or proper, 752, 753, 758.

is usually on part of defendant for delay, 754.  
 judge at chambers could not quash, when filed for delay, 23.

but now otherwise, 756.

**II. Recent rules respecting demurrers, 755.**

concise form of general demurrer prescribed, *id*.

form of special demurrer, *id*.

form of joinder in demurrer, *id*.

must be delivered, 755, 758.

tenable objection must be stated in margin, 755, 759.

if not, Court or judge may set aside, 756,  
 but on argument other points may be urged, 755.

no rule to join in, requisite, 755, 758.

signature of counsel to joinder in, not necessary, 756, 758.

making up of demurrer book, 756, 758, 759.

no rule for concilium requisite, 756, 759.

delivery of, to judges, *id*.

**III. Summary of recent improvements respecting, 756.**

general rules respecting, 756 to 760.

distinction between special and general demurrers, 757, 758.

**IV. Proceedings on argument, 760.****V. Of withdrawing demurrer, 761.**

amending upon the Court's intimation, *id*.

**VI. Costs of, how allowed, 702.****DEMURRER BOOK,**

by whom to be made up, 756, 759.

when to be delivered, 756.

general regulations respecting, 758, 759.

how to be made up, 758.

statement of objections in margin, 759.

delivery of, to judges, 756, 759.

**DEPONENT. See Affidavit.**

requisites in affidavit to be observed by, 535 to 554.

statement of addition of, 539.

genuine language of, when to be adhered to, 541.  
 signature of, 545.

when may be in a foreign character, *id*.

**DEPOSIT,**

of sum sworn to, &c. in lieu of bail-bond, 66, 366, 370.

the like in lieu of bail above, 367.

**DEPOSITIONS. (See Index, Part III.)****DEPUTY OF SHERIFF,**

imperative on sheriff to appoint, 47.

must have office within one mile of Inner Temple, 47.

liability of, *id*.

functions of, 48.

**DESCENT. (See Index, Part I.)****DETAINER, WRIT OF. (See Index, Pts. II.****III.) See Mesne Process.**

when to be issued, 337, 392.

form of, 150.  
to whom may be directed, 392.  
forms of direction, 392, 393.  
when inoperative, 393.  
is so if prior arrest by same plaintiff illegal, *id.*  
other instances, *id.*  
regular if issued without collusion by third person, though first arrest illegal, *id.*  
declaration on a writ of detainer, 393, 551, 152, 454.  
rule M. T. 3 W. 4, respecting, 394.

**DETENTIONS.** (See Index, Part I.)

**DETINUE.** (See Index, Part II.)  
offering to deliver up goods after action brought, 281.  
consequences of offer being refused, *id.*  
staying proceedings in, 691 to 693.  
plea of non detinet in action of, 727.

**DEVIATIONS.** See *Irregularities.*  
from statutory enactments not allowed, 51.  
otherwise of rule of Court, *id.*  
consequences of, 69 to 72, 509 to 534.

**DEVISE.** (See Index, Parts I. II.)

**DIES NON,** 104 to 106.  
return of process on, 75.  
execution of writ on, void, 75, 314.

**DIGGING.** (See Index, Part I.)

**DIGNITARIES AND OFFICES.** (See Index, Part I.)

**DILAPIDATIONS.** (Index, Part I.)

**DIOCESAN COURT.** (See Index, Part IV.)

**DIRECTORY REGULATIONS,**  
non observance of, 64 to 68, 509 to 534. See *Irregularities.*

**DISABLING.** (See Index, Part I.)

**DISCHARGE,**  
under insolvent act no ground to set aside out-lawry, 405.

**DISCLAIMER.** (See Index, Part I.)

**DISCONTINUING ACTION,**  
when advisable to do so, 739.  
need not, unless ruled to reply, *id.*  
general regulations respecting, 740.  
payment of costs on, *id.*

**DISCOVERY.** (See Index, Parts II. III. IV.)  
bill of, to enforce inspection of documents, 433.  
of new evidence just before trial, 865.

**DISCRETIONARY JURISDICTION.** (See Index, Part II.)  
of a judge when conclusive, 33, 35, 69.  
when statute clear, judge or Court has none, 51.

**DISPARAGING QUESTIONS,**  
when may be put to a witness, 899,

**DISPUTED SERVICE,**  
of writ of summons, 272.

time of making, 110.  
**DISTRINGAS JURATORES,**  
form of writ of, 797.  
to whom to be directed, *id.*

**DISSEISIN.** (See Index, Part I.)

**DISSENTERS** (See Index, Part II.)

**DISTINCTIONS.** (See Index, Part I.)

**DISTRIBUTIONS.** (See Index, Part I.)

**DISTRESS WARRANT.** (See Index, Part III.)

**DISTRINGAS, WRIT OF.**

1. How regulated by 2 W. 4, c. 39, s. 3, 298.  
has a double operation, 298.  
object of writ to enforce appearance, 298, 299.

duty of sheriff on executing, 298.  
when sheriff can neither distrain or serve, 299.

return by sheriff, 90, 299.  
entering appearance by plaintiff, 299.  
notice to defendant of intention of plaintiff to enter appearance, or proceed to out-lawry, *id.*

must not be framed in the alternative, *id.*  
writ of summons must precede distringas, *id.*

is never preceded by writ of capias, 298.  
affidavit that writ of summons has been issued, 299.

requisites to be observed on issuing writ, *id.*  
teste and return of writ, *id.*  
like before entering appearance, 300.

2. When writ proper to enforce appearance, 150, 300.

use and propriety of, 300.

1st, is so when party is in England and has tangible property, *id.*  
so when resident abroad, *id.*

2d, to proceed to outlawry, 300, 301.  
requisites of affidavit in latter case, 301.  
must show attempt to serve ineffectual, *id.*

3. Practice to enable plaintiff to enter appearance in first case, *id.*

1. Where plaintiff has known, though occasional residence, 302.

requisite of affidavit, 302, 304.

must particularize attempts to serve, 302.

and show diligent enquiries to effect object, *id.*

when delusive means may be resorted to, *id.*

when not, *id.*

proper proceedings to be adopted, 302, 303.

what number of attempts requisite, 303.  
statement of, in affidavit, *id.*

by whom may be made, 303, 304.

to whom made, 303.

requisites to be observed on each attempt, 303, 304.

the like on last call, 304.

when omission or variance in copy vitiates, 304.

**DISTRINGAS, WRIT OF—**(*continued.*)

- will not, if *sense* unaltered, 304.  
when letter advisable on first attempt to serve, *id.*
2. Search for defendant's appearance, 305.  
requisites of affidavit to apply for writ, *id.*  
must show that more efficacious process necessary, *id.*  
and particularize attempts to serve, *id.*  
must swear to belief that defendant keeps out of way, *id.*  
must show causes and ground for belief, *id.*  
and of indorsement of service of copy, 306.  
of ineffectual search for appearance, 291, 292, 306.  
that writ and copy were regular, 306.  
suggested form of affidavit to obtain writ, 306, 307.  
first call with copy, 307.  
second call, *id.*  
third call, *id.*  
delivering and leaving copy of writ, 308.  
production and showing original writ, *id.*  
request to deliver copy to defendant, *id.*  
of inability to serve copy personally, *id.*  
of belief that defendant was at home, *id.*  
and seen going in and out of residence, *id.*  
indorsement of day of leaving writ, 243, 308.  
statement of search for appearance, 308.  
requisites when attempt to serve in the country, *id.*
3. Proceedings thereon, 308, 309.  
search for appearance, 309.  
affidavits of search, *id.*  
motion for writ, *id.*  
suggestions as to, *id.*  
rule for writ, *id.*  
form of rule, *id.*  
judge's order for, in vacation, 310.  
practice on obtaining, 309.
4. *Præcipe* for distringas, 310.  
form and requisites of, *id.*
5. Form and requisites of writ, *id.*  
form of, 154, 310.  
notice to be subscribed to, *id.*  
must be tested of day when issued, 310.  
and returnable in term, *id.*  
if returnable on dies non, void, 311.  
to whom directed, *id.*  
form of action in, *id.*  
omission or variance in, *id.*  
practice as to signing and sealing writ, *id.*  
indorsements on, 312.  
when issued into a county palatine, *id.*
6. Proceedings on writ, and how to be executed, *id.*  
practice as to, 312, 313.  
sheriff's warrant to officer, 313.

**DISTRINGAS, WRIT OF—**(*continued.*)

- when service may be made, 313, 314.  
when may distrain, 313.  
service on dies non void, 314.
7. Defendant's own appearance to writ, *id.*  
must be within eight days inclusive of the return day, *id.*
8. Proceedings in case of actual levy and personal service, *id.*  
when defendant has not appeared, 315.  
entry of, by plaintiff, *id.*  
may be done without leave of Court or judge, *id.*  
otherwise if no distress, or personal service, *id.*
9. Proceedings on plaintiff's entering appearance without leave, *id.*  
requisite search for appearance, *id.*  
obtaining sheriff's return to writ, *id.*  
form of return, *id.*  
affidavits of execution of service of writ, 316, 317. See *Forms*.  
filing of affidavits, 316.
10. Proceedings, where leave of Court or judge essential, to enter appearance, 317.  
is so when defendant cannot be personally served, *id.*  
or goods taken, *id.*  
return of sheriff in these cases, 90, 317, 318.  
forms of return, 317.  
affidavit of ineffectual attempts to serve, 317, 318.  
cannot be dispensed with, 318.  
application to Court or judge, 317, 318.  
rule of Court to enter appearance, 318.  
judge's order to like effect, 318.  
plaintiff's entering appearance thereon, 319.  
requisites to be observed, *id.*  
where defendant resided in furnished lodgings, *id.*  
where defendant has known residence in England, but out of kingdom, 320.  
where defendant has no known residence, but supposed to be in England, *id.*  
what endeavours to serve requisite, *id.*  
requisites of affidavit, 320, 321.
4. Proceedings in non-bailable cases to outlaw defendant, 321, 400 to 403.  
where no known residence, 321.  
requisites of affidavit, *id.* See *Outlawry*.  
declaring after proceeding by distringas, *id.*  
must be absolutely, *id.*  
and not *de bene esse*, *id.*  
must not be before appearance, *id.*

DISTURBANCE. (See Index, Part II.)

DITCHES. (See Index, Part I.)

DIVIDENDS. (See Index, Part IV.)

DIVORCE. (See Index, Part IV.)

DOCKS. (See Index, Part I.)

DOCUMENTARY EVIDENCE. See *Evidence*.  
admission of, 810.

**DOCUMENTARY EVIDENCE—(continued.)**

- power of judges to make regulations respecting admission of, 817.
- proceedings requiring admission of, 818.
- prescribed form of request, *id.*
- necessity for previous examination of, 825.
- of notices to produce, 834.
- enforcing inspection of, 433 to 435, 619, 620.

**DOCUMENTS.** (See Index, Parts III. IV.) also *Declaration. Inspection.*

- enforcing inspection of, before declaration, 433 to 435.
- producing same at stamp-office, 433.
- inspection of, how enforced, 619, 620.
- when to be annexed with affidavit, 548.
- drawing up rule nisi "on reading of documents, &c." 579.
- power of judges to make regulations respecting admission of, 817.
- statement of, in brief, 852. See *Brief*.

**DOGS.** (See Index, Parts I. II. III.)**DOG SPEARS.** (See Index, Parts I. II.)**DONATIO MORTIS CAUSA.** (See Index, Part I.)**DONATIONS TO CHILDREN.** (See Index, Pt. I.)**DOUBLE LIABILITY.** See *Interpleader.*  
relief from, under interpleader act, 620, 621.**DOUBLE PLEAS.** See *Several Pleas.*  
when or not allowed, 731 to 737.**DOUBTFUL COUNT,**  
introduction of, improper, 478.**DOUBTFUL EVIDENCE.** See *Evidence.*  
propriety of adducing, considered, 826.**DOWER.** (See Index, Parts I. IV.)**DRAFTS.** (See Index, Part I.)**DRAMATIC REPRESENTATIONS.** (See Index, Part II.)**DRUNKENNESS.** (See Index, Parts II. IV.)**DUEL.** (See Index, Part II.)**DURATION,**  
of a writ of summons, 256.  
limited to four months, *id.*  
but may be continued, *id.***DUTIES.** (See Index, Part I.)**DWELLING HOUSE.** (See Index, Part I.)**EASEMENT.** (See Index, Part I.)**EASIER,**  
proviso when term falls in, 91.**EASTER TERM,**  
commencement and duration of, *id.***EAST INDIA STOCK.** (See Index, Part II.)**ECCLESIASTICAL DUES.** (See Index, Part IV.)**ECCLESIASTICAL COURT.** (See Index, Part II. IV.)  
practice of, how proved, 83.**ECCLESIASTICAL OFFENCE.** (See Ind. Pt. IV.)**ECCLESIASTICAL OFFICERS.** (See Ind. Pt. IV.)**ECCLESIASTICAL PERSONS.** (See Ind. Pt. II.)**EDUCATION OF ARTICLED CLERKS.** (See Index, Part III.)**EGGS OF BIRDS.** (See Index, Part I.)**EJECTMENTS.** (See Index, Parts I. II. III.)  
trial of, on circuit, 45.  
of immediate execution, 45, 92, 93.  
trial of, in vacation, 92.  
former practice as to declaration in, 100.  
when may be served, 100, 102.  
need not be entitled of day when served, 113.  
service of declaration on wife of tenant, 263.  
staying proceedings until residence of plaintiff known, 636.  
or security for costs given, *id.*  
what a sufficient residence, *id.*  
until costs of former action paid, *id.*  
right of counsel to begin in actions of, 876.**ELECTION.** (See Index, Part I.)**ELECTION PETITIONS.** (See Index, Part IV.)**EMBEZZLEMENT.** (See Index, Part I.)**EMBLEMENTS.** (See Index, Part I.)**ENFRANCHISEMENT.** (See Index, Part I.)**ENGLISH,**  
all process must be in, 158.**ENLARGEMENT.** (See Index, Part III.)**ENLARGING RULES,**  
practice as to, 586, 587.**ENROLMENT.** (See Index, Part III.)**ENTERING ISSUE,** 771. See *Issue.***ENTRIES, FORM OF,**  
when judges may alter, 63.**ENTRY.** (See Index, Parts I. II.)**ENTRY OF NAME.** (See Index, Part III.)**ENTRY ON LAND.** (See Index, Part II.)**EQUITABLE ESTATES.** (See Index, Part I.)**EQUITABLE MORTGAGES.** (See Index, Parts I. II.)**EQUITY,**  
difference between proceedings in, and at law, 87, 88.  
bill of interpleader in, 627.  
for injunction in, *id.*  
for a discovery, *id.*  
staying proceedings at law, to give effect to defence in Equity, 632.**EQUITY, COURTS OF.** (See Index, Pts. II. IV.)

**EQUITY DRAFTSMEN.** (See Index, Part III.)

**EQUITY OF REDEMPTION.** (See Index, Pt. I.) 369.

**ERROR, COURTS OF.** (See Index, Part IV.)

**ERROR, WRIT OF.** (See Index, Part IV.)

**ESCAPE.** (See Index, Part II.)  
inspection of writ in action for, 433.

**ESCHEAT.** (See Index, Part I.)

**ESCROW.** (See Index, Part I.)

**ESSEIGN DAYS,**  
how affected by recent statutes, 89 to 92.

**ESTATE.** (See Index, Part I.)

**ESTATES.** (See Index, Part I.)

**ESTATES OF INHERITANCE.** (See Index, Part I.)

**ESTOVERS.** (See Index, Part I.)

**EVICTION.** (See Index, Part I.)

**EVIDENCE.** (See Index, Parts II. III. — also *Witnesses.*)

I. Necessity for inquiry into, 429, 430, 807.

II. The rules of evidence, 808.  
are coeval with and part of the common law, 808.  
are modified by statutes, *id.*

III. Considerations respecting, must be,  
1. as to what must be proved, 809.  
2. of the modes of proof, *id.*  
the best evidence essential, *id.*  
proof by witnesses, 810.  
1. *viva voce*, *id.*  
2. on interrogatories, *id.*  
3. what witnesses incompetent, 810, 811.  
when or not secondary evidence admissible, 810.  
objection to witness on account of interest, 811.  
effect of 46 Geo. 3, c. 3, *id.*  
witness to give evidence against his pecuniary interest, *id.*  
voluntary evidence of party in his own favour when to be excluded, 812.  
statutory exceptions enumerated, 814 to 816.  
decisions thereon, 816, 817.

3. other recent improvements, 817.  
power of judges to make regulations as to admission of written documents, *id.*  
proceedings requiring admission of written document, 818 to 821.  
liability to costs on refusal, 818, 820.  
form of written request, 818.  
general regulations respecting, 62, 818 to 820.

IV. Professional conduct towards witnesses antecedent to trial, 821.

**EVIDENCE—(continued.)**

who to examine them, 821, 822.

mode of examining, 822.

Scotch law as to recognition of witness before trial, 823.

previous examination of documentary evidence, 825.

expediency of adducing doubtful evidence, &c. 826.

improving education of witness when practicable, *id.*

releasing witness, if necessary, 827.

number of witnesses, or quantity of evidence, *id.*

V. Practical mode to compel appearance of witness, 828.

of the subpoena, *id.*

of subpoena duces tecum, 828, 829.

full form of, *id.*

of subpoenaing witnesses, 829.

time of serving subpoena, 831.

tender of expenses, 832.

amount of sum to be tendered, *id.*

instructing witness as to time and place of trial, *id.*

VI. Of notices to produce, 834. See *Notice to Produce.*

VII. Of notices of grounds of defence, 836.

VIII. Of admissions, 837. See *Admissions.*

IX. Of final examination of evidence before trial, 839.

how to be examined, *id.*

consequent utility of examination, 839 to 842.

restoring competency of witness by release, &c. 842.

examination of character of witness, 843.

the like as to temperament, *id.*

informing counsel thereof, *id.*

when proper to instruct witness, *id.*

conduct of, before trial, 845.

the like pending or after trial, *id.*

X. Statement of, in brief, 847. See *Brief.*

XI. Consultation on, before trial, 864, 865. See *Consultation.*

why witnesses should not be present, 865.

XII. New discovery of, before trial, *id.*

communicating same to counsel, *id.*

XIII. Examination and attendance of, on trial, 869. See *Trial—Witnesses.*

early attendance of, requisite, 869.

course of adducing same, 869, 888, 889.

examination of, 890.

cross-examination, 897.

re-examination, 893.

**EXAMINATION.** (See Index, Part III.)

**EXAMINATION OF WITNESSES,** 889. See *Evidence. Trial. Witnesses.*

**EXCEPTIONS.** (See Index, Part III.)

**EXCEPTION TO BAIL.** See *Bail.*

entry of, 384.

form of entry of, 381.

written notice of, 384.

form of notice, 381.

**EXCHANGE.** (See Index, Part I.)

- lex, Part IV.)
- EXCHEQUER, Court of.** (See also Index, Part IV.)  
 number of judges in, 5.  
 Practice, Court of. See *Practice Court*.  
 decisions of, on practice, 15.  
 master in, 39. See *Master*.  
 filacer in, under 2 W. 4, c. 39, s. 7, 151.
- EXCHEQUER, EQUITY SIDE OF.** (See Index, Part IV.)
- EXCHEQUER OF PLEAS.** (See Index, Part IV.)
- EXCISE OFFICERS.** (See Index, Part II.)
- EXECUTION.** (See also Index, Part IV.)  
 power of judge to expedite, after verdict, 11, 45, 924.  
 in ejectment, immediate, after trial, 45.  
 power of sheriff to stay, *id.*  
 when immediate, after judgment, 92, 93, 924 to 926.  
 in cases of ejectment, *id.*  
 irregularity in, when or not waived, 522.
- EXECUTOR.** (See also Index, Parts I. II. III. IV.)  
 when liable to costs, 118, 126.  
 liability in action for torts, *id.*  
 non-joinder in action by, 129.  
 fraudulent release by, 129.
- EXECUTOR DE SON TORT.** (See Index, Part II.)
- EXEMPTIONS.** (See Index, Part III.)
- EXIGI FACIAS, 402.**
- EXPECTED DEFENCE,**  
 statement of, in brief. See *Brief*.  
 statement of, by counsel, 884, 886. See *Trial*.
- EXPEDITION.** (See Index, Part III.)
- EXPENSES.** (See Index, Part II. III.)
- EXPLANATION.** (See Index, Part II.)
- EXPOSURE.** (See Index, Part I.)
- EXTENT, writ of.** (See Index, Part IV.)
- EXTINGUISHMENT.** (See Index, Part I.)
- EXTORTION,**  
 liability of officer for, 46, 359.  
 penalty for, *id.*  
 recovery of penalty, *id.*  
 other proceedings for, 359, 360.  
 action for, 434.  
 inspection of warrant when refused, 434.
- FACT, error in.** (See Index, Part IV.)
- FACTORY CHILDREN.** (See Index, Part II.)
- FACTS,**  
 must be accurately stated in affidavit, 540.
- FALSE IMPRISONMENT.** (See Index, Part I. II.)
- FALSE PLEAS, 729.**
- FALSE PRETENCES.** (See Index, Parts I. II.)
- FALSE RETURNS.** (See Index, Part II.)
- FALSE SWEARING.** (See Index, Part II.)
- FAMILY ARRANGEMENTS.** (See Index, Part I.)
- FARM.** (See Index, Part I.)
- FATHER.** (See Index, Part I.)
- FEE FARM RENTS.** (See Index, Part I.)
- FEE SIMPLE.** (See Index, Part I.)
- FEE TAIL.** (See Index, Part I.)
- FEES.** (See Index, Part III.)  
 endorsement of, on briefs, 859.
- FEIGNED ISSUE.** (See Index, Part IV.)
- FELONY.** (See also Index, Part I.)  
 staying proceedings until trial for, over, 629.
- FEMALE CHILDREN.** (See Index, Part I.)
- FENCES.** (See Index, Part I.)
- FEOFFMENT.** (See Index, Part I.)
- FERRET.** (See Index, Part I.)
- FIAT.** (See Index, Part IV.)
- FIELD.** (See Index, Part I.)
- FIERI FACIAS,**  
 delivery of, to sheriff's deputy, 47.
- FIFTH JUDGE,**  
 appointment and utility of, 8, 9.
- FIGHTS AND CHALLENGES.** (See Index, Part I.)
- FILACER,**  
 appointment of, 151.
- FILING AFFIDAVIT.** See *Affidavit*.  
 general regulation respecting time of, 547.
- FILING DECLARATION,**  
 when to be filed, 491.  
 notice to be given when filed, *id.*  
 requisites of notice, 492.  
 forms of notices, 494, 495.  
 giving notice to plead, 502.  
 objecting to irregularities in, 519.
- FINES AND RECOVERIES.** (See Index, Part I. II. IV.)
- FINE, COPYHOLD.** (See Index, Part II.)

**FIRE.** (See Index, Part II.)

**FIRST DAY,**  
when excluded, 110.

**FISH.** (See Index, Parts I. III.)

**FISHERIES.** (See Index, Part I.)

**FISH AND FISHERIES.** (See Index, Part I.)

**FISH PONDS AND DAMS.** (See Index, Part I.)

**FIXTURES.** (See Index, Part I.)

**FLOTSAM.** (See Index, Part IV.)

**FOLD COURSES.** (See Index, Part I.)

**FORBEARANCE.** (See Index, Part I. 8, 112.)

**FORCE.** (See Index, Part III.)

**FORCIBLE DETAINER.** (See Index, Part III.)

**FORCIBLE ENTRIES AND DETAINERS.**  
(See Index, Parts I. II. III.)

**FORCIBLE OUSTERS.** (See Index, Part III.)

**FOREIGN CHARACTER,**  
signature to affidavit, when sufficient, 545.

**FOREIGN LAWS AND PROPERTY.** (See Index, Part I.)

**FORFEITURE.** (See Index, Parts I. II. IV.)

**FORGERY.** (See Index, Parts I. II.)

**FORMAL OBJECTIONS.** See *Irregularities. Objections.*  
when to be taken, 595.

**FORMAL PROOFS,**  
statement of, in brief, 854.  
form of analysis of, 855.

**FORMEDON.** (See Index, Part II.)

**FORM OF ACTION,**  
judicious choice of, essential, 130.  
knowledge of different forms of, requisite, *id.*  
depends on the facts, *id.*  
of the several forms of, *id.* 131.  
formerly not necessary to decide on, till declaration, *id.*  
must now be stated in first process, *id.*  
in writ of distringas must correspond with writ of summons, 311.  
statement of, in writ, 194.  
proper description of, 197, 198.  
omission or irregularities in, 194 to 199.  
variances in, when bail discharged,  
statement of, in declaration not necessary, 467.

**FORM OF AFFIDAVIT.** See *Affidavit.*  
defect in, when may be amended, 547.

**FORM, WANT OF.** (See Index, Part III.)

**FORMS OF ENTRIES.**  
judges may alter, 63.

**FORMS.** (See Index, Part I. II. III. IV.)

form of general retainer of an attorney to sue, 116.  
of instructions to sue, 120.  
of instructions to sue in an action of trespass for injury to land, 123.  
suggested questions in order to obtain proper instructions for a defence, 124.  
form of and condition of a bond to indemnify against costs, 128.  
of letter to accompany the draft of the bond, and to be delivered to Y. Z., 128.  
suggested form of case for counsel's or pleader's opinion, 132.  
forms of retainer of counsel, 134.  
of letter of plaintiff's attorney to the intended defendant, 135.  
of writ of summons, 154.  
of entering an appearance, *id.*  
of writ of distringas, *id.*  
of writ of capias, 155.  
of writ of detainer, 156.  
of writ of summons to be served on a member of parliament, in order to enforce the provisions of the statute 6 G. 4, c. 16, s. 10, *id.*  
of affidavit to account for plaintiff's suing defendant by initials or wrong name, 166.  
of directions to sheriffs, 187.  
proper description of forms of action, 197.  
of indorsement of the sum sworn to, and for which bail is to be required, 207.  
of indorsement as to attorney who issued the writ, 209.  
of indorsements upon writs issued by a plaintiff in person, 211.  
of indorsement of amount of debt and costs, and notice when same be paid, to avoid further costs, 212.  
of alias or pluries summons, 218.  
the like of alias or pluries capias, *id.*  
of præcipe of capias into another county, 219.  
of a præcipe for a writ of summons, 221.  
of præcipe for capias, *id.*  
of the like for a concurrent capias into another county, *id.*  
of notice to defendant not to appear to process discovered to have been irregular, 234.  
of undertaking by a defendant's attorney to the plaintiff or his attorney, to put in or perfect bail above, 240.  
of indorsement of time of service on a writ of summons, 244.  
the like on a writ of capias, *id.*  
of return of cepi corpus and bail-bond taken, 248.  
of return to a capias of cepi corpus, and a deposit of debt and 10*l.*, pursuant to 43 G. 3, c. 46, 248.  
of return to a capias of cepi corpus et paratum habeo, &c. where a defendant remains in sheriff's custody, *id.*  
the like and defendant in prison, 249.  
of return of arrest of one defendant, and non est inventus as to another, *id.*  
of return of cepi corpus and languidus, *id.*  
cepi corpus and detention until defendant was discharged by a judge's order, *id.*  
of return to a capias of non est inventus, *id.*

## FORMS—(continued.)

- of demand in writing under stat. 2 W. 4, c. 39, s. 17, by a defendant on plaintiff's attorney, requiring him to declare whether the process was issued by him or with his authority, and also to state the place of abode, &c. of the plaintiff, 251.
- of attorney for plaintiff's compliance with request, *id.*
- of the name, &c. of principal attorney issuing a writ, 257.
- the like where the attorney issues writ as agent for another attorney, *id.*
- of indorsement when plaintiff sues in person, 258.
- of indorsement on copy of writ of debt and costs, prescribed by rule 5 Mich. T. 3 W. 4 and Hil. T. 2 W. 4, *id.*
- of indorsement on writ of time of service, *id.*
- of præcipe for a writ of summons, 260.
- of indorsement of service of process, 271.
- of return of non est inventus to a writ of summons, 272.
- of an attorney's undertaking to appear, indorsed on writ of summons, 273.
- the like with a reservation of all objections, &c. *id.*
- of affidavit on which to set aside the pretended service of a copy of summons, 279.
- first denying the service of any writ or copy, *id.*
- the like showing the service of an insufficient copy of process, *id.*
- of affidavit objecting that the service was not in proper county, &c. *id.*
- of entering an appearance as prescribed by 2 W. 4, c. 39, schedule No. 2, 283.
- proposed new form of appearance in person, 285.
- the like, not stating the residence of the defendant, *id.*
- proposed new form of appearance by an attorney or agent for two defendants, *id.*
- of minute of warrant to defend, formerly filed, 286.
- of appearance by a guardian for an infant, 288.
- of affidavit made in the country of the personal service of a regular writ of summons, 289.
- of a separate affidavit of an ineffectual search for the defendant's appearance, where the affidavit of the service has been sworn in the country, and the search is necessarily by another deponent in London, 290.
- of affidavit of personal service where it is supposed there has been some defect or irregularity in the process, copy, or service, *id.*
- of affidavit of the personal service of a copy of a writ of summons, where the deponent cannot properly swear to the regularity of the writ or copy, 291, 292.
- of entering an appearance by the plaintiff for the defendant, according to 12 G. 1, c. 29, 294.
- of affidavit to obtain distringas, 307.
- of rule for a distringas, 309.

## FORMS—(continued.)

- of judge's order for rule for a distringas in vacation, 310.
- of sheriff's warrant to his officer on a distringas, 313.
- of return that he has executed a writ of distringas, by seizing goods and serving copy on defendant in person, 315.
- of affidavit that the defendant's goods have been taken under a distringas, and himself been personally served with a copy of the writ of distringas, 316.
- of affidavit of distress upon the goods, and having left a copy of writ at defendant's residence, *id.*
- the like of affidavit of personal service of writ of distringas, but no distress taken because no goods on request had been pointed out, 317.
- of sheriff's return of nulla bona and non est inventus, *id.*
- of affidavit of ineffectual attempts to serve and execute a writ of distringas, *id.*
- of rule of Court authorizing plaintiff to enter an appearance for the defendant, upon a distringas returned nulla bona and non est inventus, 318.
- of judge's order to the like effect, *id.*
- of affidavit on a promissory note, bill of exchange, goods sold, work done, money lent, paid, had, and received, and on an account stated, 340.
- of a writ of capias, with warnings, 342.
- of præcipe for a writ of capias, 346.
- of order not to arrest but to serve one of several defendants in capias, 348.
- the like by a short indorsement on writ, *id.*
- of a sheriff's warrant on a capias, 351.
- of a bail-bond, 364.
- of notice to deposit debt, &c. in lieu of bail, 366.
- of an attorney's undertaking to put in and perfect bail above, 368.
- of affidavit of each bail justifying in anticipation, under Reg. Gen. Trin. T. 1 W. 4, and subsequent rules, 374.
- of bail piece on parchment, in either Court, 377.
- of notice of bail having been put in, in K. B., or C. P., or Exchequer in town, and that both are housekeepers, and one also a freeholder, and showing their residences for the last six months, 380.
- of four days' notice that bail will be put in, and will justify at the same time in open Court in person, *id.*
- of notice of putting in and justifying bail before a judge at chambers, in vacation, *id.*
- of usual entry of exception, 381.
- of the usual notice of exception to bail, *id.*
- of the usual notice of justification in Court in K. B. or Exchequer, in person or by affidavit, *id.*
- of the like in C. P. *id.*
- of notice of justification before a judge at chambers, on 1 W. 4, c. 70, s. 12, *id.*
- of affidavit of the service of notice of justification, 382.
- of affidavit of justification of country bail,



sworn before a commissioner in the country, 382.  
 of another form of justification of country bail, sworn before a commissioner, 383.  
 of affidavit to oppose bail, *id.*  
 of affidavit of one call and service of copy of summons on defendant's wife, and the absence of defendant, in order to obtain a distringas and proceed to outlawry, 402.  
 of memorandum of date of first writ, 408.  
 of affidavit to ground an application to obtain inspection of an agreement, 434.  
 of summons to produce, &c. 435.  
 of a rule for time to declare, 447.  
 of demand of declaration, 448.  
 of commencement of declaration on a writ of summons, 454.  
 do. on a *capias*, *id.*  
 do. on a writ of detainer, *id.*  
 do. against several defendants, one arrested or detained, and the other served with a copy of *capias*, 455.  
 of commencement of declaration in a second action after a plea in abatement, 459.  
 of notice of declaration having been filed on serviceable process and to plead, where plaintiff has entered an appearance for defendant *sec. stat.* 495.  
 the like *de bene esse* on bailable process, 496.  
 of detached notice to plead, 502.  
 of instructions for rule to plead, 504.  
 of entry of rule to plead, *id.*  
 of demand of plea, 507.  
 of separate demand of plea, *id.*  
 of letter intimating irregularity, 529.  
 the like accompanying a copy of summons, &c. and of affidavit where defendant was in custody, 529.  
 of offer to amend and pay costs, 534.  
 of summons, 555, 640.  
 of affidavit of service of two summonses and of deponent's attendance, but that opponent has not attended, 562.  
 of judge's order thereon, 566.  
 the like where both parties attended, *id.*  
 of notice of intended motion to set aside proceedings for irregularity, 571.  
 of rule nisi in K. B. or Exch., in such case, 578.  
 the like in C. P. *id.*  
 of full particulars of demand, 616.  
 the like in action on a surety bond, *id.*  
 of demand ofoyer, 618.  
 of notice of motion to stay proceedings until security for costs given, 635.  
 of summons to strike out count, 640.  
 of order thereon, *id.*  
 of bill of costs thereon, *id.*  
 of judge's order suspending trial of more actions than one for same cause, 645.  
 of affidavit to change venue, 652.  
 of rule to change venue in term time, 654.  
 of judge's order in vacation, 655.  
 of rule to retain venue upon the usual undertaking, *id.*  
 full form of *cognovit*, whole debt payable on one day, with suggested stipulations as to sale, &c. 666.

the like where debt payable by instalments, and execution to issue for the whole on one default, 667.  
 the like where execution to issue from time to time for the instalment that has become due, *id.*  
 of plea of payment into Court, 688.  
 of suggested statement of a death, &c. since last pleading, 701.  
 of summons for time to plead, 705.  
 comprehensive form of order thereon, *id.*  
 of plea in abatement, that contracts were made jointly with another person not joined as a co-defendant, 713.  
 of affidavit of truth of such plea, 714.  
 of plea of non assumpsit denying the whole or part of declaration, and concluding to the country, 715.  
 the like to part of cause of action, and another plea to other part or residue, *id.*  
 commencement of second plea to same matter, *id.*  
 of summons to obtain leave to plead double, 733.  
 judge's indorsement thereon, *id.*  
 of replications, 744.  
 1. the commencement, *id.*  
 2. similiter, *id.*  
 3. to part of cause of action, *id.*  
 4. conclusion to the country, *id.*  
 5. do. with a verification, *id.*  
 6. do. with verification to part, with prayer of judgment, *id.*  
 of rejoinders, 747.  
 1. commencement of rejoinder to whole cause of action, *id.*  
 2. to part of cause of action, 748.  
 3. conclusion to the country, *id.*  
 4. with verification, *id.*  
 5. verification as to part, with prayer of judgment, *id.*  
 of plea after last pleading in banc, 749.  
 of affidavit of truth of plea, *id.*  
 of demurrer, 755.  
 concise form of, as prescribed, *id.*  
 form of special demurrer, *id.*  
 of joinder in demurrer, *id.*  
 of an issue as prescribed, 766.  
 of rule to enter issue in K. B. 771.  
 of entry thereof, *id.*  
 of rule to enter the issue in C. P. *id.*  
 of entry thereof, 772.  
 of an incipitur only of the issue on the roll, *id.*  
 of notice of trial in London, 778.  
 the like in Middlesex, *id.*  
 the like at the assizes, *id.*  
 of notice of continuance, 779.  
 of countermand of notice of trial, 780.  
 full form of subpoena duces tecum, 829.  
 of notice to produce, 836.  
 of notice that on trial defendant will insist that plaintiff's work and materials were insufficient, 837.  
 of analysis of plaintiff's case in brief on trial at nisi prius, 850.  
 of proposed proofs on trial, 854.

FORNICATION. (See Index, Part IV.)

- FORTHWITH**,  
meaning of term, 112.
- FOUND COMMITTING**. (See Index, Parts II. III.)
- FOWLS**. (See Index, Part I.)
- FOXHUNTING**. (See Index, Part II.)
- FRACTION OF A DAY**,  
when essential to ascertain, 111.
- FRANCHISES**. (See Index, Parts I. II.)
- FRAUDS**. (See Index, Parts I. IV.)
- FRAUDS, STATUTE AGAINST**. (See Index, Parts I. IV.)
- FRAUDULENT CONVEYANCES**. (See Index, Part I.)
- FRAUDULENT JUDGMENT**. (See Index, Part I.)
- FRAUDULENT PURCHASE**. (See Index, Part II.)
- FRAUDULENT REMOVAL**. (See Index, Part III.)
- FREE FISHERY**. (See Index, Part I.)
- FREEHOLD**. (See Index, Parts I. II.)
- FREE WARRENS**. (See Index, Part I.)
- FRESH EVIDENCE**,  
discovery of, before trial, 865.  
communicating same to counsel, *id*.
- FRIENDLY SOCIETY ACT**. (See Index, Part III.)
- FRIENDS**. (See Index, Part II.)
- FRUCTUS INDUSTRIALES**. (See Index, Part I.)
- FRUIT**. (See Index, Part I.)
- FUGITIVE DEBTOR**. (See Index, Part II.)
- FULL COURT**. See *Courts*. In *Banc*.  
what so termed, 2, 3.  
acts to be transacted before, 5, 6, 7.  
number of judges to constitute one, 5.  
varied at different times, *id*.  
advantages of investigation before, 8.  
in Exchequer all motions disposed of in, 15.  
when improper for single judge to interfere, 18.
- FUNDS**. (See Index, Part I.)
- FUNERAL EXPENSES**. (See Index, Part II.)
- GAME**. (See Index, Parts I. II.)
- GAME ACT**. (See Index, Part III.)
- GARDENS AND ORCHARDS**. (See Index, Part I.)
- GAOL**. (See Index, Part I.)
- GAZETTE**. (See Index, Parts II. IV.)
- GENERAL DEMURRER**, 755. See *Demur-  
rer*.
- GENERAL LAW OFFICE**,  
propriety of, considered, 65.
- GENERAL RETAINER**. See *Retainer*.  
effect of, 116.
- GENERAL RETURN DAYS**,  
how effected by recent statutes, 89, 91, 92.  
proviso as respects Easter Term, 91.
- GENERAL RULES**. (See Index, Part IV. and  
*Rules of Court*.)  
introduction of, regulating practice of all the  
Courts, 53.  
distinction when by statute, *id*.  
deviations from, when not allowed to be  
amended, 54.  
enactments respecting, 10, 153.  
what judges must concur in making, 10.  
effect of non observance of, 64 to 68, 509 to  
535. See *Irregularities*.  
objections to, when waived, 521.
- GHOST**. (See Index, Part I.)
- GIFT**. (See Index, Part I.)
- GIFTS AND GRANTS**. (See Index, Part I.)
- GIVING TIME**. (See Index, Part II.)  
caution to be observed before giving time, 663.
- GLEBE LANDS**. (See Index, Part I.)
- GOODBEHAVIOUR**. (See Index, Part II.)
- GOOD FAITH**,  
proceedings against, 75, 633.  
breach of and consequence, 76.  
staying proceedings when action contrary to,  
633.
- GOOD FRIDAY**,  
when time expires on, 110.
- GOODS AND CHATTELS**. (See Index, Parts  
I. IV.)
- GOOD WILL**. (See Index, Part II.)
- GRAMMAR SCHOOLS**. (See Index, Part IV.)
- GRANT**. (See Index, Part I.)
- GRANTS**. (See Index, Part I.)
- GRANTS OF KING**. (Part I. 341.)
- GRANTS AND GIFTS**. (See Index, Part I.)
- GRASS NATURAL**. (See Index, Part I.)
- GRIEVOUS BODILY HARM**. (See Index,  
Part I.)
- GROUND**. (See Index, Part I.)
- GROWING CROPS**. (See Index, Part I.)
- GUARANTEES**. (See Index, Part I.)

- GUARDIAN.** (See Index, Parts I. II.)  
appearance of infant by, 288.
- HABEAS CORPUS.** (See Index, Parts I. II. IV.)  
writ of, may be issued in vacation by a single judge, 28.  
return to, when to be made, 23.
- HABEAS CORPORA JURATORUM,**  
form of writ of, 798,  
direction of, *id.*
- HALF YEAR,**  
how calculated, 107.
- HARBOURING.** (See Index, Part II.)
- HARBOURS AND PORTS.** (See Index, Part I.)
- HARES.** (See Index, Part I.)
- HARE WARREN.** (See Index, Part I.)
- HAY BOTE.** (See Index, Part I.)
- HEALTH.** (See Index, Part I.)
- HEDGE BOTE.** (See Index, Part I.)
- HEDGES, FENCES, AND DITCHES.** (See Index, Part I.)
- HEIR.** (See Index, Part I.)
- HEIR LOOM.** (See Index, Part I.)
- HERBAGE.** (See Index, Part I.)
- HERBS.** (See Index, Part I.)
- HEREDITAMENTS.** (See Index, Part I.)
- HERIOTS.** (See Index, Parts I. II.)
- HIGHWAYS AND TURNPIKE ROADS.** (See Index, Part I.)
- HILARY TERM,**  
commencement and duration of, 91.
- HOLIDAYS,** 104 to 106.
- HOMICIDE.** (See Index, Parts I. II.)
- HORSES.** (See Index, Part I.)
- HOSTILE CAPTURE.** (Parts I. II.)
- HOSTILITIES, COMMENCEMENT OF.** (See Index, Part II.)
- HOUR OF THE DAY,**  
service of process on, when particular, 110.  
essential to ascertain, 110, 111.  
process may be served at any hour, 110.  
otherwise as to rules and orders, *id.*
- HOUSE.** (See Index, Part I.)
- HOUSEBREAKING.** (See Index, Part I.)
- HOUSE BOTES.** (See Index, Part I.)
- HOUSE DOVE.** (See Index, Part III.)
- HOUSE OF LORDS.** (See Index, Part IV.)
- HOUSEHOLD FURNITURE.** (Part I. 95, note.)
- HOUSES.** (See Index, Part I.)
- HOVEL.** (See Index, Part I.)
- HUNDRED.** (See Index, Parts I. II.)
- HUNDREDORS,**  
requisites in writ against, 169.  
consequences of mistakes in, *id.*  
in action against, time how calculated, 108, 109.
- HUSBAND,**  
indemnity from costs of action by wife, 129.
- HUSBAND AND WIFE.** (See Index, Parts I. II.)  
service of process on husband sufficient, 263.  
cannot give evidence against each other, 810.
- HYPOTHECATION.** (See Index, Part IV.)
- IDEM SONANS,** 171.
- IGNORANCE.** (See Index, Part II.)  
staying proceedings on ground of, 628.
- ILLEGAL ARREST.** See *Arrest.*  
action for, when affidavit void, 517, 518.
- ILLEGAL DAMAGING.** (See Index, Part I.)
- ILLEGAL DETENTION.** (See Index, Part I.)
- ILLEGAL IMPRISONMENT.** (See Index, Part I.)
- ILLEGAL TAKINGS.** (See Index, Part I.)
- IMMATERIAL OBJECTION.** See *Irregularities.*  
when or not advisable to take advantage of, 76, 77, 511, n. (d).
- IMPARLANCES,**  
how far abolished, 90, 103, 700.  
impliedly so in all personal actions, 700.  
otherwise as to real or mixed actions, 700, 701.  
entry of suggestion in lieu of, 700.
- IMPRISONMENT.** (See Index, Part I. II.)
- IMPROVEMENTS.** (See Index, Part I.)
- INADEQUACY OF PRICE.** (See Index, Part II.)
- INANIMATE MOVEABLE PERSONAL PROPERTY.** (See Index, Part I.)
- IN BANC.** See *Court.*  
jurisdiction of Court of, 2, 3.  
properly consists of four judges or barons, 3.  
what business transacted before, *id.*  
practice of the Court in banc, 4.  
I. In general, *id.*  
II. What acts must be transacted in banc, 5.  
number of judges, &c. of each Court, *id.*  
varied at different times, *id.*  
prerogative of the king in respect of, *id.*  
enactments of 1 W. 4. c. 70, s. 1, respecting, 5, 6.  
at present consists of five, 5.  
though four only can sit together, *id.*

## IN BANC—(continued.)

provision for the absence of either chief judge, &c., 6.  
 proceedings valid if three only sit, 6.  
 formerly if two only sat, *id.*  
 business usually transacted before, 6, 7.  
 importance of having a full Court, *id.*  
 of the judgment being given seriatim, *id.*  
 reports of the decision of the Court, 7.  
 advantages resulting from, 7, 8.  
 formerly Court sat out of term, 8.  
 though judgment pronounced in term, 9.  
 enactment of 3 G. 4, c. 102, respecting, *id.*  
 repealed by 1 G. 4, c. 70, s. 5, 9.  
 judges how occupied in vacation, *id.*

- III. What relationship or interest precludes judge from acting, 9.  
 delicacy observed in this respect, *id.*  
 decision of privy council respecting, 10.  
 slightest degree of interest an objection, *id.*
- IV. Consequences of judge's differing in opinion, *id.*

decision depends on majority, *id.*  
 in making rules the three chiefs must concur, *id.*

or rules cannot be made, *id.*  
 course when *equally* divided, *id.*

- V. Limits of jurisdiction of judges, 11.  
 limited by statute or express rules, *id.*  
 from which they cannot deviate, *id.*  
 unless by consent of parties, *id.*  
 cannot give *more time* than practice allows, *id.*  
 their power to expedite execution after verdict, *id.* 924.

INCAPACITY OF WITNESS,  
 postponing a trial on account of, 826.

INCEST. (See Index, Part IV.)

INCLOSURES. (See Index, Part I. II.)

INCORPOREAL PROPERTY. (See Index, Part I. II.)

INCORPOREAL REAL PROPERTY. (See Index, Part I. II.)

INCUMBRANCES ON LAND. (See Index, Part I.)

INDEBITATUS COUNTS,  
 general regulation respecting, 456.

INDECENT EXPOSURE OF PERSON. (See Index, Part I.)

INDEMNIFICATION. (See Index, Part I. II.)

INDEMNITY,  
 of nominal plaintiff from costs, 127 to 130.  
 form of bond to indemnify, 128.  
 form of letter to accompany bond, *id.*  
 to husband from costs when separated from wife, 129.

INDICTMENT. (See Parts I. II. IV.)

INDORSEMENT. See *Memo Process*. *Capias*.  
 on writs of, 72, 206 to 216, 310, 344.  
 irregularities in, 74, 75. See *Irregularities*.  
 forms of, 207, 208, 257.

## INDORSEMENT—(continued.)

not to arrest a particular defendant, 208.  
 of name and abode of plaintiff's attorney, 152, 208, 312.  
 of plaintiff's abode, when no attorney, 208.  
 forms of, 209, 257, 258.  
 of writ issued by plaintiff, 211.  
 form of, *id.*  
 of amount of debt and costs, 160, 212, 312.  
 form of, 212.  
 of abode, &c. of defendant not necessary in bailable process, 215.  
 on writ of distringas, 310. See *Distringas*.  
 on writ of *capias*, 206 to 216, 344 to 346.  
 See *Capias*.  
 on writ of summons, 257. See *Summons*.  
 of name and abode of plaintiff's attorney, 208, 257.  
 of agent and attorney, 209, 257.  
 when plaintiff sues in person, 211, 257.  
 of amount of debt and costs, 212, 257.  
 forms of, 211, 257, 258.  
 of day of service of copy of writ, 271.  
 form of, *id.*  
 on writ of summons of non est inventus, *id.*  
 return of, 272.

INDULGENCE,  
 consequences of granting, 365.

INFANT PLAINTIFF,  
 proceedings in name of, 117.  
 rule Hil. T. 2 W. 4, respecting, *id.*  
 retainer by, *id.*

INFANT. (See Index, Parts I. II. III. IV.)  
 appearance by, 288.  
 must be by guardian, *id.*  
 not by attorney, *id.*  
 form of appearance by guardian, *id.*

INFERIOR COURT. (See Index, Parts III. IV.)  
 practice of, how ascertained, 83.

INFORMATION. (See Index, Parts II. III.)

INFORMER. (See Index, Part III.)

INFRA DIGNITATEM. (See Index, Part II.)

INHERITANCE. (See Index, Part I.)

INITIALS,  
 suing defendant by, 165, 166.  
 when plaintiff may declare by, 460.  
 statutory enactment respecting, *id.*

INJUNCTION. (See Index, Parts I. II. IV.)  
 delivery of declaration after, 446.

INJURIES. (See Index, Parts I. II. IV.)

INNOCENT CONVEYANCE. (See Index, Part I. 243, 244.)

INQUIRY, WRIT OF. See *Writ of Inquiry*.  
 when or not objection to be waived, 521.

INSOLVENT ACT. (See Index, Part I.)  
 vexatious defence under, 79.  
 discharge under, no ground to set aside proceedings to outlawry, 405.

INSOLVENCY. (See Index, Part II.)

**INSPECTION OF WRIT,**  
important to demand, 274, 434.

**INSPECTION OF DOCUMENTS.** See *Declaration*.

how to enforce, 433, 620.  
formerly bill of discovery requisite, 433.  
sometimes is so now, *id.*  
now enforced by order of a judge, *id.*  
requisites to be observed before applying, 434.  
affidavit to ground application on, *id.*  
requisites and form of affidavit, *id.*  
to whom to be made, 435.  
costs of application, *id.*

**INSPECTION OF COURT ROLLS.** (See Index, Part II.)

**INSPECTION OF WARRANT, 434.** (See Index, Part III.) See *Extortion*.

**INSTALMENT,**  
judge at chambers cannot order payment of debt by, 28, 32.  
terms of cognovit when debt payable by, 666, 667.  
forms of, 667.

**INSTANCE COURT.** (See Index, Part IV.)

**INSTANTER,**  
meaning of term, 112.

**INSTRUCTIONS,**  
to sue,  
attention in obtaining, requisite, 117 to 121.  
should be full and accurate, 117, 120.  
and at earliest stage of proceeding, 117.  
duty of attorney in this respect, 118 to 120.  
consequences of neglect, 118.  
fee allowed for, 119.  
form of instructions to sue, 120 to 123.  
for declaration,  
duty of attorney to obtain, 429.  
should be full, and in writing, 117, 125, 429, 430, 452.  
to defend,  
suggested questions in order to obtain, 124.  
for plea, 695.  
for replication, 741.  
to witness, 843.  
when or not proper to give, *id.*

**INSURANCE.** (See Index, Part II.)  
avertment of interest in policies of, 724.

**INTEGRITY.** (See Index, Part III.)

**INTEREST.** (See Index, Parts I. III.)  
when it precludes judge from acting, 9.  
objection to witness on account of, 810 to 812.  
removing same, 842.  
of a juror, on account of, 795.

**INTEREST IN REAL PROPERTY.** (See Index, Part I.)

allowance of, in general, discretionary in Court or judge, 29, 597 to 601.  
in some cases imperative, 597.  
how discretion of Court exercised, 597, 598.  
in rules nisi, should be expressly prayed, 598.  
or Court cannot grant, *id.*  
if not prayed, Court sometimes will discharge same without costs, 598, 599.  
when costs in the cause, *id.*  
when or not prudent to pray costs, *id.*  
general regulation respecting, 599.  
allowance of, when subject subsequent to judgment, &c., 599.  
when application fails on technical objection, 600.  
or on doubtful or material point of practice, *id.*  
if Court adjudicate upon question of costs, subject cannot be again discussed, *id.*  
when considered special damages in action for false imprisonment, 80, 81, 601.  
notice and appointment to tax, 602.  
general regulations respecting, *id.*  
master's allocatur of, *id.*  
enforcing payment of, by attachment, *id.*  
order for payment of, must be absolute, *id.*  
and not conditional, *id.*  
judge's order for, must be made a rule of Court before attachment moved for, *id.* 603.  
the like as to master's allocatur, 603.  
personal service of rule and master's allocatur requisite, *id.* 604.  
personal demand of, requisite before attachment, 604, 605.  
affidavit of service and instruction and rule for attachment, 606.  
rule when nisi only, *id.*  
when absolute in first instance, *id.*  
execution of attachment for, 607.  
when or not recoverable by action, *id.*  
when may be set off, *id.*

**INTERMIXTURE.** (See Index, Part II.)

**INTERPLEADER ACT.** (See Index, Parts II. IV. and *Interpleader, Bill of*.)  
where judge may refer matter to full Court, 16.  
application of sheriff for relief under, 21, 28.  
order of a judge under, when final, 34, 35.  
proceedings under, 620 to 627.  
to what actions statute applies, 621.

**INTERPLEADER, BILL OF.** (See Index, Part IV.)  
application for relief by, 620.  
in equity, (see Vol. II.) 417 to 420.  
at law, (see Vol. II.) 341 to 347.  
act stated, and decisions under same, *id.*  
who may apply for relief by, 620, 621.  
substance of first section of Interpleader Act 621.  
only extends to named actions, *id.*  
to whom application to be made, 621, 622.  
when may be before a single judge, 622.  
when to the full Court, *id.*  
time of application, 623.  
must be made at earliest opportunity, *id.*  
and before proceedings, *id.*  
delay in, when or not excused, *id.*

**INTERPLEADER, BILL OF—(continued.)**

- must be a known claimant and actual claim, 623.
- when sheriff may apply to enlarge time of returning writ, *id.*
- when sheriff relieved by, *id.* 624.
- when not, 624.
- affidavit, motion, and proceedings for, 625.
- when third party, claim barred and held to pay costs, *id.*
- when issue to be directed, *id.*
- when costs payable, and to whom, 625 to 627.
- of bills of interpleader in equity, 627; Vol. II., 417 to 420.

**INTERROGATORIES. (See Index, Part IV.)**

- examination of witness by, 816.
- decisions on stat. 1 W. 4, c. 22, 816.

**INTERRUPTION. (See Index, Part II.)****INTERVENTION, RIGHT OF. (See Index, Part IV.)****INTESTATE. (See Index, Part IV.)****INTOXICATION. (See Index, Part II.)****INTRICATE ACCOUNTS. (See Index, Pt. III.)****INNUENDOES,**

- stating words spoken without, in brief, 849.

**INVENTORY. (See Index, Part II.)****IRELAND, COURTS OF. (See Index, Pt. IV.)****IRREGULARITIES. (See Index, Part II.)**

- Jurisdiction of Practice Court over, 11 to 18.
- See *Practice Court*.
- of a single judge at chambers, 19 to 35. See *Chambers*.
- judge no discretion, if from form prescribed by statute, 51, 68.
- otherwise if from rule of Court, 51.
- amendment of, in bailable *capias*, 69, 70.
- what deemed such, 21, 73.
- in form of writ, 195, 237, 275.
- proceedings on part of defendant to set aside proceedings for, 368.
- I. *Of irregularities, nullities, and non-observance of mere directory regulations, &c.* 509 to 534.
  1. Of these in general, 509.
    - may arise in every stage of an action, 510.
  2. When objectionable, to take advantage thereof, 276, 510 to 512.
    - when proper to do so, 512.
  3. Time of application in respect of, 85, 237, 512.
    - must be as early as possible, 512, 75, 226, 237, 275.
    - before a subsequent step in the cause taken, 512, 513.
    - general regulations respecting, *id.*
    - decisions as to setting aside process, 236 to 233, 244.
    - as to objections on writ of summons, *id.* 275, 276, 514.
    - as to affidavits, 340, 514.

**IRREGULARITIES—(continued.)**

- course when irregularity occurs in vacation, 227, 237, 238, 514.
- what deemed *reasonable time*, 227, 514.
- all objections must be taken at once, 515.
- unless of a different nature, *id.*
- summary of times of objecting, 227, 238, 368, 515.
- chronological enumeration of the principal irregularities, 515 to 562.
- time of objecting to same, *id.*
- 4. Distinction between irregularities and nullities, 75, 226, 229, 275, 311, 522 to 525.
  - when nullities may be taken advantage of, 522 to 524.
  - what deemed nullities, 523.
  - when may be waived, 534, 535.
- 5. Of nullities, and sudden advantages taken thereof, 525.
  - when or not may be justifiably taken, *id.* 526.
  - propriety of obtaining leave to treat proceedings as a nullity, *id.*
- 6. When Court will *ex mero motu* object, 527.
  - instances of objecting, *id.*
- 7. Of deviations from directory rules, *id.*
- 8. Of notices of irregularities, 527 to 531.
  - sometimes necessary to give, 527.
  - propriety of giving, considered, 528.
  - costs influenced by, 528 to 531.
  - form of letter intimating irregularity, 529.
  - the like, where defendant in custody, *id.*
- 9. Notice of motion, and consequences of omission, 531.
  - must be served two days before moving, *id.*
  - or no stay of proceedings granted, *id.*
  - of obtaining rule nisi with stay of proceedings, 532.
  - distinction between rules obtained by plaintiff and defendant, *id.*
  - effect of, when obtained by plaintiff, *id.*
  - utility of notice of applications in other cases, 533.
- 10. Of opponent's notice, and proceedings thereon, *id.*
  - offering to amend on payment of costs, *id.* 534.
  - form of written offer to amend, 534.
- 11. Notice of motion for a criminal information, &c., *id.*
- II. *Affidavits in support of or against application for* 535.
  1. When or not necessary, 36, 37, 535 to 537. See *Affidavits*.
    - general regulations respecting, 536, 537.
  2. By whom to be made, 537.
  3. Title of Court, 332, 537.
  4. Title of cause, 333, 538.
  5. Addition of deponent, 333, 539.
  6. The commencement, 540.
  7. The body or substance, *id.*
  8. Deponent's signature to, 543.
  9. Before whom sworn, 24, 25, *id.*
  10. Of the jurat, 339, 546.

12. Documents to be annexed to and exhibited with affidavit, 548.
13. If previously used, when to be resworn, 549.
14. Consequences, if not sufficient in first instance, *id.*
15. When amendment in, permitted, 550. or supplement one received, *id.*
16. When or not objection to, waived, *id.*
17. Of delivering copies to opponent, 551.
18. Of opponent taking office copies, *id.*
19. Affidavits in answer to summons, &c., 552.
20. Time of swearing same, 553.
21. If defective merely in form, may be amended, 554.
- III. *Of summons and judge's order, in cases of, id. to 569.*
  1. Of summary applications in general, 554.
  2. When a summons proper, 555.
  3. Before what judge, 556.
  4. Summons during vacation, 557.
  5. When to be supported by affidavit, *id.*
  6. Form and substance of a judge's summons, 558. usual form of, *id.*
  7. How far a stay of proceedings, 559.
  8. How many summonses necessary, 561.
  9. Service of summons, and affidavit thereof, 562.
  10. Place of serving notices, summons, &c., 563, 584.
  11. Hour of day of serving, 564.
  12. When not necessary to produce original summons, 565.
  13. Of indorsing a consent, *id.*
  14. Proceedings on opposing summons, &c., *id.*
  15. Form and terms of order, 566. when peremptory, *id.* when conditional, *id.* drawing up and serving same, *id.*
  16. A judge's power to award costs, 29, 567.
  17. Order how far conclusive and binding, 568.
  18. When may be abandoned, *id.*
  19. Making same a rule of Court, *id.*
  20. Setting same aside, 569.
- IV. *Of motions, rules nisi, showing cause, rules absolute or discharged, costs, attachments, &c., 570 to 608. See also those several titles.*
  1. Notice of motion, when or not necessary, 570.
  2. Delivery of brief, &c. to counsel, 571.
  3. Motion to what Court, 572.
  4. By whom to be moved, 573.
  5. Time of moving, *id.*
  6. Second motion, when or not permitted, 574.
  7. Conduct of counsel upon moving for rule nisi, 575.
  8. When rule absolute in first instance, or only nisi, 576.
  9. Costs when or not allowed, when rule absolute in first instance, 29, 577.
  10. Forms and requisites in rules nisi, 578.
  11. Statement of day to show cause, 579.

13. Precise objection to be stated, 277, 278, 579, 580.
14. All objections to be stated at once, 581.
15. Statement to whom payment, &c. to be made, *id.*
16. As to praying costs, 582.
17. As to immediate stay of proceedings, 531, 570, 571, 583.
18. Of amending or allowing fresh rule nisi, 583.
19. Service of copy of rule nisi, &c. 563, *id.*
20. Service, when to be personal, 584.
21. When not, *id.*
22. Time of serving rule nisi, 586.
23. Of enlarging and reviving rules, 99, *id.*
24. Notice of party's intention not to oppose rule, 587. or to resist only in part, 534, 580, 588.
25. What party to show cause, 588.
26. Of showing cause in first instance, 557, 589.
27. Of obtaining office copy of rule nisi, &c. before showing cause, 551, 555, *id.*
28. Of swearing affidavits in opposition, &c. 553, *id.*
29. Brief to move rule absolute, 590.
30. Brief to oppose rule, 591.
31. When to move rule absolute, 592.
32. Conduct of counsel on hearing rule, *id.*
33. Of discharging a rule nisi, 593.
34. Professional conduct of barristers towards each other, &c. 594.
35. Arguments upon affidavits, &c. in support of rule, 535, 589.
36. Formal objections, when to be taken, 595.
37. How Court, &c. decide on conflicting affidavits, 596.
38. Of making rule absolute, or discharging same, *id.*
39. Of interlocutory costs, 29, 529, 571, 597. *See Costs.*
40. Of the Court imposing terms, 280, 601.
41. Terms of the rule absolute, 601.
42. Notice and appointment for taxing interlocutory costs, 602.
43. Master's allocatur of costs, *id.*
44. Of enforcing payment of, by attachment, *id.*
45. Care essential in served copies, 603.
46. Personal service of rules and allocatur, &c. *id.*
47. Personal demand of costs, 605.
48. Motion, &c. for attachment, 606.
49. Execution of attachment, &c. 607.
50. Interlocutory costs, when or not recoverable by action, *id.*
51. Setting-off interlocutory costs, when, *id.*
52. Of setting aside judgment by default on account of irregularity, 680.

IRREPARABLE INJURY. (See Index, Pt. II.)

ISSUE. (See also Index, Part IV.)

general observations relative to an issue, 763.  
 general regulations respecting, 476, 764 to 773.  
 who to make up the issue, 764.  
 time of making it up, *id.*  
 delivering same, *id.*

**ISSUE—(continued.)**

general regulation of Hil. T. 4 W. 4, respecting form of, 765.  
 form of, 766.  
 observations on such form, 770 to 766.  
 trial of, before sheriff, &c. 675, 676, 770.  
 examining and returning issue, 770.  
 ruling plaintiff to enter issue, 771.  
 entering same, *id.*  
 form of rule to enter issue in K. B. *id.*  
 entry of such rule, *id.*  
 the like in C. P. *id.*  
 form of entry of issue, 772.  
 form of incipitur only of the issue on the roll, *id.*  
 time of entry, after being ruled, *id.*  
 of plaintiff's entering issue, *id.*  
 consequence of no issue being joined, 743.  
 allowance of costs on, 477.  
 objection to, when or not waived, 521.

**JACTITATION OF MARRIAGE.** (See Index, Part IV.)**JETSAM.** (See Index, Part IV.)**JOINDER IN DEMURRER.**

prescribed form of, 755.  
 no rule to join in, requisite, *id.*  
 need not be signed by counsel, 756, 758.  
 indorsing notice of inquiry on, *id.*  
 consequences of no joinder in demurrer, *id.*

**JOINT AND SEVERAL CONTRACTS.** (See Index, Part I. 121.)**JOINT TENANCY.** (See Index, Part I.)**JOINT TENANTS.** (See Index, Part I.)**JOINTURES.** (See Index, Part I. II.)**JOURNEYMAN.** (See Index, Part II.)**JUDGES.**

number of, in each Court, 5.  
 power of king to appoint, *id.*  
 enactment of 1 W. 4, c. 70, respecting, *id.*  
 what number constitutes full Court, 5, 6.  
 jurisdiction of, in Practice Court, 5.  
 at chambers, 6.  
 validity of proceedings of, *id.*  
 provision for absence of C. J. of either Court, *id.*  
 importance of having full Court on, *id.*  
 delivery of opinions of, *seriatim*, 6, 7.  
 when influenced by firmness of counsel, 7.  
 or legal reports, *id.*  
 when one judge only presides, 8.  
 appointment of a fifth judge in K. B. *id.*  
 his duty, *id.*  
 before which, judges sat in vacation to transact term business, 9.  
 though judgment delivered in term, *id.*  
 sitting of, in vacation no longer essential, *id.*  
 occupation of, in vacation, *id.*  
 what relationship or interest precludes him from acting, *id.*  
 recent decisions of privy council respecting, 10.  
 consequences of differing in opinion, *id.*  
 limit of jurisdiction of, 11.  
 is limited by statutes or express rules, *id.*  
 power of, to expedite execution after verdict, *id.*  
 cannot give time to pay a debt, *id.*  
 his power in Practice Court, 12 to 17. See *Practice Court.*

**JUDGES—(continued.)**

jurisdiction of, at chambers, 19 to 36. See *Chambers.*  
 number of, requisite to make rules, 57.  
 the chiefs of each Court must concur in making, 57.  
 implied power of, to make rules, 64.  
 consequences of conferring together, 65, 67.  
 order of, for return of process in, 99.  
 privileges of, from arrest, 330.  
 notes of, no affidavit in support of, necessary, 535.  
 summing up of, at nisi prius, 911. See *Trial.*  
 time of objecting to same, 914.

**JUDGE'S ORDER.** See *Orders.*

when beyond his jurisdiction, 32.  
 how enforced, 33.  
 motions to set same aside, 33 to 35.  
 when conclusive, 35.  
 practice as to costs on reversal of, 34.  
 for return of process in vacation, 99.

**JUDGMENT.** (See also Index, Parts I. II. IV.)

of judges delivered in term, 8, 9.  
 when may be given in vacation, 92.  
 when to be entered of record, 101.  
 to be entered of day when signed, 63.  
 Court may order entry of nunc pro tunc, 101.  
 for want of plea, 105, 497, 507, 704, 710.  
 cannot be signed on a Sunday, 105.  
 or before notice to plead, 498.  
 or before demand of plea, 507.  
 objection to, when waived, 521.

**JUDGMENT BY DEFAULT,**

when proper to suffer, 671, 672, 699.  
 general observations respecting, 672, 673.  
 of letting plaintiff take judgment by default in part, 674.  
 recent enactments respecting, 674 to 676.  
 writ of inquiry may be returnable in vacation, 674.  
 immediate judgment and execution thereon, *id.*  
 when may be stayed, 674, 675.  
 writ of inquiry to ascertain truth of breaches, 675.  
 assessment of damages thereon, *id.*  
 return to writ of inquiry, *id.*  
 signing judgment thereon unless, &c. *id.*  
 general regulations respecting, 676, 677..  
 how soon may be signed, 676.  
 practical proceedings thereon, 677.  
 issuing writ of inquiry, 678. See *Writ of Inquiry.*  
 what a good jury, 678.  
 setting aside judgment by default, 680.  
 reference to master to compute, 37, 681.

**JUDGMENT OF NON PROS.** See *Non pros.*  
 setting aside of, 450.**JUDGMENT IN CASE OF NONSUIT, 784 to 793.** See *Nonsuit.***JUDGMENT RECOVERED.**

requisites in plea of, 730.  
 general regulation respecting, *id.*

**JUDICIAL COMMITTEE OF PRIVY COUNCIL.** (See Index, Part IV.)**JUNIOR COUNSEL.**

duty of, on trial at nisi prius, 866, 878. See *Trial.*  
 opening pleadings, 877.  
 examining witnesses, 891, 892.



when may be amended, 546.

**JURISDICTION.** (See also Ind. Pt. IV. and *Court.*)  
enumeration of six branches of each Court, 2, 3, 4.  
of the judges how limited, 11.  
of judge in Practice Court, 15. See *Practice Court.*  
at chambers, 19 to 35. See *Chambers.*  
at nisi prius, 39.  
on circuit, 41.

**JURISDICTION OF JUDGES.** (See Ind. Pt. IV.)

**JURISDICTION OF JUSTICES.** (See Ind. Pt. III.)

**JUROR.** See *Jury. Jury Process.*  
qualification of, 795.  
communications with, when improper, 800.

**JURY,**  
qualifications of, 795.  
necessity for inquiry respecting, *id.*  
course when one of jury objectionable, *id.*  
of the panel, 800.  
time of summoning, *id.*  
of common jurors, *id.*  
when special, *id.*  
what communications with, proper, *id.*  
directions relating to special jurors, 801.  
discharging rule for special jury, 802.  
judge's certificate for allowance for special jury, 803.  
direction of judge to. See *Trial.*  
of jury withdrawing. See *Trial.*

**JURY PROCESS.** See *Jury.*  
may be tested in vacation, 99.  
return of, immediately after execution, *id.*  
1. inquiry into qualification of jury, 795, 796.  
2. of jury process in general, 796.  
proceedings on summoning jury, *id.*  
requisites of writs, 796, 797.  
forms of writs, 797, 798.  
of venire facias juratores in K. B. 797.  
of distringas juratores in K. B. *id.*  
of habeas corpora juratorum, 798.  
writs how to be directed, *id.*  
when to be resealed, 799.  
practice on issuing writs, *id.*  
of the panel, 800.  
of summoning jury, *id.*  
time of summoning, 800, 801.  
what communications with, proper, 800.  
of the special jury, 801.  
time of trial, 802.  
discharging rule for special jury, *id.*  
judge's certificate for special jury, 803.  
3. of the view, 803. See *View.*  
4. of record of nisi prius, 804. See *Record.*

**JUSTICES.** (See Index, Parts I. II. IV.)

**JUSTICES OF THE PEACE.** (See Ind. Pt. II. IV.)

**JUSTIFICATION OF BAIL.** See *Bail.*  
written notice of, 385.  
when to be served, *id.*  
affidavit of service of, *id.*  
forms of notice of, 379 to 383.  
affidavit of justification, 382.  
VOL. III.

brief and motion to justify, *id.*  
appearance, &c. of bail to justify, *id.*  
hour of justifying, *id.*  
opposition to, *id.*  
demand of plea when a waiver of, 506.  
objecting to notice of, 518.

**KING.** (See also Index, Parts II. III.)  
prerogative of, to appoint judges, 5.  
sometimes conferred by statute, *id.*  
statement of name of, in writ, 164.  
mistake in, when a variance, *id.*  
servants, &c. of, privileged from arrest, 329.

**KING'S BENCH.** (See also Index, Part IV. and  
*In Banc.*)  
number of judges in, 5.  
business transacted in, 6.  
formerly sat in banc after term, 8.  
Practice Court of, 14. See *Practice Court.*  
master in, 36 to 38. See *Master.*

**KING'S GRANTS.** (See Index, Part. I.)

**KING'S SERVANTS,**  
when privileged from arrest, 329.

**LABOURERS AND SERVANTS.** (See Index,  
Part III.)

**LACHES.** (See Index, Part II.)

**LAND.** (See Index, Parts I. II.)

**LANDLORD AND TENANT.** (See Index, Parts  
I. II. III. IV.)

**LANGUIDUS,**  
when sheriff may return, 249, 358.

**LARCENY.** (See Index, Part I.)

**LAST DAY,**  
when included, 110.

**LAW OFFICES,**  
holidays and dies non at, 104 to 106.  
hours of attendance at, 106.

**LEADING QUESTIONS,**  
when or not permitted, 892, 893.

**LEASE AND RELEASE.** (See Index, Part I.)

**LEASEHOLD.** (See Index, Part I.)

**LEASES.** (See Index, Parts I. II.)

**LECTURES.** (See Index, Part II.)

**LEGACY.** (See Index, Parts I. II. IV.)

**LEGACY DUTY.** (See Index, Part IV.)

**LEGAL AND EQUITABLE ESTATES.** (See  
Index, Part I.)

**LEGAL ASSISTANCE.** (See Index, Part II.)

**LEGAL AND EQUITABLE MORTGAGES.**  
(See Index, Part I.)

**LEGAL QUALIFICATION.** (See Index, Pt. III.)

LEGATEES. (See Index, Part IV.)

LETTER. (See Index, Parts II. III.)

writing of, before action, 134.

form of, to defendant, 135.

fee allowed for, 135 to 137.

propriety of writing, for inspecting documents, 434.

forms of, intimating irregularities, 529.

form of, offering to amend same and pay costs, 534.

statement of, in brief, 852. See *Brief*.

LETTERS OF ADMINISTRATION. (See Index, Part II.)

LETTERS OF REQUEST. (See Index, Part IV.)

LEWDNESS. (See Index, Part IV.)

LIABILITY OF ATTORNIES. (See Ind. Pt. III.)

LIABILITY OF JUSTICES. (See Index, Pt. III.)

LIBELLOUS MATTER,  
striking same out of declaration, 638.

LIBELS. (See Index, Parts I. II. III. IV.)

LIBERTY. (See Index, Parts I. II.)

LICENSE. (See Index, Parts I. II.)

LICENSE TO USE LAND. (See Index, Part I.)

LIEN. (See Index, Parts I. II. III.)

LIFE. (See Index, Parts I. II.)

LIGAN. (See Index, Part IV.)

LIGHT-HOUSES, BEACONS, AND SEA-MARKS. (See Index, Part I.)

LIMBS AND BODY. (See Index, Part I.)

LIMITATION. (See Index, Parts III. IV.)

LIMITATIONS OF ACTIONS. (See Ind. Pt. I.)

LIMITATIONS, STATUTE OF. (See Index, Parts II. III. IV.)

date of process; commencement of action, 159, 204, 406 to 408.

proceedings to save statute of, 406 to 408.  
enactment of 2 W. 4, c. 39, s. 10, respecting, 406.

requisites to be observed after issuing first writ, *id*.

return of non est inventus thereon, *id*.

entry of such return, *id*.

issue of continued process, *id*.

subscription of memorandum thereto, 407.

form of memorandum, 408.

amendment of writ to prevent operation of, 54, 407.

the like, of continued process, 407.

service of process at house of agent will not save statute, 408.

process must be in form of action afterwards declared on, *id*.

return of non est inventus to first writ essential, 408.  
indorsement of date of first writ on continued process, *id*.

LITERARY PROPERTY. (See Index, Pt. I., 98.)

LITIGATION. (See Index, Part II.)

LOCAL ACTIONS. See *Venue*.  
changing place of trial in, 649.

LOCAL DESCRIPTIONS. 459, 460, 464, 470.  
See *Declaration*. *Venue*.

LOCAL MEANINGS. (See Index, Part I.)

LODGERS. (See Index, Part I.)

LONDON,  
sittings at nisi prius in, 91, 98.

LONDON FLAT. (See Index, Part IV.)

LONG ENJOYMENT. (See Index, Part I. II.)

LORD CHANCELLOR,  
power of, to make order altering practice, 52.  
may commit solicitor for disobeying same, *id*.  
no action lies for such commitment, 53.

LORD OF A MANOR. (See Index, Part IV.)

LORDS, HOUSE OF. (See Index, Part IV.)

LOSING A TRIAL, 388.

LOSS OF BILLS, &c. (See Index, Part II.)

LOST DEEDS. (See Index, Part IV.)

LUNATIC AND LUNACY. (See Index, Pt. II.)

MAGISTRATES. (See Index, Parts II. III.)

MAIM. (See Index, Part I.)

MAINTENANCE OF CHILDREN. (See Index, Parts I. II.)

MALA PRAXIS. (See Index, Part I.)

MALICE. (See Index, Part I.)

MALICIOUS ARREST. (See Index, Part I.)

MALICIOUS COMMISSION. (See Ind. Pt. I.)

MALICIOUS INJURIES. (See Index, Part I.)

MALICIOUS INJURIES TO PROPERTY. (See Index, Part III.)

MALICIOUS PROSECUTONS. (See Index, Part I.)

MANDAMUS. (See Index, Parts II. III. IV.)  
writ of, may be moved in Practice Court, 16.  
cause generally shown in full Court, 16.

MANOR. (See Index, Part I.)

MANSIONS. (See Index, Part II.)

MANUFACTORIES AND MANUFACTURERS.  
(See Index, Parts I. II.)

**MARGIN,**  
statement of venue in, 459, 460, 464, 470.  
of title of cause in a plea, 716.

**MARINER'S WAGES.** (See Index, Part IV.)

**MARRIAGE.** (See Index, Parts I. II. III. IV.)

**MARRIAGE SETTLEMENT.** (See Index, Pt. I.)

**MARRIED WOMEN.** (See Index, Parts II. III.)

**MARSHALLING ASSETS.** (See Index, Part IV.)

**MASTER.** See *Prothonotary*.  
authority of, 36.

1. master on civil side of K. B. *id.*  
importance of office of, *id.*  
experience and ability of, *id.*  
consulted by the judges, *id.*  
what business usually referred to, 3, 36, 37.  
reference to, when advantageous, 36.  
when he may receive further affidavits, 3, 36.  
or examine parties *viva voce*, 36.  
attendance of counsel before, 36, 37.  
moving for his report, 3, 37,  
after reading, may be objected to, 37.  
taxing and allowance of costs before, *id.*  
his discretion in this respect, *id.*  
when Court will interfere with his decision, *id.*  
when expedient to refer to, *id.*  
either may object to reference, 37, 38.  
reference proper on points of practice, 38.  
but not so on points of law, *id.*  
when counsel should not consent, *id.*
2. master of crown office, *id.*  
duty of, in case of attachment, *id.*  
in cases of indictment or information, *id.*
3. prothonotaries in C. P. *id.*  
duty and jurisdiction of, *id.*  
what business referred to, 38, 39.
4. master in Exchequer, 39.  
his duty, *id.*
5. reference to, to compute, 681 to 683.

**MASTER AND APPRENTICE.** (See Index, Parts I. II.)

**MASTER AND CLERK.** (See Index, Part I.)

**MASTER AND SERVANT.** (See Ind. Pts. I. II.)

**MASTER OF ARTS.** (See Index, Part III.)

**MASTER OF ROLLS.** (See Index, Part IV.)

**MASTER OF SHIP.** (See Index, Part I. 73, 74.)

**MASTER'S REPORT,**  
when may be objected to, 37.  
usual for counsel to see, before being read in Court, *id.*

**MAYHEM AND WOUNDING.** (See Index, Part I.)

**MEASURES.** (See Index, Part II.)

**MEDICAL PRACTITIONERS.** (See Index, Part I.)

**MEMBER OF PALIAMENT.** (See Index, Pt. I.)  
mode of proceeding against, under 2 W. 4, c. 39. 152, 395.  
form of writ of summons against, 156.  
privilege of, from arrest, 329.

**MEMORANDUM.** (See Index, Part III.)  
on writ of summons, 205, 257.

**MENACES.** (See Index, Part I.)

**MENIAL SERVANTS.** (See Index, Part I.)

**MERITS,**  
affidavit of, 66.  
difference of K. B. and Exch. in this respect, 66, 67.  
staying proceedings on bail bond, to enable original defendant to try on merits, 388.  
swearing to, in affidavit, 543 to 545.  
definition of term, 545.  
when defendant let in to try on, 544.  
statement of evidence of, in brief. 855. See *Brief*.

**MESNE PROCESS.** See *Process*.  
I. Of mesne process, and proceedings thereon in general, 140 to 163.

1. Of the subject generally, 140.
2. Necessity for some process, and why, 141.  
on what principles to be framed, served, and executed, 142.  
time of service, 143.  
mode of service, 144.  
why to be personal, *id.*  
distringas to induce party to appear, 145.
3. Of the ancient process and objections to same, 145 to 147.  
by original writ and course of proceedings, 145, 146.  
jurisdiction of each Court formerly limited, 146.  
now nearly co-extensive, *id.*  
writ formerly not considered commencement of action, *id.*  
now otherwise, 147.
4. The five several writs substituted by 2 W. 4, c. 39, *id.*  
observations on same, 147, 148.  
statement of the outline of the regulations in that act, 148.  
objections thereto, 149, in note.  
the act printed in note, 150 to 156.  
practical operation of, considered, 156.  
is confined to personal actions, 157.  
does not extend to mixed or real actions, *id.*

## MESNE PROCESS—(continued.)

- does not affect actions removed from inferior Courts, 157.
- deviations from, when fatal, 157, 158.
- enumeration and consideration of five writs, 158.
  1. Of the writ of summons, *id.*
  2. Of distringas, *id.*
  3. Of capias, *id.*
  4. Of detainer, *id.*
  5. Of summons against M. P., *id.*
- all process must still be in English, *id.*
- general operation of the act, 158, 162.
- writ now considered commencement of action, 159.
- 5. Statement of rules of Court for enforcing the same, *id.*
- same printed in note, 160, 161.
- 6. Examination of the several parts of writs, 162.
  - analytical parts of writs, 163.
    1. Name of the king, 164.
    2. Direction to defendant, *id.*
    3. Statement of Christian and surnames of defendant, &c. 165.
      - must be full and exact, *id.*
      - when deviation allowed, *id.*
      - form of affidavit accounting for defendant being sued in wrong name, 166.
      - of using due diligence to ascertain, *id.*
      - when bond or deed signed in wrong name, 167.
    - terms of rule of Hil. Term 2 W. 4, *id.*
    - applies only to bailable process, *id.*
    - instances of misnomer, 168.
    - when two persons of same name, *id.*
    - requisite of name of a corporation, 169.
    - against Hundredors, *id.*
    - consequences of omissions and mistakes in, 170.
    - cases of *idem sonans*, 171.
    - amendments when refused, 173.
    - the like, in continued process, 174.
- 4. Statement of defendant's residence, *id.*
  - consequences of mistakes in, 174 to 179.
  - the like, in continued process, 179.
- 5. Defendant's addition of degree, 180.
  - when or not necessary, 180, 181.
- 6. Character in which defendant is sued or plaintiff sues, *id.*
  - caution to be observed, 182, 183.
- 7. Names of all defendants to be inserted, 183.
  - distinction between serviceable and bailable process, 184, 185.

## MESNE PROCESS—(continued.)

8. Directions to sheriff on writ of distringas, 185.
  - forms of, 188, 189.
9. Of the non-omittas clause, 190.
10. Statement of what defendant or sheriff required to do, 191.
11. Time of appearance and return days, 192.
12. Returnable in what Court, 193.
13. Description of form of action, 194.
  - forms of action, 197, 198.
14. Name of plaintiff and character, 199.
15. Notice to defendant, §00.
  - consequences of non-appearance, §00, §01.
  - or putting in bail above, §01.
  - warnings to defendant, *id.*
16. Teste of writ, §02.
  - in whose name issued, *id.*
17. Teste or date of writ, *id.*
  - is the commencement of action, §04.
  - in proceedings to outlawry, *id.*
18. Memoranda, notices, and warnings at bottom of writ, §05.
19. Indorsement on writs, §06.
  1. Of sum sworn to, §07.
    - forms of, *id.*
    - directions not to arrest particular defendant, §08.
  2. Name and abode of plaintiff's attorney or agent, *id.*
    - when no attorney, *id.*
    - form of indorsements, §09.
    - when issued by plaintiff in person, §11.
    - form of indorsement, *id.*
4. Of amount of debt and costs, §12.
  - form of indorsement, *id.*
5. Description of defendant's abode, &c. in bailable process, when necessary, §15.
20. Of concurrent writs into different counties, §16.
  - forms of, §17.
21. Of alias and pluries writs of summons and capias, *id.*
  - forms of, §18, §19.
22. Of supposed necessity for second affidavit of debt, §19.
23. Of the *precipe* for every writ, §20.
  - forms of, §21.
24. By what officer writ to be signed, and how, §22.
25. By what officer to be sealed, §24.
26. Practical proceedings on issuing writ, §25.
27. Consequence of non-observance of requisites in mesne process, and copies thereof, §26.

**MESNE PROCESS—**(*continued.*)

- application must be made in due time, 227.
- when deviation fatal, 229, 230.
- when not, 231, 232.
- 28. Amendment and re-sealing before execution, 233.
- notice to defendant not to appear, 234.
- form of, *id.*
- 29. Amendments after execution, *id.*
- no distinction between writ and copy, 236.
- 30. Of motions and summons for irregularity, *id.*
- when and how to be made, *id.*
- time of application, 237.
- 31. Of preparing to serve or execute writ, 238.
- 32. Of execution of writs in general, 239.
- delivery of, to sheriff, &c. 239, 240.
- defendant's attorney's undertaking to appear, 240.
- duration of writs, 241.
- time of execution, *id.*
- place of, *id.*
- mode of, 242.
- 33. Indorsement of time of execution, 243.
- forms of, *id.*
- consequence of non-compliance, 244.
- 34. Affidavits of execution of process, 245.
- 35. Return to process, *id.*
- by whom to be made, *id.*
- enforcing return, 246.
- rule to return, how obtained, 247.
- forms and requisites of returns, 248.
- proceeding on a return of non est inventus on a capias, 249.
- 36. Summary of circumstances to be attended to by a defendant after execution of process in general, *id.*
- 37. Ascertaining authority of plaintiff's attorney to sue, 251.
- demand of, *id.*
- compliance with demand, *id.*

**MESSAGE.** (See Index, Part I.)**METROPOLIS PAVING ACTS.** (See Index, Part II.)**MICHAELMAS TERM,**  
commencement and duration of, 91.**MIDDLESEX,**  
number of sittings at nisi prius in, 91, 98.**MILLS.** (See Index, Part I.)**MINES.** (See Index, Part I.)**MINISTERS.** (See Index, Part IV.)**MISCARRIAGE.** (See Index, Part I.)**MISDEMEANOUR.** (See Index, Parts I. II.)**MISDIRECTION OF JUDGE.** See *Trial.***MISNOMER,**

- no plea in abatement for, 179, 711.
- defendant to proceed by summons in case of, 170, 711.
- bail bond when void, 3 Dowl. 638.

**MISREPRESENTATION.** (See Index, Part II.)**MISTAKES.** See *Irregularities.*

- when advisable to take advantage of, 76, 77.
- when or not material, 231.
- in entering appearance sec. stat. 293.

**MISTAKES AND ALTERATIONS.** (See Index, Parts I. IV.)**MIXED ACTIONS.** (See Index, Part IV.)  
not affected by 2 W. 4, c. 39, 101.**MODUS.** (See Index, Part IV.)**MONEY,**

- when paid into Court, under 43 G. 3, c. 46, s. 2, 24.
- single judge cannot order payment of, to defendant, *id.*
- showing cause against rule for payment of, to defendant, 27.

**MONTH.** (See Index, Parts II. III.)  
how calculated, 108, 109.**MONTHLY INSTALMENT,**  
Court cannot stay proceedings on paying debt by, 28, 637.**MONUMENTS.** (See Index, Part I.)**MORAL CHARACTER,**  
no ground of objection to bail, 376.**MORTGAGE.** (See Index, Part III.)**MORTGAGE DEEDS.** (See Index, Part IV.)**MORTGAGEE.** (See Index, Part III.)**MORTGAGOR OF A SHIP.** (See Index, Part IV.)**MORTGAGOR AND MORTGAGEE.** (See Index, Part I. II.)**MOTION.**

- to set aside a judge's order, 33.
- for writ of distringas, 309.

**MOTIONS.** See *Rule Nisi.*

1. Notice of, when necessary, 570, 531 to 533.
- general regulations respecting, 571.
- form of notice, *id.*
2. Brief to counsel on, *id.*
- what should consist of, 571, 572.
- copies of affidavits should be full, 571.
- delivery of original affidavits, &c. 572.
3. Motion to what Court, 672, vol. ii. 349, 350.
- in cases of several actions must apply to each Court, 572.
- when action in C. P. at Lancaster, 573.
4. By whom to be moved, *id.*
- when by counsel, *id.*
- when by party himself, *id.*
- an attorney cannot make, *id.*
5. Time of moving, *id.*
- when of a criminal nature, *id.*

## MOTIONS—(continued.)

- consequences of moving on last days of term, 574.
- 6. Second motion on same ground, when or not permitted, *id.*  
general regulations respecting, *id.*
- 7. conduct of counsel on moving for rule nisi, 575.  
stating grounds for and against motion, *id.*  
should not conceal objections, *id.*
- 8. When rule absolute in first instance, or only nisi, 576.  
when may be moved absolute, *id.*  
general regulations respecting, 577.  
in cases of attachment, when, *id.*
- 9. When costs allowed or refused when rule absolute in first instance, *id.*
- 10. Forms and requisites of rule nisi, 578. See *Rules Nisi.*  
service of, and making same absolute, 578 to 608.  
costs of, when allowed, 597 to 601. See *Interlocutory Costs.*

MURDER. (See Index, Parts I. II.)

MUTINOUS CONDUCT. (See Index, Part IV.)

MUTINY ACT. (See Index, Part I. 188, 193.)

MUTUAL CREDIT. (See Index, Part I.)

MUTUALITY. (See Index, Part II.)

NAMES OF PARTIES. See *Misnomer.*  
statement of, in declaration, 185 to 185, 466.  
description by initial, 164 to 169, 466.

NAVIGABLE RIVERS, CREEKS. (See Index, Part I.)

NAVIGATION. (See Index, Part I.)

NE EXEAT REGNO. (See Index, Parts II. IV.)

NEGOCIATIONS. (See Index, Part III.)

NEIGHBOURS. (See Index, Part III.)

NEWSPAPERS. (See Index, Parts I. 44, III. IV.)

NEW TRIAL,  
certificate of sheriff to enable party to apply for, 47.

NEXT OF KIN. See *Executors.*

NIGHT. (See Index, Part I.)

NIGHT POACHING. (See Index, Parts I. II.)

NIL DEBET,  
plea of, abolished, 726.

NISI PRIUS,  
jurisdiction of judge at, 39.  
in London and Middlesex, *id.*  
formerly the chief justice presided at, 39, 40.  
now either judge or baron may, 40.  
inconvenience of sittings during term, *id.*  
enactment of 11 G. 4, and 1 W. 4, c. 70, s. 7, respecting, *id.*  
number of days allowed, *id.*  
proviso for trial at bar, *id.*  
jurisdiction of Court to grant or refuse special jury, 41.

## NISI PRIUS—(continued.)

judge or Court will not interfere with cause list of another judge, 41.  
or order the trial of a special jury, *id.*  
though rule obtained for delay, *id.*  
or restore cause struck out, *id.*  
application to be made to the chief justice at chambers, *id.*  
amending postea, *id.*  
power as to amendments, 42, 43. See *Amendments.*  
when decision of judge conclusive, 44.  
no appeal against judge's refusal to amend, *id.*  
when amendment permitted, party complaining may apply to Court, 43.  
should liberally exercise power as to amendment, 44.  
cannot avoid effect of a release pleaded puis darrein continuance, *id.*  
trial then instantan suspended, 45.  
future proceedings in banc, *id.*  
prescribed number of sittings at, 91.  
trial at, by consent, 92.  
trial of, and incidents, 866 to 926. See *Trial.*  
withdrawing record at, 870, 871.

NISI PRIUS RECORD, 804 to 806. See *Record.*

NON APPEARANCE,  
to writ, and consequence to defendant, 200.

NON ASSUMPSIT,  
form of plea in, denying whole or part of declaration, 715.  
commencement of second plea, *id.*  
Reg. Gen. respecting, 724.

NONATTENDANCE. (See Index, Part III.)

NON DETINET,  
plea of, 727.

NON EST FACTUM,  
plea of, 726.

NON EST INVENTUS,  
return of, on writ of summons, 271.  
form of return of, 272.  
return of, to writ of distringas, 299, 317, 321.  
form of, 317.  
return of, to writ of capias, 249.  
proceedings thereon to enter appearance, 317.  
return of, in proceedings to outlawry, 398 to 404.  
return of, to save statute of limitations, 272, 406 to 408.  
form of return to, 272, n. (2).

NONFEAZANCE. (See Index, Part I.)

NONJOINER. (See Index, Part III.)  
effect of 3 & 4 W. 4, c. 42, s. 8, in cases of, 126, 127.  
commencement of second action after plea in abatement for nonjoinder, 459, 467.  
form of, 459.

NON OMITTAS CLAUSE,  
statement of, in writ, 190, 310.

**NONPAYMENT.** (See Index, Part II.)**NON PROS.** See *Declaration*.

if judgment for, not signed, plaintiff may declare within a year, 445.

proceedings to enable defendant to sign judgment for, 448.

rule to compel plaintiff to declare, when necessary, *id.*

demand of declaration, when necessary, *id.*

form of demand of, *id.*

signing judgment of, 449.

setting aside judgment of, 450.

of compelling plaintiff to submit to, 745.

**NONSUIT, JUDGMENT AS IN CASE OF, 784.**

enactment of 14 G. 2, c. 17, respecting, *id.*

Reg. Gen. of H. T. 2 W. 4. 784, 785.

reasons for and against motion for, 785.

practice on moving for, 786.

time of moving, 786, 787.

in King's Bench, 787.

in country causes, 789.

in Common Pleas, 790.

in the Exchequer, *id.*

of proceedings on trial for judgment as in case of, 791.

what a sufficient excuse for delay, *id.*

what not, 792.

of peremptory undertakings, 793.

**NONSUITS, VOLUNTARY, 910.****NONUSER.** (See Index, Part I.)**NOTARY.** (See Index, Part II.)**NOTARIES.** (See Index, Part III.)**NOTES OF JUDGES,**

affidavit in support of, requisite, 535.

**NOTES OF TRIAL,**

duty of junior counsel to take, 879.

the like of attorney, *id.*

**NOTICE OF ACTION.** (See Index, Part III.)**NOTICE OF APPEAL.** (See Index, Part III.)**NOTICES.** (See Index, Parts I. II. III.)

service of notices, 59, 105, 110.

must be before nine at night, 110.

delivery of, sealed up, 111.

of justification of bail, *id.*

letter giving notice on Sunday need not be opened till Monday, 104.

in writ to defendant, 300, 306.

of trial and inquiry, 59.

suggestions respecting, 80.

of bail,

requisites of, 379.

must be in writing, *id.*

service of, 379, 385.

affidavit of service of, 385.

decisions as to, 379.

form of, in town bail, *id.*

four days' notice that bail will be put in and justified in Court in person, 380.

notice of justifying at chambers in vacation, 380.

entry of exception, 381.

**NOTICES—(continued.)**

notice of entry, 381.

notices of justification in Court of King's Bench or Exchequer, *id.*

the like in Common Pleas, *id.*

the like at chambers, *id.*

affidavit of service of notice of justification, 382.

affidavit of justification of country bail, *id.*

another form, 383.

irregularities in, when to be objected to, 518.

**NOTICE OF DECLARATION,**

how to be given, 491.

course when residence of defendant unknown, *id.*

requisites of, 491 to 494.

form of, 494, 495.

irregularities in, when to be objected to, 494.

time of pleading to be stated in, *id.*

objecting to irregularities in, 519.

service of, on Sunday void, 105.

**NOTICE OF INQUIRY, 678.** See *Writ of Inquiry.*

continuance thereof, 678.

countermand thereof, *id.*

indorsement of, on joinder in demurrer, 758.

**NOTICE OF INTENDED DEFENCE,**

propriety of giving, 836, 837.

form of, 837.

**NOTICE OF IRREGULARITY.** See *Irregularity.*

propriety of giving, 527, 528.

**NOTICE OF MOTION,**

necessary to give, before stay of proceedings ordered, 531.

consequences of omission, *id.*

utility of notice, 533.

proceedings on receiving notice, *id.*

**NOTICE OF TRIAL,**

objections to, when or not waived, 521.

notice, when requisite, 773.

time of giving it, *id.*

mode of giving it, 774.

when should be delayed, *id.*

time to be given by notice of trial, 775.

what in general, *id.*

what short notice, 776.

forms of notice of trial, 777.

in London indorsed on issue, &c. 778.

in Middlesex, *id.*

at the assizes, *id.*

by continuance, 779.

must be in writing, 777.

to whom to be given, 778.

on whom to be served, *id.*

of continuing or countermanding notice, 779.

notice by continuance, *id.*

of countermanding notice of trial, 105, 780.

if served on a Sunday bad, 105.

form of notice of countermand, 780.

fresh notice, when necessary, 781.

conduct of defendant's attorney when notice insufficient, *id.*

costs of day for not proceeding to trial, 782.

See *Costs of the Day.*

judgment in case of nonsuit, 784. See *Nonsuit.*

**NOTICE TO PLEAD,**

- service of, on Sunday void, 105.
- when given, 497, 501.
- general regulations respecting, 498.
- requisite in all cases, *id.*
- in cases of prisoners, 498, 505.
- judgment for want of plea cannot be signed until notice given, 498.
- fresh notice when necessary, *id.*
- unless given, defendant need not plead, 499.
- what time to be stated in, 499, 500.
- when declaration delivered absolutely, 499.
- when *de bene esse*, *id.*
- consequences of giving too little time, 500.
- depends on venue and defendant's residence, *id.*
- how long plaintiff may delay serving, 501.
- defendant may plead without service of, *id.*
- when delayed for four terms, *id.*
- mode or form of giving, 501, 502.
- forms of, 494, 495, 502.
- irregularity in, 520.

**NOTICE TO PRODUCE,**

- when proper to give, 834.
- requisites of, 835.
- what it should state, *id.*
- full form of, 836.

**NOTICE TO PROVE CONSIDERATION, 837.****NUISANCES. (See Index, Parts I. II.)****NULLA BONA,**

- sheriff's return of, on writ of distringas, 299, 317, 321.
- form of, 317.
- proceedings thereon to enter appearance, *id.*
- return of, in proceedings in outlawry, 398, &c.

**NULLITIES. See Irregularities.**

- distinction between, and irregularities, 522 to 527.
- when to be taken advantage of, 525 to 527.

**NULLITY OF MARRIAGE. (See Index, Part IV.)****NUMBER OF JUDGES,**

- what requisite to give validity to proceedings, 6.
- when they must concur, 5.

**NUMBER OF OWNERS. (See Index, Part I.)****OATHS. (See Index, Parts II. III.)****OBJECTIONS. See Irregularities.**

- when must be taken, 515.
- cannot be successively, *id.*
- aliter, if of a different nature, *id.*
- summary of times of objecting, 227, 228, 237, 340, 368, 515.
- chronological enumeration of, 515 to 522.
- statement of, in affidavit, 542.
- to affidavits, 550.
- when or not waived, *id.*
- precise statement of, in rule nisi requisite, 579.
- if several, must be all stated, 581.
- cannot be objected to separately, 581.

**OCCUPANCY. (See Index, Part I.)****OFFENCE. (See Index, Parts I. III.)****OFFENDERS, APPREHENSION OF. (See Index, Part II.)****OFFICE COPIES OF AFFIDAVITS,**

- general regulations respecting taking of, 551.
- when or not requisite to obtain, 589.

**OFFICE OF PLEAS,**

- hours of attendance at, in Exchequer, 107.

**OFFICERS. (See Index, Parts II. IV.)****OFFICES AND DIGNITIES. (See Index, Parts I. II.)****OFFICIAL ASSIGNEE. (See Index, Part IV.)****OMISSIONS. See Irregularity.**

- Reg. Gen. of M. T. 3 W. 4, respecting, 21, 62, 74.
- when deemed irregularities, *id.*
- how to be taken advantage of, 21, 74.
- when void, or merely irregular, 75, 227, 304, 311.
- when process void in consequence of, 75, 229, 304, 311.
- when irregular and consequence, 75, 304.
- of form of action in writ, 195.
- application to set aside for, 227.
- must be made in due time, *id.*

**OPENING SPEECHES,**

- advantage of, on trials at nisi prius, 871, 872.
- See *Trial*.
- right of counsel to begin, 876, 877.

**OPINION. (See Index, Parts II. III.)**

- when judges differ in, 10.
- course pursued, *id.*
- majority must concur in, *id.*
- usually given seriatim, 17.
- of counsel, statement of, in brief, 853.

**OPPOSING BAIL. See Bail.**

- form of affidavit to oppose, 383.
- mode of opposing, 385, 386.

**ORCHARDS AND GARDENS. (See Index, Part I.)****ORDER OF PROOF,**

- statement of, in brief, 895. See *Brief. Trial*.

**ORDER OF REFERENCE. (See Index, Pt. III.)****ORDERS. (See Index, Parts II. IV.)****ORDERS OF JUDGES. See Summons.**

- power of a single judge to make, 19.
- enactments respecting, 10.
- what judges must concur in making, *id.*
- of a judge, when may be treated as a nullity, 32, 34.
- preferable to apply to Court to discharge same, 32.
- unless the delay prejudicial, *id.*
- of judge, how enforced, 33.
- motions to set same aside, *id.*
- cannot be enforced by attachment, 19, 33.
- otherwise, if made a rule of Court, *id.*
- when subsequent performance of, will not purge contempt, *id.*
- costs on reversal of, when allowed, 34.
- when may be rescinded or altered, *id.*



**ORDERS OF JUDGES—(continued.)**

if acquiesced in, how far valid, 34.  
 when conclusive, 35.  
 of a judge on the circuit, 45.  
 must be served before nine o'clock at night, 110.  
 two summonses necessary before, 561.  
 cases where one will suffice, *id.*  
 requisites of, 566.  
 forms and terms of, *id.*  
 should be peremptory and not conditional, *id.*  
 567.  
 award of costs in, *id.*  
 how far conclusive, 568.  
 when may be abandoned, *id.*  
 making same a rule of Court, *id.*  
 how to be enforced, 246, 247, 569. See *Attachment*.  
 setting same aside, 569.  
 for particulars of demand, 613.  
 consequences of plaintiff's not complying with, 617.

**ORIGINAL DOCUMENTS,**

propriety of leaving copies of, instead of originals, 432.  
 enforcing inspection of, 433 to 436.

**ORIGINAL WRITS,**

long recital of, in declaration, prohibited, 453.

**OTHER BUILDINGS. (See Index, Part I. 171.)****OUSTERS. (See Index, Part I.)****OUTHOUSES. (See Index, Part I.)****OUTLAWRY. (See Index, Parts II. IV.)****OUTLAWRY, PROCEEDINGS TO. (See Index, Parts II. IV.)**

return to proceedings in, 90.  
 proceedings to, 151, 396 to 405.  
 enactment of 2 W. 4, c. 39, respecting, 151, 397.  
 appointment of filacer in Exchequer, 151,  
 tests of proceedings in, 204.  
 proceeding to, when sheriff cannot distrain or serve defendant, 299.  
 writ must not be in alternative, *id.*  
 when writ of distringas proper, 300.  
 requisites of writ, 301.  
 steps to be taken before proceeding to, *id.*  
 of proceeding to outlawry in general, 396.  
 observations respecting, *id.*  
 when may be issued, *id.*  
 when may be set aside, *id.*  
 on what terms, 397, 398.  
 must appear and put in bail, *id.*  
 proceeding to, now more expeditious, *id.*  
 proceeding where one of several defendants abroad, 398.  
 enactments of 3 & 4 W. 4, c. 42, s. 7, respecting, 398.  
 plaintiff may proceed against those resident in England, *id.*  
 no plea in abatement for nonjoinder allowed, *id.*  
 unless verified by affidavit stating residence of omitted party, 399.  
 substance of practice as altered by 2 W. 4, c. 39, s. 5, 399, 400.  
 formerly no proceeding to outlawry sustainable in Exchequer, 399.

**OUTLAWRY—(continued.)**

now otherwise, 399.  
 practice on serviceable process, 321, 400 to 403.  
 See *Distringas*.  
 requisites to be observed on attempting to serve writ of summons, 400, 401.  
 of the writ of distringas, 400.  
 requisites of affidavit on obtaining distringas, 401.  
 differs when to proceed to outlawry, *id.*  
 form of affidavit, *id.*  
 writ, to whom to be directed, 402.  
 time between delivery and return to writ, *id.*  
 return to writ, *id.*  
 of writs of exigent and proclamation, *id.*  
 indorsements on, not requisite, 152, 160, 403, 404, n. (e).  
 should be filed, 403.  
 irregularities in, must be objected to within reasonable time, *id.*  
 on bailable process, *id.*  
 writ of capias issues, *id.*  
 no distringas necessary, *id.*  
 requisite of sheriff's return, *id.*  
 no alias or pluries writ required, 404.  
 when writ of *exigi facias* may issue, *id.*  
 must be returnable in term, *id.*  
 time of return, *id.*  
 allocatur exigent, when necessary, *id.*  
 indorsements on writ of exigent, *id.*  
 writ of proclamation, *id.*  
 proceedings in joint action, where one a prisoner, 404, 405.

**OUTSTANDING TERM. (See Index, Part IV.)****OVERSEERS OF POOR. (See Index, Part II.)****OWNERSHIP. (See Index, Part II.)****OYER, 618. See *Demanding Oyer*.****OYSTER BEDS. (See Index, Parts I. II.)****PANEL,**

duty of sheriffs respecting, 800.  
 annexing same to venire, *id.*  
 what should contain, *id.*

**PAPER BOOK. See *Demurrer*.**

objection to, when or not waived, 521.

**PARAPHERNALIA. (See Index, Part II.)****PARCENERS. (See Index, Part I.)****PARENT AND CHILD. (See Index, Parts I. II.)****PARISH. (See Index, Parts I. II.)****PARKS. (See Index, Part I.)****PARLIAMENT. (See Index, Parts I. IV.)****PAROL CONTRACT. (See Index, Part I.)****PARTICULARS OF DEMAND, 496.**

taking out summons for, 611.  
 at what time may be applied for, 275, 611.  
 should be before appearance, *id.*  
 no affidavit requisite, 611.

PARTICULARS OF DEMAND—(*continued*.)

when improper to apply for, 612.  
 origin of ordering particulars, *id.*  
 general regulations respecting, *id.*  
 when to accompany declaration, *id.* 613.  
 costs for, when not allowed, 613, 614.  
 consequences of not delivering them, 613, 617.  
 copy of, when to be annexed to record, 613.  
 when an order for, may be obtained, *id.*  
 power of judge to order, in all cases, *id.*  
 when judge will refuse order for, 614.  
 giving defendant notice when they exceed three folios, *id.*  
 requisites of particulars of demand, *id.* 615.  
 forms of, 616.  
 consequence of plaintiff not complying with order for, 617.  
 prescribed time of pleading after delivery of, 618, 702.  
 statement of, in brief, 850. See *Brief*.

PARTICULARS OF SALE. (See *Ind. Part I.*)

PARTNERS. (See *Index, Part III.*)

PARTNERS IN TRADE. (See *Ind. Parts I. II.*)

PARTNERSHIP. (See *Index, Part II.*)

PART OWNERS. (See *Index, Part IV.*)

PARTITION. (See *Index, Parts I. IV.*)

PART PAYMENT. (See *Index, Part III.*)  
 when to be admitted in declaration, 472.

PART PERFORMANCE. (See *Index, Part II.*)

PARTY AGGRIEVED. (See *Index, Part III.*)

PARTY TO ACTION,  
 who to be considered, 125 to 130.

PARTY WALL. (See *Index, Part I.*)

PASSENGER. (See *Index, Part II.*)

PASTURES ON COMMON. (See *Ind. Pt. I.*)

PATENTS. (See *Index, Part II.*)

PAYMENTS. (See *Index, Part I. II.*)

PAYMENT OF COSTS. See *Attachment*.  
 enforced by attachment, 602.  
 when recoverable by action, *id.*

PAYMENT OF MONEY,  
 statement in rule nisi, to whom to be made, 682.

PAYMENT OF MONEY INTO COURT,  
 enactments respecting, 684 to 686.  
 general regulations thereon, 687, 688.  
 when advisable, 684.  
 in what actions allowed, *id.* 685.  
 not allowed formerly where damages uncertain, *id.*  
 but power of, greatly extended, 685.  
 enactment respecting torts, 686.  
 salutary effect of this enactment, *id.*  
 to be pleaded specially, 687.  
 prescribed plea of, 688.  
 prescribed replication to such plea, 689.  
 rule or order, when necessary, *id.*  
 decisions on form and requisites of such plea, *id.*  
 consequences of paying money into Court, 689.

PAYMENT OF MONEY INTO COURT—  
(*continued*.)

time of paying into Court, 689.  
 proceedings thereon, 690.

PEACE, BILLS OF. (See *Index, Part IV.*)

PEACE OFFICERS. (See *Index, Part II.*)

PECUNIARS, COURT OF. (See *Ind. Pt. IV.*)

PECUNIARY INTEREST. See *Interest*.  
 compelling witness to give evidence against, 811.

PEDIGREE. (See *Index, Part I.*)

PEERS. (See *Index, Part I.*)  
 privilege of, from arrest, 329.

PENAL ACTION,  
 single judge cannot authorise compounding of,  
 24.  
 staying proceedings in, 629.  
 compounding of, 693.

PENAL STATUTES. (See *Index, Parts I. II.*)

PENALTIES. (See *Index, Part II.*)

PENALTY. (See *Index, Part III.*)

PEREMPTORY,  
 meaning of term, 112.

PEREMPTORY PAPER,  
 of Practice Court, 17.

PEREMPTORY UNDERTAKING,  
 when may be enlarged, 793.

PERFORMANCE, SPECIFIC. (See *Ind. Pt. I.*)

PERJURY. (See *Index, Parts II. III. IV.*)  
 Court will not set aside appearance on suggestion of, 218.

PERMIT. (See *Index, Part II.*)

PERMITTED NUISANCES. (See *Ind. Pt. II.*)

PERPETUITY. (See *Index, Part I.*)

PERSONS. (See *Index, Part I.*)

PERSONAL ACTIONS. (See *Index, Part II.*)  
 rules affecting forms of, 63.  
 writ, commencement of, 150.  
 act of 2 W. 4, c. 39, respecting, 63, 150.

PERSONAL INJURY,  
 right of counsel to begin in actions for, 873, 874.  
 See *Trial*.

PERSONAL LIBERTY. (See *Index, Part I.*)

PERSONAL PROPERTY. (See *Ind. Pt. I. II.*)

PERSONAL RIGHTS TO POSSESSION. (See  
*Index, Part I.*)

PERSONAL SECURITY. (See *Index, Part I.*)

PERSONAL SERVICE. See *Main Process. Summons. Appearance. Distress*.  
 of copy of writ requisite, 260, 261, 263.  
 1. of what copy, 260.

- copy must be exact, 260.
- what deviation allowed, 261.
- 2. by whom to be served, 262.
- 3. on whom to be served, 263.
- personal service requisite, *id.*
- consequences of serving wrong person, 264.
- 4. time of service, *id.*
- 5. place of service, 265.
- 6. mode of service, 266 to 271.
- 7. indorsement of time of service, 271.
- form of indorsement, *id.*
- 8. of non est inventus, *id.*
- form of, *id.*
- 9. proceedings by defendant on, 272.
- 10. when personal service disputed, *id.*
- affidavit of, 289.
- requisites of affidavit, *id.* to 291.
- forms of affidavits, *id.*
- requisite endeavours to serve before proceeding by distringas, 301. See *Distringas*.
- of rules nisi when or not requisite, 584 to 586.
- what deemed personal service, 584, 585.

**PERSONALTY.** (See Index, Part I.)

**PERUSAL OF WARRANT.** (See Ind. Pt. III.)

**PETITION.** (See Index, Parts III. IV.)

**PETITIONING CREDITOR.** (See Ind. Pt. IV.)

**PETITION OF RIGHT.** (See Index, Part IV.)

**PETTY OBJECTIONS,**  
when advisable to waive, 77.

**PEWS.** (See Index, Parts I. IV.)

**PHYSIC AND NATURAL PHILOSOPHY.** (See Index, Part III.)

**PICTURES.** (See Index, Part II.)

**PIGEONS.** (See Index, Parts I. III.)

**PILOTAGE.** (See Index, Part IV.)

**PLACE,**  
statement of, when material, 471.

**PLAINTIFF.** (See Index, Part III.)

- suggested queries to, before action, 120 to 123.
- who to be plaintiff considered, 125.
- indemnity to nominal plaintiff, 127.
- form of bond to indemnify, 128.
- form of letter accompanying bond, 128,
- when plaintiff should or not arrest defendant, 137 to 139.
- name of, in writ, 199, 211, 257.
- character in which plaintiff sues, 200.
- issuing writs by, in person, 211, 257.
- forms of indorsement, *id.*
- entering appearance for defendant sec. stat. 288 to 296. See *Appearance*.
- preparing brief for, on trial, 847. See *Brief*.
- statement of claims of, by counsel in speech, 881 to 884.

**PLAINTIFF'S ATTORNEY,**  
indorsement of name of, on writ of summons, 257

**PLANS,**  
statement and utility of, in brief, 852.

**PLAY.** (See Index, Part III.)

**PLEA.**

introductory observations respecting, 694.

I. Instructions for plea, 695, 117 to 125, 429 to 431.

II. Duty of defendant's attorney as to plea and defence, 697.

when must follow instructions of client, 697, 698.

what defence or plea may be pleaded or advanced, 698.

when advisable to plead, 699.

when to suffer judgment by default, *id.*

occasional conduct on behalf of a defendant collateral to pleading, *id.*

III. Times of pleading, 499 to 501, 700.

imparlances, how far abolished, 700.

are so in personal actions, *id.*

though not in real or mixed actions, *id.*

suggestions on record in lieu of entry of, 700, 701.

suggested statement of a death, &c.

since last pleading, 701.

usual times of pleading, 499 to 501, 701.

time how reckoned, 702.

plea in bar, *id.*

in abatement, *id.*

after delivery of particulars, *id.*

in cases of prisoners, 703.

before what hour at night to be delivered, *id.*

IV. Of obtaining further time to plead, 703.

in bar, *id.*

in abatement, when, *id.*

when given to plead in bar, 628, 704.

length of time, and on what terms, 704.

time, how calculated, *id.*

order for, how obtained, 704, 705.

form of summons for, 705.

comprehensive form of order thereon, *id.*

meaning of words "usual terms," *id.*

construction of terms "pleading issuably," *id.*

what such a plea, or not, 705 to 707.

rejoining gratis, 708.

taking short notice of trial, 709.

time in order, how construed, 710.

how soon plaintiff may sign judgment for want of a plea, *id.*

V. Practice as to pleas, *id.*

taking declaration out of office when filed, *id.*

practice relating to pleas in abatement, 711.

enumeration of statutes affecting them, 711, 712.

time of swearing affidavit in support of, 712.

time of pleading such plea, 712, 713.

where further time granted, 713.

how to be intitled, *id.*

commencement of, *id.*

general regulations respecting, *id.*

form of plea in abatement, *id.*

form of affidavit thereto, 714.

Of pleas in bar, *id.*

forms and requisites of, in general, *id.*

1. The title or date, 716.

general regulation respecting, *id.*

## PLEA—(continued.)

2. Marginal title of cause, 716.
  3. Introduction or commencement, *id.*  
general regulations respecting, 716, 717.
  4. Body of plea, 718.  
general requisites of, *id.*
  5. Conclusions, 719, 720.
  6. Signature of counsel, 720.  
when or not requisite, 720, 721.  
general regulations respecting, *id.*  
delivery of plea, 111, 721.  
of waiving or adding a plea, 722.  
of pleading de novo to amended declaration, 723.
- VI. What plea may or must be pleaded, *id.*  
what facts must be traversed, *id.*  
what pleaded particularly, *id.*  
special plea when necessary, *id.*  
allegation in commencement of declaration cannot be traversed, *id.*  
denial of character or right must be pleaded specially, *id.*  
general regulations and decisions relating to pleas, 724 to 729.  
I. Assumpsit, 724 to 726.  
II. Covenant and debt, 726.  
III. Detinue, 727.  
IV. In case, *id.*  
V. Trespass, 728.  
of sham or false pleas, 729.  
pleas of judgment recovered, 730.  
general regulation respecting, *id.*
- VII. Of pleading *several* pleas, 731.  
*double* pleas when allowed, *id.*  
how to obtain leave to plead the same, *id.*  
mode of application, when necessary, 732.  
general regulations respecting, 731, 732.  
when summons unnecessary, 733.  
instances enumerated, *id.*  
practice as to, when necessary, *id.*  
delivery of abstract, *id.*  
judge's indorsement on summons, *id.*  
what double pleas allowed, 734 to 737.  
instances when disallowed, 736, 737.
- VIII. Of applications to set aside pleas, 737.  
when may be made, *id.*
- IX. Of *several* defendants joining or separating in their pleas, 737, 738.
- Proceedings to compel defendant to plead*, 497 to 508.
1. Notice to plead, 498 to 502. See *Notice to plead*.  
taking advantage of irregularity in, 520.
  2. Rule to plead, 502 to 504. See *Rule to plead*.  
irregularity in, 520.
  3. Demand of plea, 505 to 508. See *Demand of Plea*.  
irregularity in, 520.  
ascertaining time of, 111.
- waiver of, 526.  
proceedings between declaration and plea, 609 to 646.  
of payment of money into Court, 688.  
replication thereto, *id.*

## PLEA—(continued.)

- of matter arising pending suit, 748.  
form of plea, after last pleading in banc, 749.  
affidavits of its truth, *id.*  
of puis darrien continuance, 748.  
judgment for want of, cannot be signed on a Sunday, 105.  
Sunday, when included in rule to plead, *id.*

## PLEADER,

- stating opinions of, in brief, 853.

## PLEADING. (See Index, Parts I. II. III.)

## PLEADING ISSUABLY,

- construction of term, 706.  
what such a plea, *id.*

## PLEADINGS, RULES.

- discretionary jurisdiction of judge to alter, 33, 35.  
new rules affecting, 59, 62, 63.  
authority to judges to alter form of, 63.  
between 10th Aug. and 24th Oct., 96, 97, 100.  
time for, when it expires, 97.  
how to be intitled, 113.  
knowledge of, essential to attorneys, 431, 432.  
chronological statement of rules affecting, 451 to 461.  
influenced by consideration of costs, 486.  
observations on new rules of, 487.  
reducing length of, by consent, 642.  
statement of, in brief, 847, 848. See *Brief*.  
considering sufficiency of, before trial, 849.  
copy of, for judge on trial, 850.  
deviations from rules of pleading, how to be taken advantage of, 461.  
deemed irregularities, *id.*  
cannot be demurred to, 461, 462.  
how far imperative on a judge at chambers or nisi prius, 486.  
observations on effect of, 487.  
impolicy of non-observance of, *id.*  
affecting pleas, 724 to 729.

## PLEDGES,

- entry and statement of, discontinued, 455, 473.

## PLENARY CAUSES. (See Index, Part IV.)

## PLOUGH BOTE. (See Index, Part I.)

## PLURIES WRIT,

- issuing of, into another county, 217.  
form of, 218.

## POACHING, NIGHT. (See Index, Parts I. II.)

## POINTS OF LAW,

- stating observations on, in brief, 853, 885.

## POISONING. (See Index, Part I.)

## POLICE. (See Index, Part II.)

## POLICY OF INSURANCE,

- statement of interest of parties in declaration, 459, 472.  
when may be in the alternative, 459, 472.

## PONDS, WATERCOURSES, RIVERS, WATER, FISH. (See Index, Part I.)

**POOR-RATE.** (See Index, Parts II. IV.)

**PORTS AND HARBOURS.** (See Index, Pt. I.)

**POSSESSIO FRATIS.** (See Index, Part I.)

**POSSESSION.** (See Index, Parts I. II. III. IV.)

**POSTEA,**

Court in banc will not alter, 41.

application must be made to judge who tried, *id.*

**POSTMASTER GENERAL.** (See Index, Pt. II.)

**POSTPONING TRIAL,**

propriety of doing so, 870, 871.

**POWER.** (See Index, Part I.)

**POWER OF ATTORNEY.** (See Index, Part II.)

**PRACTICE.** (See Index, Parts II. III.)

of the Courts, how regulated, 49 to 88.

1. Introductory observations in general, 49.

practical mode of conducting suit should be the same, *id.*

want of simplicity in new rules, *id.*

when should be altered, 49, 50.

authority of, before 1 W. 4, c. 70, 50.

1. by general statutes, 50 to 52.

2. by express written rules, 50 to 53.

3. by prior decisions, 50, 55.

4. by usage, *id.*

1. Practice, how regulated by statutes, 50 to 52.

when ambiguous construction of, differs, 50.

not so when clear and peremptory, *id.*

contrarities in decisions respecting, 50, 51.

when judge no discretionary power over irregularities, 51, 54.

otherwise when deviation from rule of

Court, 51, 54.

why inexpedient to prescribe rules of practice by statute, 51.

judges should have power to alter or modify, *id.*

2. How regulated by express rules, 52 to 55.

decisions of judges in House of Lords as to,

52.

in discretion of Court to make, *id.*

propriety of, cannot be discussed in House

of Lords, *id.*

this though made in Court abroad, *id.*

when Lord Chancellor may alter practice in

Chancery, *id.*

and commit for disobeying such order, *id.*

no action for the false imprisonment, 53.

same principle applies to the other judges,

*id.*

introduction of general rules regulating

practice of all the Courts, *id.*

distinction between statute and mere rule

of Court, 54.

when deviations from, may be amended or

not, 54.

discretionary jurisdiction of judges in this

respect, *id.*

3. By decisions, and effect thereof, 55.

are generally upon construction of a sta-

tute, *id.*

when intention of legislature clear, con-

trary decisions ought not to counteract

that intention, *id.*

**PRACTICE—(continued.)**

otherwise, when ambiguous, 55.

decisions, when preferred, *id.*

4. By usage, and effect thereof, 55, 56.

may be termed the common law, 55.

judges may alter, *id.*

should be strictly adhered to, 56.

or change would mislead, *id.*

cannot prevail against explicit act of parlia-

ment, *id.*

objections to conventional practice, *id.*

former objectionable practice in Exchequer,

*id.*

former inconveniences in process and prac-

tice remedied, 57.

2. Alterations by recent acts and rules, *id.*

enactment of 1 W. 4, c. 70, s. 11, *id.*

empowers judges to make rules, *id.*

what number must concur in making, *id.*

3. By general rules, 58.

of Trinity Term, 1831, *id.*

of Hilary Term, 1832, *id.*

of Easter Term, 1832, *id.*

4. Alterations by subsequent statutes, 59.

enumeration of, 59, 60.

particularly by 2 W. 4, c. 39, 60.

5. By general rules founded on 2 W. 4, c. 39, 61.

of Mich. T. 1832, 61. Process.

of Hil. T. 1833, 62. Evidence.

of Hil. T. 1834, *id.* Pleading.

6. Considerations of present practice, 64.

consequent improvement in, *id.*

power to judges to continue ameliorations in,

*id.*

in what respects objectionable, 64, 65.

general consequences of recent alterations, 65.

extended power of a single judge by, 66.

operation of old rule when contrary to recent

one, 66, 67.

instance where practice of Court differs, 67.

suggestions to rectify dissimilarity, *id.*

consequences of the judges conferring, *id.*

uniformity in practice secured thereby, 67,

68.

7. Why exact observance of fixed practice exacted,

68.

deviations from, set aside for irregularity, *id.*

but do not render process void, 68, 69.

defect in system, to whom attributable, 69.

discretionary power of judges exercised libe-

rally, *id.*

will make practitioner pay cost of mistakes, *id.*

strict observance of prescribed forms essen-

tial, *id.*

consequences of deviations, *id.*

must be objected to in due time, *id.*

Court will give effect to objection, *id.*

though deviation trifling and will not mis-

lead, *id.*

instances of deviations, 69 to 71.

when Court will overrule objection, 71.

8. Inconveniences from distinction between per-

emptory and directory, 72.

confusion in decisions resulting therefrom, *id.*

when merely directory omission will not vi-

tiate, *id.*

instances of deviations, 72, 73.

9. Recent rule, that omissions shall be deemed

irregularities, 74.

substance of rule, *id.*

## PRACTICE—(continued.)

- distinctions between acts void or merely irregular, 75.
- proceedings when void, and consequence, *id.* when irregular, and consequence, *id.*
- 10. Breach of good faith in, and consequence, 76. Court will set aside judgment against, *id.* will not impose terms on defendant, *id.* when costs of application allowed, *id.*
- 11. Whether imperative or discretionary in Court or judge to set aside proceedings, *id.* is imperative when irregularity clear, *id.* may refuse costs of application, *id.* if refused, cannot afterwards be recovered as special damages, *id.*
- 12. Why advisable not to take trifling objections, 77. judges condemn such objections, 77, 79. are injurious to client's interest, 77. though knowledge of technicalities essential, *id.* should not demur to defect in form, *id.* petty objections should be waived, *id.* consequences, when taken, 77, 78. may be taken if arrest vexatious, 78. increase of, in Practice Court, 79. enactment of 7 G. 4, c. 37, s. 49, respecting, *id.* costs on, sometimes disallowed, *id.* should not be taken unless opponent mislead, &c. 80. suggestions respecting, *id.* suggested notice of, before summons, &c. *id.* allowance of costs if irregularity persisted in, *id.*
- 13. Discretion of Court or judge over interlocutory costs, 80 to 82. See *Costs*.
- 14. Practice of Court, how proved, 82. usual course in the superior Courts at Westminster, *id.* by certiorari to judge of inferior Court, 83. who makes his return, *id.* accuracy of, when disputed, *id.* practice of Ecclesiastical Court, how proved, *id.*
- 15. Simplicity in practice of superior Courts, *id.*
- 16. Summary of the ordinary proceedings in an action, *id.* course of, enumerated, 83 to 85.
- 17. Irregularities and collateral proceeding in a suit, 85. may arise in every stage of a suit, *id.* how taken advantage of, *id.* in practice, *id.* in pleading, *id.* other occasional proceedings, 86.
- 18. Proceedings of less frequent occurrence, *id.* enumeration of, *id.*
- 19. Practical proceedings peculiar to one Court, *id.* what in King's Bench, *id.* in Common Pleas, *id.* in Exchequer, *id.*
- 20. Difference between practice at law and in equity, 87, 88. at law defendant no intimation of cause of action before appearance, 87. process merely describes form of action, *id.* enactments of 2 W. 4, c. 39, respecting, *id.* no intimation of claim until declaration, *id.* when defendant may obtain particulars before appearance, *id.* practice in equity different, 87, 88. no process for appearance until bill filed, 88.

## PRACTICE—(continued.)

in equity no arrest of defendant, 88. except in instance of *ne exeat regno*, *id.* at law disputed facts tried by a jury, *id.* in equity judge decides, *id.* or directs issue to be tried, and then decides, *id.*

## PRACTICE COURT,

constitution of, 12. business transacted before, 12 to 14. former practice respecting, 12. enactments respecting, 12, 13. sits apart from the Court in banc, 14. course and time of sitting, *id.* where holden in K. B. 15. in C. P. *id.* in Exchequer, *id.* sometimes called the Bail Court, *id.* operation of 11 Geo. 4, and 1 W. 4, c. 70, as to, *id.* jurisdiction of, *id.* proceeding in, *id.* one judge only presides, *id.* bail added and justified in, *id.* motions heard and decided in, *id.* rules and orders made, *id.* decisions of Exchequer, *id.* matters of practice determined there, 15, 16. motions for writs of mandamus, &c. granted, 16. though cause shown in full Court, *id.* course when judge doubts propriety of granting rule, *id.* at instance of judge, motions re-heard in full Court, *id.* single judge's decision conclusive, *id.* which differs from practice at chambers, *id.* enactment in interpleader act, *id.* when single judge ought not to act, *id.* common paper of, 17. peremptory paper of, *id.* limited expediency of this Court, *id.* observations respecting, 18. decisions of, preferable to those of a judge at chambers, *id.*

## PRÆCIPUE,

form and requisites of, considered, 220, 221. forms of, for writ of summons, 221, 260, 346. for capias, 221, 346. for concurrent capias, 221. for distringas, 310.

## PRAYER OF JUDGMENT,

when unnecessary, 743. form of, 744.

## PRECAUTIONARY MEASURES. (See Index, Part II.)

## PRECAUTIONARY PROCEEDINGS. (See Index, Part III.)

## PRECEDENTS. (See Index, Parts I. III.)

## PRECLUDI NON,

when or not necessary in replication, 743.

## PRECOGNITION OF WITNESSES, law of Scotland respecting, 823 to 825.

## PREPARING DECLARATION, costs of, when allowed, 440, 441.

**PREFERENCE.** (See Index, Part II.)**PRELIMINARY STEPS.** (See also Index, Part II.)

when necessary before commencement of action, 114 to 139.

I. Of retainer of attorney, 114. See *Retainer*. expediency of, 114. formerly practice to file, *id.* should be in writing and explicit, 115. form of, 116.

II. How to obtain proper instructions to sue or defend, 117.

should be obtained in first instance, *id.* duty of attorney in this respect, 118. minute inquiry essential, *id.* instructions to sue, *id.* suggested form of instructions, 120 to 123. the like to defend, 124.

III. Of considering instructions, &c. before commencing action, 125. (And Index to Part III.)

IV. Who to be plaintiff or defendant, 125. difficulties attending selection of, *id.* care to be observed respecting, 126, 127.

V. Of obtaining authority to use party's name, 127.

indemnity to such party, *id.* form of bond to indemnify, 128. form of letter accompanying bond, *id.* essential to obtain previous leave, 129. when wife separated from husband, *id.* indemnity to husband from costs, *id.* in cases of executors, 129. of assignees or trustees, 129, 130. of parties, 129.

VI. Of the form of action to be observed, 130. knowledge of, essential, *id.* judicious choice of, when several allowed, 130, 131.

will depend on the facts, 130. of the several forms of actions, 130, 131. formerly not necessary to decide till declaration framed, 131. must now be stated in process, *id.*

VII. Of taking counsel's opinion, *id.* attorney's duty in taking, 131, 132. protects him if properly taken, 132. suggested form of case for counsel's opinion, *id.* in note.

VIII. Of retaining counsel, *id.* and *ante*, vol. ii. 71, 322.

when expedient to retain, 132. fee to be given, 132, 133. when requisite to renew, 133. form of retainer, 134.

IX. Of attorney's letter before action, *id.* expedient to write, *id.* what it should contain, 135. fee allowed for, 135, 136. form of letter, 136.

X. Whether or not to arrest defendant, 137. reasons for not arresting, 137, 138. reasons for arresting, 138, 139.

XI. Subjects to be considered by an attorney for a defendant, 139.

**PREMISES.** (See Index, Part I.)**PREMIUM.** (See Index, Part III.)**PREPARING FOR TRIAL.**

I. Final, examination of witnesses, &c. 839. See *Witness*. *Evidence*.

1. How to be examined, 839.

quantity of examination, 840 to 842.

2. releasing or removing interest of witness, 842.

3. consideration of character, &c. of witness, 843.

4. instructions, &c. to witnesses when or not proper, *id.*

5. conduct of witnesses before trial, 845.

6. the like pending or after trial, *id.* See *Trial*.

II. Of the brief in general, 847 to 864. See *Brief*.

III. Of delivering brief, 863, 864.

IV. Of consultation before trial, 864, 865. See *Consultation*.

V. Of discoveries before trial, 865. communicating same to counsel, *id.*

**PREROGATIVE.** (See Index, Part I.)**PREROGATIVE COURT.** (See Index, Part IV.)**PRESCRIBED FORMS,**

essential to observe, 69, 71.

consequences of deviation from, *id.*

departure from, when allowed, 71.

**PRESCRIPTION.** (See Index, Part I.)**PRESENTMENT.** (See Index, Parts I. IV.)**PRESENTS.** (See Index, Part I.)**PRESERVES.** (See Index, Part I.)**PRESUMPTION.** (See Index, Part II.)**PREVENTIVE REMEDIES.** (See Index, Parts I. II.)**PRICE.** (See Index, Part II.)**PRIMA TONSURA.** (See Index, Part I.)**PRINTER.** (See Index, Part III.)**PRIORITY OF POSSESSION.** (See Index, Part I.)**PRISON BREAKING.** (See Index, Part II.)**PRISONER.** (See also Index Part II.)

transfer of, to sheriff, 48.

declaring against, 62, 444, 469.

number of copies of declaration, 490.

time for pleading of, 62.

mode of detaining, under 2 W. 4, c. 39, 151.

form of writ of detainer of, 156.

proceedings against, by writ of detainer, 392 to 394. See *Detainer*.

proceedings to outlawry where one defendant a prisoner, 404, 405.

right of, to be superseded when waived, 522.

one summons for discharge of, only necessary, 561.

time of pleading by, 703.

**PRIVATE DOCUMENTS,**

inspection of, how obtained, 619, 433 to 435.  
previous application before summons requisite, 619.

Reg. Gen. H. T. 2 W. 4, reg. 102, respecting Court rolls, 619.  
rule for inspection of, when nisi, 620.

**PRIVATE INJURIES.** (See Index, Parts I. IV.)

**PRIVATE REMEDIES.** (See Index, Part I.)

**PRIVATE RIGHTS** (See Index, Part I.)

**PRIVATELY STEALING FROM PERSON.**  
(See Index, Part I.)

**PRIVILEGE FROM ARREST,**  
what persons are so, 329, 331.

**PRIVITY OF POSSESSION.** (See Index, Part I.)

**PRIVY COUNCIL,**  
cannot review or alter a rule or order of inferior Court abroad, 52.

**PRIZE.** (See Index, Part I.)

**PRIZE COURT.** (See Index Parts II. IV.)

**PRIZE FIGHT.** (See Index, Parts I. II.)

**PROBABLE DEFENCE,**  
statement of, in brief, when anticipated, 353, 358.

**PROBATE.** (See Index, Parts II. IV.)

**PROCEEDINGS,**  
number of judges to give validity to, 6.  
when discretionary in judge to set aside, 76.  
when imperative, *id.*  
summary of, when action regular, 83, 84.  
some proceeding of less frequent occurrence, 86.  
peculiar to three superior Courts, *id.*  
difference between, in law and equity, 87.  
exceptions as to, between 10th Aug. and 24th Oct. 96.

**PROCEEDINGS BEFORE JUSTICES.** (See Index, Part III.)

**PROCEEDINGS BETWEEN RETAINER AND COMMENCEMENT OF LITIGATION.** (See Index, Part III.)

**PROCEEDINGS IN AN ACTION,**  
amendment of, after notice, 529, 530, 534.  
1. enumeration of the regular ones, 421.  
of the different warnings, 422.  
2. of occasional proceedings, 423, 424.  
3. of defective or irregular proceedings, 425, 426.  
4. modes of proceeding relative to each, 426.  
5. enumeration of the principal recent alterations and improvements, 427, 428.  
to compel defendant to plead, 497 to 508.  
between declaration and plea, 609 to 646.  
the like when defendant no defence, 659 to 681.  
the like when defendant admits action in part, 684.  
bill in equity to restrain, 627.

**PROCESS.** See *Memo Process.*

issuing of, 4.  
how far proceeded in before Court has knowledge of, *id.*

**PROCESS—(continued.)**

seal of Court gives authenticity to, 4.

crime to forge seal of, *id.*

return to, in vacation, how enforced, 20, 46.

transfer of, to incoming sheriff, 48.

omissions in copies of, 62, 71, 72.

indorsement on, 72.

when irregularity does not render void, 69.

execution of, on Sunday, void, 75, 104.

formerly returnable in term, 89.

how otherwise, 89.

exceptions, when issued between 10th Aug. and 24th Oct., 96.

judge's order for immediate return to, 99.

may be served at any hour, 110.

time and mode of service, 143 to 145.

why to be personal, 144.

uniformity of process act, 2 W. 4, c. 39, 149 to 156.

practical operation of, 156.

enumeration of five forms of, 158.

must be in English, *id.*

writs under 2 W. 4, c. 39, considered commencement of action, 159.

rules of Court respecting, 160, 161.

general operation of 2 W. 4, c. 39, respecting, 162.

parts and requisites of, 162 to 252. See *Means Process. Capias. Summons.*

must be in English, 158.

considerations, what process to issue, 253, 254.

when plaintiff may abandon serviceable process and issue bailable, 254.

service of, on wife, void, 263.

entry of appearance must correspond with, 287, 295.

**PROCLAMATION,** writ of, 402.

what deemed execution of, 403.

**PROCTOR.** (See also Index, Parts II. and III.)  
retainer of, 116.

**PROFESSIONAL BUSINESS.** (See Index, Part III.)

**PROFESSIONAL CONFIDENCE,**  
witnesses not allowed to violate, 811.

**PROFIT A PRENDRE.** (See Index, Part II.)

**PROHIBITION.** (See also Index, Part IV.)  
writ of, may be moved for in Practice Court, 16.  
though cause shown in full Court, *id.*

**PROMISE OF MARRIAGE.** (See Index, Part III.)

**PROMISSORY NOTES.** (See also Index, Pt. II.)  
forms of declarations for, limited by Reg. Gen. T. T., 1 W. 4, 452, 476.

**PROOF OF FACTS.** (See Index, Part III.)

**PROOFS,**  
statement of, in brief, 854, 855. See *Brief.*

**PROPER SECURITY.** (See Index, Part II.)

**PROPERTY.** (See Index, Part I.)

**PROPOSAL FOR TIME.** (See Index, Part III.)

**PROPOSALS.** (See Index, Part I.)



- PROSPECTIVE MORTGAGE.** (See Index, Part III.)
- PROTECTION TO JUSTICES.** (See Index, Part III.)
- PROTEST.** (See Index, Part II.)
- PROTESTATIONS,**  
in pleading, abolished, 743.
- PROTHONOTARY.** (See also Index, Part III.)  
And see *Master*.  
what matters referred to, 3, 38.  
may require further affidavits, 3.  
report result to full Court, *id.*  
duty and jurisdiction of, 38.  
report of, 39.  
hours of attendance of, 107.  
objecting to report of, 37.
- PUBLIC DOCUMENTS,**  
inspection of, how obtained, 433 to 435, 619.  
reg. gen. respecting court rolls, 620.  
rule for, when nisi only, *id.*
- PUBLICATION.** (See Index, Part III.)
- PUBLIC INJURIES.** (See Index, Part I.)
- PUBLIC LECTURES.** (See Index, Part III.)
- PUBLIC REMEDIES.** (See Index, Part I.)
- PUBLIC RIGHTS.** (See Index, Part I.)
- PUBLIC WORKS.** (See Index, Part II.)
- PUFFERS.** (See Index, Part II.)
- PUIS DARRIEN CONTINUANCE,**  
release pleaded, judge at nisi prius cannot avoid it, 44, 748.
- PUISNE JUDGE,**  
sitting of, in Practice Court, 14, 15.
- PURCHASE.** (See Index, Part I.)
- PURCHASER.** (See Index, Parts I. III.)
- PUTTING IN BAIL.** See *Bail*.  
import of term, 373.  
time and mode of, 383.
- QUALIFICATION,**  
of jurors, necessity for inquiring into, 795.
- QUANTUM MERUIT COUNTS,**  
abolished, 450, 476.
- QUANTUM VALEBANT COUNTS,**  
abolished, *id.*
- QUARE CLAUSAM FREGIT,**  
statement of abutments in actions for, 460, 470, 471.  
pleas to actions for, 728, 729.
- QUARE IMPEDIT.** (See Index, Part II.)
- QUAYS.** (See Index, Part I.)
- QUESTIONS.** (See also Index, Part II.)  
when leading ones may be put, 893, 899.  
disparaging ones, when, 899.
- VOL. III.**
- QUIA TIMET.** (See Index, Part II.)
- QUIET ENJOYMENT,** (See Index, Pts. I. II.)
- QUIT RENT.** (See Index, Part I.)
- QUI TAM ACTION,**  
conclusion of declaration in, 473.  
staying proceedings in, 636.
- QUOD PERMITTAT PROSTERNERE.** (See Index, Part II.)
- QUO WARRANTO.** (See Index, Part IV.)
- RABBIT WARREN.** (See Index, Part I.)
- RABBITS.** (See Index, Parts I. II.)
- RACK RENT.** (See Index, Part I.)
- RAIL ROADS. WAGGON ROADS.** (See Index, Part I.)
- RAPE.** (See Index, Parts I. II.)
- RATE.** (See Index, Part II.)
- REAL ACTIONS.** (See also Index, Parts II. IV.)  
not affected by 2 W. 4, c. 39, 101.
- REAL PROPERTY.** (See Index, Parts I. II.)
- REASONABLE TIME,**  
meaning of term, 112.  
in taking advantage of irregularities, 509.
- REBUTTER, 746.**
- RECAPTION.** (See Index, Parts I. II.)
- RECEIVERS.** (See Index, Parts I. III.)
- RECITALS.** (See also Index, Part I.)  
of original writs, when prohibited, 463.
- RECOGNIZANCE.** (See Index, Parts II. III. IV.)
- RECORD.** (See Index, Part I.)
- RECORD OF NISI PRIUS,**  
formerly forms of, various, 804.  
one general form now prescribed, *id.*  
form of, *id.*  
contents of, *id.*  
general regulations respecting, *id.* 805.  
entry of suggestions on, *id.*  
of marking and passing record, *id.*  
if imperfect, judge may refuse to try cause; *id.*  
time of entry, 806.  
withdrawing same, 870, 871.
- RECORDS.** (See Index, Parts I. II.)
- RECOVERY.** (See Index, Part I.)
- RECTORY.** (See Index, Part I.)
- RE-ENTRY.** (See Index, Part II.)
- RE-EXAMINATION OF WITNESS.** See *Evidence. Trial. Witnesses.*
- REFERENCE.** (See Index, Parts II. III.)

- REFERENCE TO MASTER.** (See also Index, Part II.)  
 when expedient, 36 to 38.  
 when or not proper, 38.  
 duty of counsel on consenting, *id.*  
 to compute, when proper, 681.  
 practice as to, 682.  
 showing cause against rule nisi to compute, *id.*
- REGISTERS AND ENTRIES.** (See Index, Part I.)
- REGISTRARS.** (See Index, Part IV.)
- REGISTRY.** (See Index, Part I.)
- REGULAR PROCEEDINGS,**  
 in a cause, few and simple, 4.  
 not unfrequently become complex, *id.*
- REGULARITY OF WRIT,**  
 affidavit and requisites of, 262, 289 to 291.
- RELATION.** (See Index, Parts I. II.)
- RELATIONSHIP,**  
 when it precludes judge from acting, 9.  
 decision of the Privy Council respecting, 10.
- RELATIVE RIGHTS.** (See Index, Part I.)
- RELEASE.** (See Index, Part I.)  
 pleading of, at nisi prius, 44.  
 by one executor against co-executor, 129.  
 competency of witness affected by, 827, 842.
- RELIEF.** (See Index, Part IV.)
- RELIGION,**  
 objecting to witness's, 810.
- REJOINDER,**  
 requisites of, 747.  
 forms of, 747, 748. See *Forms*.  
 commencement and conclusions of, *id.*  
 1. to whole cause of action, 747.  
 2. to part of cause of action, 748.  
 3. conclusion to the country, *id.*  
 4. conclusion, with a verification to whole cause of action, *id.*  
 5. the like as to part, with prayer of judgment, *id.*
- REJOINING GRATIS,** 708.
- REMAINDER AND REVERSION.** (See Index, Part I.)
- REMAINDERMAN AND REVERSIONER.** (See Index, Part I.)
- REMEDIES.** (See Index, Parts I. II.)
- REMOVAL FROM SESSIONS.** (See Index, Part IV.)
- REMOVAL AND ABATEMENT.** (See Index, Part II.)
- REMUNERATION.** (See Index, Part III.)
- RENTS.** (See Index, Parts I. II.)
- RENT CHARGE.** (See Index, Part I.)
- RENT, CORN.** (See Index, Part I.)
- RENT, FEE FARM.** (See Index, Part I.)
- RENTS, QUIT.** (See Index, Part I.)
- RENT, RACK.** (See Index, Part I.)
- RENT SECK.** (See Index, Part I.)
- RENT SERVICE.** (See Index, Part I.)
- REPAIRING FENCES.** (See Index, Parts I. II.)
- REPAIRS.** (See Index, Part II.)
- REPETITION of Precautionary Measures suggested.** (See Index, Part II.)
- REPLEVIN.** (See Index, Parts I. III. IV.)  
 right of counsel to begin in actions of, 876. See *Trial*.
- REPLEVIN BOND.** (See Index, Part IV.)
- REPLICATIONS,**  
 in general, 741, 742.  
 recent regulations affecting form and requisites of, 742, 743.  
 to be intitled of day when pleaded, 743.  
 repetition of venue unnecessary, *id.*  
 precludi non and prayer of judgment when unnecessary, *id.*  
 protestations abolished, *id.*  
 special traverses to conclude to the country, *id.*  
 prescribed form to plea of payment of money into court, 688, 743.  
 signature of counsel when necessary, 743.  
 must be delivered, *id.*  
 consequence of no similiter or perfect issue joined, *id.*  
 forms of commencement and conclusions, 744.  
 1. commencement, *id.*  
 2. similiter, *id.*  
 3. to part of cause of action, *id.*  
 4. conclusion to the country, *id.*  
 5. like, with a verification, *id.*  
 6. ditto, to part with prayer of judgment, *id.*  
 Reg. Gen. dispensing with rule to rejoin, *id.*  
 other requisites of replications, 745.  
 of compelling plaintiff to reply, *id.*  
 or submit to non pros, 745, 746.
- REPLY,**  
 advantage of, at nisi prius, 28, 872. See *Trial*.
- REPORTS.** (See Index, Part I.)
- REPRESENTATIVE CHARACTER,**  
 general regulation as to suing in, 467.
- REPUTATION.** (See Index, Part I.)
- REQUEST.** (See Index, Parts II. IV.)
- RESCINDING CONTRACT.** (See Index, Part II.)
- RESCUE.** (See Index, Part II.)
- RESEALING WRIT,**  
 when allowed, 233.
- RESIDENCE,**  
 statement of defendant's, in writ, 174.  
 consequences of mistake in, 174 to 179.  
 in continued process, 179, 180.

**RESIDENCE—(continued.)**

of plaintiff, mode of ascertaining, 251.  
 of defendants, in proceeding by distringas, 320.  
 staying proceedings until residence of plaintiff known, 636.

or security for costs given, *id.*

**RESIDUE OF ASSETS.** (See Index, Part II.)

**RESISTANCE.** (See Index, Part II.)

**RESISTING RULE NISI,**

notice of party's intention to do so only in part, 587, 588.

propriety of giving such notice, 587, 588.

**RESTITUTION.** (See Index, Part IV.)

**RESTORING GOODS, &c.**

staying proceedings on account of goods, &c. being delivered up, 691.

formerly not allowed, *id.*

now otherwise, 691, 692.

**RESWEARING AFFIDAVIT,**

when or not necessary, 549.

**RETAINER.** (See Index, Parts II. III.)

of an attorney, 114.

object of retaining, *id.*

formerly practice to file, *id.*

should be explicit and in writing, 115.

if several plaintiffs, should be signed by all, *id.*

whether general or qualified, *id.*

when want of, will not vitiate proceedings, 116.

effect of general retainer to sue or defend, *id.*

requisites of, in Ecclesiastical Court, *id.*

no precise words essential, *id.*

qualification of, *id.*

form of, *id.*

no retainer fee allowed, 117.

in cases of warrants of attorney, *id.*

when plaintiff an infant, *id.*

of counsel, 132.

when expedient to retain, 132, *ante*, vol. ii. 71, 322.

duty of attorney in this respect, 132.

fee to be given, *id.*

when to be given, 133.

when renewal of, requisite, 133, 134.

form of, 134.

of stifling retainers, *id.*

**RETAINER OF ATTORNEYS.** (See Index, Part III.)

**RETAINING OF COUNSEL.** (See Index, Part III.)

**RETAINING, REMEDY BY.** (See Ind. Pt. II.)

**RETAKING.** (See Index, Part II.)

**RETURN TO PROCESS,**

how enforced in vacation, 20, 46, 61, 64.

by whom to be made, 245.

forms of return, 248, 249. See *Form*.

enforcing return to, 246.

rule to return writ, how obtained, 247.

to writ of distringas must be in term, 310.

if on dies non, void, 310, 311.

**RETURN OF SUMMONS,**

before what judge, 556.

may be before either of judges having concurrent jurisdiction, *id.*

**REVENUE, COURT OF.** (See Index, Part IV.)

**REVENUE OFFICERS.** (See Index, Part IV.)

**REVERSION.** (See Index, Part I.)

**REVERSIONER.** (See Index, Part I.)

**REVIEW, Court of.** (See Index, Part IV.)

**REVIVING RULES,**

practice as to, 586, 587.

**REVOCATION.** (See Index, Part I.)

**REVOCATION OF POWER OF ARBITRATOR.** (See Index, Part III.)

**REWARDS.** (See Index, Part I.)

**RIGHT,**

denial of, in party suing, must be pleaded specially, 723.

**RIGHT OF COMMON,**

new rules respecting pleas of, 728, 729.

**RIGHT OF WAY,**

new rules respecting pleas of, *id.*

**RIGHTS.** (See Index, Part I.)

**RIOT.** (See Index, Part II.)

**RIVERS.** (See Index, Parts I. II.)

**ROBBERY.** (See Index, Part I.)

**ROGUE AND VAGABOND.** (See Ind. Pt. II.)

**ROLLS, MASTER OF.** (See Index, Part IV.)

**ROOKERY.** (See Index, Part I.)

**ROOKS.** (See Index, Part II.)

**ROYAL FAMILY,**

privilege of, from arrest, 329.

**RULE ABSOLUTE.** See *Rule Nisi.*

when absolute in the first instance, 576.

costs when allowed, if absolute in first instance, 577.

of shewing cause in first instance, 589.

of obtaining office copies of rule nisi, and affidavits before shewing cause, *id.*

swearing affidavits in opposition, 590.

shewing same to counsel, *id.*

delivery of brief to move rule absolute, *id.*

when or at what time should be moved, 592.

of making rule nisi absolute, 596.

interlocutory costs of, 597. See *Interlocutory Costs*.

terms of rule absolute, 601.

notice of, and appointment to tax, 602.

**RULES AND ORDERS.** (See Index, Part IV.)

**RULES NISI.** See *Irregularities. Motions. Affidavits.*

swearing affidavit in support of, 546, 550.  
 filing same, 547.  
 motions for, 570 to 574. See *Motions*.  
 notices for, when or not necessary, 531 to 533, 570. See *Notice of Motion*.  
 conduct of counsel on moving for, 575.  
 when absolute or only nisi, 576.  
 when costs allowed on, 577.  
 forms and requisites of rule nisi, 578.  
 statement in, of time of shewing cause, 579.  
 drawing same up on "reading documents, &c." *id.*  
 for irregularity, precise objection to be stated, *id.*  
 all objections to be stated at once, 580.  
 cannot be moved for successively, 581.  
 statement in, "to whom payment to be made," *id.*  
 or "deed &c. delivered up, &c." *id.*  
 when it should pray costs, 582.  
 when should pray an immediate stay of proceedings, *id.*  
 amendment of, when or not allowed, 547, 583.  
 when fresh rule permitted, 583.  
 service of copy of rule nisi, *id.*  
 service on Sunday bad, 105.  
 form of affidavit of such service, 583.  
 time of service, 110.  
 when need not be personal, 584.  
 when it must be personal, 585.  
 of enlarging and revising rules, 99, 586.  
 of giving notice by party against whom rule obtained of intention not to resist same, 587.  
 or resist only in part, 587, 588.  
 what party to shew cause against, 588.  
 of shewing cause against, in first instance, 589.  
 no necessity to obtain office copy of rule nisi, before shewing cause, *id.*  
 or office copies of affidavits, *id.*  
 swearing affidavits in opposition to, *id.*  
 shewing same to counsel, 589, 590.  
 delivery of brief to move rule nisi absolute, 590.  
 requisites of such brief, 590, 591.  
 should be delivered as early as possible, 591.  
 brief to oppose rule, *id.*  
 when, or at what time should be moved absolute, 592.  
 conduct of counsel on each side in supporting or opposing rule, *id.*  
 of discharging rule nisi, 593, 596.  
 professional conduct of barristers in disposing of rules, 594.  
 arguments upon affidavits, &c. in support of, *id.*  
 supplementary affidavits, when allowed, 36, 37.  
 formal objections, when to be taken, 595.  
 deciding on conflicting affidavits, 596.  
 of making rule absolute, *id.*  
 interlocutory costs of, 597 to 600.  
 when the Court will impose terms, 601.  
 terms of rule absolute, *id.*  
 notice of, and appointment to tax, 602. See *Interlocutory Costs*.  
 master's allocatur of costs, *id.*  
 enforcing payment of, by attachment, 603.  
 care essential in served copies of rules nisi, *id.*  
 form of, to change venue, 654, 655. See *Venue*.  
 to compute, 682.  
 granted in Practice Court, 3.  
 hearing of, at chambers, when allowed, 27, 28.  
 deviations from, when may be amended, 51, 52.

practice, how settled by, 52.  
 making of, in discretion of Court, *id.*  
 decision of House of Lords respecting, *id.*  
 impropriety of, cannot be discussed in superior Court, *id.*  
 power of lord chancellor to make, *id.*  
 may commit solicitor for disobeying, *id.*  
 no action lies for commitment, 53.  
 introduction of, regulating practice of all the Courts, *id.*  
 unless altered, govern present practice, *id.*  
 amendment of deviations from, allowed, 54.  
 are construed less rigidly than statutory regulations, *id.*  
 costs of amendment under, *id.*  
 inconveniences resulting from number of, 56.  
 partiality of judges for those of own Court, 57.  
 are now similar in all the Courts, *id.*  
 number of requisites, on making, *id.*  
 promulgation of, under 1 W. 4, c. 70, *id.*  
 of Trin. term, 1831..58.  
 of Hil. term, 1832.. *id.*  
 of Easter term, 1832..59.  
 under 2 W. 4, c. 39..60.  
 of Mich. term, 1832..61.  
 of Hil. term, 1833..62.  
 of Trin. term, 1833.. *id.*  
 of Hil. term, 1834..62, 63.  
 distinction, when imperative or directory, 72.

#### RULE TO COMPUTE,

when may be obtained, 681,  
 shewing cause against same, 682, 683.

#### RULE TO DECLARE. See *Declaration*.

#### RULE TO PLEAD,

when necessary, 502.  
 Reg. Gen. Hil. term, 4 W. 4, r. 42, respecting, *id.*  
 entry of, 503.  
 time of entering, *id.*  
 must not be before notice to plead, *id.*  
 or before notice of declaration, 504.  
 mode of ruling to plead, *id.*  
 form of præcipe for, *id.*  
 form of entry of, *id.*  
 inutility of this proceeding, *id.*  
 Sunday, when included in, 105.

#### SACRILEGE. (See *Index*, Part I.)

#### SAILOR. (See *Index*, Part I.)

#### SALE. (See *Index*, Part I.)

#### SALVAGE. (See *Index*, Parts II. IV.)

#### SALVAGE ACTS. (See *Index*, Part III.)

#### SAVING BANK ACT. (See *Index*, Part III.)

#### SCANDALOUS MATTER,

striking same out of declaration, 638.

#### SCIRE FACIAS. (See *Index*, Part IV.)

uniformity of process act does not extend to, 100.  
 irregularity in, when waived, 522.

**SEA BANKS AND WALLS.** (See Index, Part I.)

**SEA BATTERY.** (See Index, Part IV.)

**SEAL OF COURT,**  
gives authenticity to process, 4.  
high crime to forge, *id.*

**SEAL OFFICE,**  
hours of attendance of, 106.

**SEALING OF WRIT,**  
by what officer, 224.  
rules respecting, *id.*  
practice of, differs in K. B. and Exch. 224, 225.  
fee for sealing, 225.

**SEA MARKS.** (See Index, Part I.)

**SEAMAN'S WAGES.** (See Index, Parts III. IV.)

**SEARCH WARRANT.** (See Index, Part III.)

**SEAS.** (See Index, Part II.)

**SECONDARY.** (See Index, Part III.)

**SECONDARY EVIDENCE.** See *Evidence.*  
when allowed, 810.

**SECOND ACTION,**  
commencement of, after plea in abatement, 459,  
467.  
staying proceedings in, 632.

**SECOND ARREST,**  
when or not permitted, 331, 335,

**SECOND COUNTS.** See *Declaration.*  
Reg. Gen. Hil. term, 4 W. 4, reg. 5, affecting,  
445.  
when or not to be allowed, 455, 461.  
illustrative instances, 455, 456.  
obtaining order for striking out, 458.  
consequences of retaining, *id.*  
origin of, 475.  
propriety of introducing, considered, 480, 481.  
liability of plaintiff, on failing to establish same,  
458.  
rules respecting, how far imperative on a  
judge, 486, 638.  
of striking out superfluous counts, 638.  
to whom, and how to apply, *id.*  
must be to a judge at chambers, 639.  
time of application, *id.*  
may be after order for time to plead, *id.*  
should be before pleading, *id.*  
mode of applying, 458, 640.  
form of summons, 640.  
form of order thereon, *id.*  
bill of costs relating to same, *id.*  
when application proper, 641.  
when not, 641, 642.  
costs of application how allowed, 476, 597.  
proceedings on obtaining summons, 642.  
of reducing length of pleadings by consent, *id.*

**SECOND MOTION,**  
when permitted on same ground, 574.

**SECRETS.** (See Index, Part II.)

**SECURITIES FOR CLIENT.** (See Index, Part  
III.)

**SECURITIES OF PEACE.** (See Index, Part II.)

**SECURITY.** (See Index, Part III.)

**SECURITY FOR COSTS.** See *Costs.*  
staying proceedings until given, 633.  
when plaintiff permanently abroad, 633,  
634.  
when plaintiff insolvent, 635.  
time of application, 634.  
general regulation respecting, *id.*  
course of proceedings to obtain, 635.  
notice of intended motion, *id.*  
when not in a *qui tam* action, on ground of  
plaintiff's poverty, 636.  
in actions of ejectment when, *id.*  
until residence of plaintiff known, *id.*

**SEIZURES.** (See Index, Part IV.)

**SENSE,**  
mistake not altering, when material, 231, 304.  
instances, 231, 232, 304.

**SEPARATION.** (See Index, Parts I. II.)

**SEPARATE SPEECHES,**  
of counsel when allowed, 907. See *Trial.*

**SERJEANTS,**  
when privileged from arrest, 330.

**SERJEANTS AT LAW.** (See Index, Part IV.)

**SERJEANTS' INN HALL,**  
formerly practice of judges to sit there, 8.

**SERVANT.** (See Index, Parts I. II.)

**SERVANTS IN HUSBANDRY.** (See Ind. Pt. I.)

**SERVANTS IN TRADE.** (See Index, Part I.)

**SERVICE OF ARTICLED CLERK.** (See Index,  
Part III.)

**SERVICE OF PROCESS,** 260 to 270. See *Means  
Process. Summons.*  
form of indorsement of time of, 258, 271.  
where several arrested and one served, 259.  
must be personal, 260, 263.  
of what copy, 260.  
by whom, 262.  
on whom, 263.  
time of, 264.  
place of, 265.  
mode of, 266 to 271.  
of disputed service, 372.  
time of objecting to, 517, 518,

**SERVICE OF RULES,**  
time of service, 100, 561 to 564.  
general regulations respecting, 583.  
when need not be personal, 584.  
when must be personal, 585.

**SERVICE OF WRIT.** See *Means Process.*  
preparing to serve or execute, 238, 239.  
service of in general, 239.  
time of service, 143, 241.  
place of service, 241.  
mode of service, 144, 242.  
why to be personal, 144.

- SERVICE OF WRIT**—(*continued.*)  
 indorsement of time of service, 244.  
 forms of indorsement, *id.*  
 affidavit of service, 245.
- SERVICE OF SUMMONS**, 561. See *Summons*.  
 affidavit of service of, 561.  
 time of service, *id.*  
 place of service, 265.  
 time of day of serving, 564.
- SERVICEABLE PROCESS**,  
 enactment of 2 W. 4, c. 39, respecting, 150.  
 mode of appearance to, *id.*  
 how enforced, *id.*  
 when plaintiff may abandon and issue bailable, 254.  
 declaring *de bene esse* on, impliedly abolished, 436.  
 filing or delivering declaration on, 438. See *Declaration*.
- SESSIONS**. (See Index, Parts II. IV.)
- SETTING ASIDE PLEAS**,  
 applications for, when to be made, 737.
- SETTLEMENTS**. (See Index, Parts I. IV.)
- SET OFF**. (See Index, Parts I. II.)  
 particulars of, to be annexed to record, 613.  
 general regulation respecting, *id.*  
 statement of, in brief, 850. See *Brief*.
- SEVERAL BREACHES**,  
 allowed under reg. gen. Hil. T. 4 W. 4, 479.  
 suggestions as to, 485.
- SEVERAL COUNSEL AND SPEECHES**, 907.
- SEVERAL COUNTS**. See *Declaration*. *Second Counts*.  
 origin of introduction of, 475.  
 costs of, how allowed, *id.*  
 rule avoiding, 64.
- SEVERAL PLEAS**. See *Pleas*.  
 general regulations respecting, 455.  
 when to be allowed, 455, 461, 731.  
 illustrative instances, 457.  
 order for striking out same, 458.  
 consequences of retaining, *id.*  
 obtaining leave to plead same, 431.  
 mode of obtaining leave, 732.  
 when summons not necessary, 733.  
 practice as respects summons, *id.*  
 what double plea allowed, 734.  
 instances where disallowed, 734 to 737.
- SEVERAL SEPARATE SECURITIES**. (See Index, Part I., 121, 122.)
- SEVERANCE**. (See Index, Part I.)
- SEWERS**. (See Index, Parts I. IV.)
- SEWERS, COMMISSIONERS OF**. (See Index, Part IV.)
- SHAM DEMURRER**,  
 judge at chambers could not quash, 23.  
 but now may by express rule, 756.
- SHAM PLEADING**, 729. See *Pleas*.  
 defeated by 2 W. 4, c. 39.
- SHEEP**. (See Index, Part I.)
- SHEEP WALKS**. (See Index, Part I.)
- SHERIFF**. (See Index, Pts. II. IV.) *Capias*.  
 jurisdiction of, 4, 46.  
 judge in vacation may compel him to make an immediate return to process, 20, 46.  
 application of, for relief under interpleader act, 21, 620 to 627.  
 must be to Court in banc, *id.*  
 trial of debts under 20L by, 4, 21, 47.  
 return to writ of habeas corpus against, 27.  
 functions of, considered, 46, 48.  
 his liability for officer's misconduct, 46.  
 return to writ in vacation, 46, 62.  
 indorsement on executing writ of *capias*, 46.  
 his power as a judicial officer, *id.*  
 may preside as judge when debt under 20L., 46, 47.  
 his jurisdiction under writs of inquiry, 46.  
 in executing writs of *elegit*, *id.*  
 when he presides on trial of an issue of fact, *id.*  
 his certificate for applying for new trial, 47.  
 may stay immediate execution, *id.*  
 may permit amendments, *id.*  
 cannot certify to deprive plaintiff of costs, *id.*  
 must appoint a sufficient deputy, *id.*  
 with proper office within one mile of Inner Temple Hall, *id.*  
 on neglect, duty how enforced, *id.*  
 in case of delay, &c., liable for loss, &c., *id.*  
 when not liable, 47, 48.  
 notification of appointment of, 48.  
 must take oath, *id.*  
 transfer of process and prisoners to, *id.*  
 acknowledgment of, to outgoing sheriff, *id.*  
 auditing accounts of, *id.*  
 functions executed by under sheriff, *id.*  
 deposit with, in lieu of bail, 66, 366.  
 hour of seizure by, when material, 111, 112.  
 directions to, in writ, 185, 191.  
 forms of directions to, 187 to 189.  
 indorsement of service of writ by, 244.  
 consequences of neglect to do so, *id.*  
 service of writ of summons by. See *Summons*.  
 proceedings by, on writ of *distringas*. See *Distringas*.  
 return to process by. See *Returns*.  
 forms of returns by. See *Forms*.  
 form of warrant to his officer on a *distringas*, 313.  
 form of, on a *capias*, 351. See *Capias*.  
 proceedings by, on a *capias*. See *Capias*.  
 proceedings against, on bail bond, 389.  
 when liable on bail bond, 389, 390.  
 attachment against, 389.  
 consequences of refusing to take bail bond, 363, 390.  
 his liability if sureties insufficient, 390.  
 course of proceeding to fix sheriff, 390, 391.  
 duty of, on taking, 390.  
 duty of sheriff's officer on arresting defendant, 353 to 389, 390.  
 proceedings by, under interpleader act, 620 to 627, 21.  
 when not relieved by, 624.  
 duty of, on executing writ of inquiry, 674 to 677.  
 has like power to judge *ad nisi prius*, 676.
- SHEWING CAUSE**. See *Motions*. *Rule Nisi*.  
 against rule nisi, time for, 576, 577, 579.  
 what party to do so, 588.

when not advisable to do so in first instance, 578, 589.  
of necessity of obtaining office copy of rule nisi, 589.  
the like of office copies of affidavits, *id.*  
swearing affidavits before shewing cause, *id.*  
delivery of brief to counsel to shew cause, 591.  
requisite of brief, 592.  
conduct of counsel on shewing cause, *id.*  
formal objections when to be taken, 595.  
costs of, 579, 597 to 601.

**SHIPS.** (See Index, Parts I. II. IV.)

**SHIPS' REGISTRY.** (See Index, Part II.)

**SHORT NOTICE OF TRIAL,**  
what deemed such, 709, 776.  
general regulation respecting, 776.

**SHRUBS AND TREES.** (See Index, Part I.)

**SIGNATURE AND SEALING.** (See Index, Parts I. II.)

**SIGNING OF WRIT,** 222.  
what officer to sign, *id.*  
fee for signing, 225.

**SIGNING JUDGMENT,**  
cannot be before notice and demand of plea, 497, 507.

**SIMILITER,**  
when plaintiff may add it, 741.  
consequence of no similiter being joined, 743.  
form of, 744.

**SIMPLE CONTRACTS.** (See Index, Part I.)

**SIMPLICITY,**  
in framing new rules essential, 49.

**SINGLE JUDGE.** See *Practice Court. Chambers.*  
his jurisdiction in Practice Court, 12 to 17.  
See *Practice Court.*  
at chambers, 19 to 35. See *Chambers. Summons.*  
when should be resorted to, 20.  
when may act in matters not in his own Court, 22.  
his power in vacation, 24.  
during term, *id.*  
hours of attendance at chambers, 27.  
what business transferred to him, *id.*  
power of, to allow costs, 29.  
reasons for such power, 31.  
order of, when improper, 32.  
order, how enforced, 33.  
motion to set order aside, *id.*  
when orders conclusive, 35.

**SITTINGS,**  
in London and Middlesex prescribed, 91, 98.

**SIX MONTHS,**  
how construed, 107, 108.

**SIX YEARS.** (See Index, Part III.)

**SLANDER.** (See Index, Part II.)  
statement of words spoken, in brief, 849.

**SLANDEROUS WORDS.** (See Index, Part I.)

**SLAUGHTERING HOUSE.** (See Index, Part I.)

**SLAVE.** (See Index, Part I.)

**SMALL STEALINGS.** (See Index, Part III.)

**SODOMY.** (See Index, Part I.)

**SOLDIER.** (See Index, Part I.)

**SOLICITATION.** (See Index, Parts I. IV.)

**SOLICITOR.** (See Index, Parts II. III. IV.)  
commitment of, for disobeying order of Chancellor, 52.  
no action lies for such commitment, *id.*

**SOLICITOR AND ATTORNEY.** (See Index, Part III.)

**SOLVENT PARTNER,**  
joinder of copartner when bankrupt, 129, 130.

**SON.** (See Index, Part II.)

**SON ASSAULT DEMESNE.** (See Index, Pt. II.)

**SOUND,**  
mistake not altering, when material, 231.  
instances of, 231, 232.

**SPEAKER.** (See Index, Part IV.)

**SPEAR, DOG.** (See Index, Part II.)

**SPECIAL ASSAULT.** (See Index, Part I.)

**SPECIAL BAIL.** See *Bail.*  
proceedings in default of, 153.

**SPECIAL CASE.** (See Index, Part II.)  
enactment of 3 & 4 W. 4, c. 42, s. 25, respecting, 750.  
may be stated by consent without proceeding to trial, 63, 750.  
issue must be joined, 750.  
order of judge requisite, *id.*  
requisites to be observed in drawing up case, 751.  
when advisable not to consent to special case, *id.*  
cannot be turned into a special verdict, *id.*

**SPECIAL CONSTABLES.** (See Index, Part II.)

**SPECIAL DEMURRER.** See *Demurrer.*  
prescribed form of, 755.

**SPECIAL JURY.** See *Jury.*  
requisite inquiry as to qualification of, 795.  
practice and time of summoning, 800.  
costs of, 801.  
discharging rule for, 41, 802.  
general regulations respecting, 801, 802.  
judge's certificate for, 803.

**SPECIAL OCCUPANCY,** (See Index, Part I.)

**SPECIAL PLEADER.** (See Index, Part III.)

- SPECIALTIES.** (See Index, Part II.)
- SPECIAL TRAVERSES,**  
must conclude to the country, 743.
- SPECIFIC DELIVERY OF CHATTEL.** (See Index, Part II.)
- SPECIFIC RELIEF OR PERFORMANCE.** (See Index, Parts I. II. IV.)
- SPEECHES OF COUNSEL,**  
how regulated at nisi prius, 877 to 907. See *Trial*.  
when or not several, 907.
- SPIRITUAL COURT.** (See Index, Part IV.)
- SPOILIATION.** (See Index, Part IV.)
- SPRING GUNS.** (See Index, Part I.)
- STAG HUNTING.** (See Index, Part II.)
- STAKEHOLDER,**  
relief by, under interpleader act, 620, 622.
- STALE DEMANDS.** (See Index, Part II.)
- STAMP.** (See Index, Parts II. III.)
- STATUTE.** (See Index, Part I.)
- STATUTES.** (See Index, Parts I. II.)  
practice how regulated by, 50.  
when clear, Courts adopt similar construction of, *id*.  
otherwise if ambiguous, 50, 51.  
inexpediency of prescribing rules of practice by, 51, 52.  
deviations from, in practice, 51.  
affecting practice, judges should have power to modify, *id*.  
judges bound by, and cannot promulgate rules to modify, *id*.  
distinction between statutory regulation and rule of Court, 54, 72.  
amendment of, 54.  
improvements in practice by, enumerated, 59.  
giving effect to, 67.  
contrary decisions on 12 G. 1, c. 29, *id*.  
consequence of, *id*.
- STATUTE AGAINST FRAUDS.** (See Index, Part I.)
- STAYING JUDGMENT,**  
when single judge has power to, 20.  
when not, 26.
- STAYING PROCEEDINGS,** 511. (See Index, Part II.)  
suggestions as to, 511.  
summons of judge for, in vacation, 557.  
of obtaining summons for, before order, 557, 559, 580.  
summons how far a stay of, 559.  
when rule nisi should pray, 582.  
expediency of praying, pending application, 610.  
under interpleader act by sheriff or third party, 620 to 627.  
by bill of interpleader in equity, 627.  
by injunction, *id*.  
by bill of discovery, *id*.
- STAYING PROCEEDINGS—(continued.)**  
staying proceedings at law, 628.  
on ground of plaintiff's incapacity to sue, *id*.  
or ignorance of the proceeding, *id*.  
or injustice of his suing, 629,  
where penal or other statute not authorizing present proceedings, *id*.  
for want of authority to attorney to sue, *id*.  
on ground that no debt is due, 630.  
that several and concurrent actions pending for same cause, 631.  
in second action after former recovery or defect, 632.  
in order to render defence, &c. in equity, available, 632.  
that proceeding contrary to good faith, 633.  
or contrary to agreement, *id*.  
on ground that action frivolous, 634.  
or for too small a sum, *id*.  
until security for costs given when plaintiff abroad, 633.  
time of application, 634.  
general regulations respecting, *id*.  
course of proceedings to obtain security, 635.  
form of notice of motion for, *id*.  
the like when plaintiff insolvent, *id*.  
when not in a *qui tam* action, 636.  
in ejectment until residence of plaintiff stated, *id*.  
the like in *qui tam* actions, *id*.  
until payment of costs of prior action, *id*.  
under particular statutes, 637.  
in other cases without consent, *id*.  
when the Court or judge has no power to stay proceedings on unusual terms, *id*.  
cannot without consent, 638.  
though reasonable security offered, *id*.  
on payment of whole debt and costs, 660.  
when Court will impose terms, 691.
- STEALING PRIVATELY.** (See Index, Pt. I.)
- STIPULATED DAMAGES.** (See Index, Part II.)
- STIPULATIONS.** (See Index, Part III.)
- STOCKS.** (See Index, Parts I. II.)
- STOPPING IN TRANSITU.** (See Index, Part I.)
- STRANDED PROPERTY.** (See Index, Part II.)
- STRANGER.** (See Index, Part II.)
- STRIKING.** (See Index, Part IV.)
- STUDENTS FOR THE BAR.** (See Index, Part III.)
- SUBDIVISION COURTS.** (See Index, Part IV.)
- SUBMISSION TO ARBITRATION.** (See Index, Parts III.)
- SUBPENA,**  
practice on issuing, 828 to 832.  
full form of subpoena duces tecum, 829.  
to appear and give evidence in action, *id*.  
to search for and bring documents, *id*.



**SUBPENA**—(continued.)  
statement of consequences of disobedience, 830.  
time of service, 831.  
tender of expenses, 832.

**SUBPENA DUCES TECUM.** See *Subpæna*.

**SUBTRACTION OF TITHE.** (See *Index*, Part IV.)

**SUCCESSION.** (See *Index*, Part I.)

**SUCCESSORS.** (See *Index*, Part I.)

**SUFFERANCE.** (See *Index*, Part I.)

**SUGGESTIONS,**  
entry of, on record, in lieu of imparlance, 700, 701, 804, 805.  
suggested statement of a death, &c. since last pleading, 701.

**SUMMARY JURISDICTION.** (See also *Index*, Part IV.)  
where given to full Court, 16.  
where otherwise, single judge may act, *id.* 17.

**SUMMARY PROCEEDINGS.** (See *Index*, Part I.)

**SUMMING UP OF JUDGE,** 911. See *Trial*.

**SUMMONS.** See *Irregularities. Affidavit.*

1. of summary applications in general, 19 to 35, 554.
2. when proper, 555, 556.  
general regulations respecting, 19 to 36, 458, 555.
3. returnable before what judge, 556.  
concurrent jurisdiction of judges, 22 to 24, 556.
4. summons during vacation, 21, 22, 557.  
may be taken out in most cases of irregularities, *id.*
5. when to be supported by affidavit, *id.*  
mode of applying for, *id.*  
of obtaining immediate stay of proceedings, 558.  
when Court may act without an affidavit, 555, 556, 558.
6. form and substance of judge's summons, *id.*  
particularity to be observed in, *id.*  
relief to be prayed by, 559.  
consequences of asking too much, *id.*  
all existing objections to be stated, *id.*  
form of summons, 558.
7. how far a stay of proceedings, *id.* 559.  
in general not until returnable, 560.  
when judge may order in first instance, 558, 560.
8. how many summonses necessary before an order made, 561.  
general regulations respecting, *id.*  
now only two necessary, *id.*  
one summons for discharge of prisoner only necessary, *id.*  
or for delivering or taxing attorney's bill, *id.*  
one appointment for same suffices, *id.*
9. service of summons, *id.*  
before what time, 562.  
on whom, *id.*

**SUMMONS**—(continued.)  
affidavit of service, 562.  
form of same, *id.*  
of serving copies of affidavits, 563.  
notice of intention to attend by counsel, *id.*  
10. place of service, &c. under particular circumstances, *id.*  
general regulations respecting, *id.*  
attorneys to enter place of residence, *id.* 564.  
of fixing copy in office of Clerk of Pleas, *id.*  
personal service, when dispensed with, *id.*  
11. time of day of service, *id.*  
must be before nine at night, *id.*  
12. when not necessary to produce original summons, 565.  
13. of indorsing a consent, *id.*  
drawing up order on same, *id.*  
14. of attending judge, *id.*  
hearing summons, *id.*  
order thereon, 566.  
15. forms and terms of orders, drawing up a serving same, *id.*  
forms of, *id.*  
16. judge's power to award costs, 567.  
have in general a discretionary jurisdiction, *id.*  
when imperative to allow them, 568.  
17. order, how far conclusive, *id.*  
is so, unless rescinded or set aside, *id.*  
18. judge's order, when may be abandoned, *id.*  
19. making order rule of Court, *id.*  
20. setting same aside, when, 569.  
to obtain inspection of documents, 435.  
form of, *id.*  
for particulars of demand, 613.  
costs of second summons, how allowed, *id.*  
to strike out second count, 640.  
form of, and order, *id.*  
for inspection of annuity deed, 20.  
or to take a copy, *id.*  
should be before judge at chambers, *id.*  
practice of obtaining at nisi prius or on circuit, 45.  
power of judge over costs on, 68.  
how to be dated, 90.

**SUMMONS, WRIT OF.** See *Mesne Process*.

consideration what process to issue, 253, 254  
when plaintiff may abandon serviceable process and issue bailable, 254.

I. Requisites of writ and proceedings thereon, 255.

1. enactments and rules relating thereto, *id.*  
enactment of 2 W. 4, c. 39, *id.*  
prescribes form of, 154, 255, 256.  
either of the three courts may issue, *id.*  
requisites to be observed in, 202 to 255.  
rule of Mich. T. 3 W. 4, respecting, *id.*  
date and teste of, 202 to 212, 255.  
duration of writ of summons, 90, 255.
2. form and requisites of, 256.  
where one defendant, 154, 256.  
if several, 256.  
residence of defendant to be stated, *id.*  
to 181, 256.  
christian and surname of defendant, *id.*  
to 174, 256.

## SUMMONS, WRIT OF—(continued.)

- court to appear in, 193, 257.
- form of action, 194, 257.
- christian and surname of plaintiff, 198, 257.
- where several must be repeated, 202, n. (p), 257.
- name of chief judge or baron, 202, 257.
- date of issuing, *id.*
- memorandum on, 205, 257.
- indorsements on, 156, 208, 257.
- forms of, 257, 258.
- 3. when this writ preferable, 258, 259.
- 4. of several concurrent writs of, 259.
- costs not allowed on more than one, *id.*
- 5. practical proceedings on issuing of, *id.* 220, 221.
- obtaining full instructions to issue, 117 to 124, 259.
- filing with officer, 220, 260.
- precautions in case of loss of, 260.
- copies of, *id.*
- signing and sealing of, 223 to 225, 260.
- 6. service of, how to be made, 260.
- 1. of what copy, *id.*
- should be exact, *id.* 261.
- when deviation allowed, *id.*
- 2. by whom to be served, 262.
- need not be by sheriff's officer, *id.*
- plaintiff or attorney may serve, *id.*
- usually by clerk, *id.*
- requisites to be observed before serving, *id.*
- course when known irregularity exists, *id.*
- swearing to service of copy, 262, 263.
- form of affidavit, 291, note.
- 3. on whom to be served, 263.
- personal service, when required, *id.*
- in cases of corporations, 152, *id.*
- on hundredors, *id.*
- against several defendants, 263, 264.
- against husband and wife, 263.
- consequences of serving wrong person, 264.
- 4. time of service, *id.*
- duration of, limited by 2 W. 4, c. 39, s. 10, *id.*
- may be served at any hour of night, *id.*
- distinction between process and rules and orders, *id.*
- but service on Sunday, &c. void, 265.
- may be served between 10 Aug. and 24 Oct., *id.*
- service on wrong person void, *id.*
- effect of service on wrong person, *id.*
- does not vitiate writ, *id.*
- cannot be served on a person or witness attending court, *id.*
- void if before cause of action accrued, *id.*
- 5. place of service, *id.* 266.
- of service within 200 yards of county, 265.
- requisite in affidavit to set aside service, 266.
- 6. mode of service, *id.*
- must be personal, *id.* 267.

## SUMMONS, WRIT OF—(continued.)

- exact copy of writ must be delivered, 267.
- writ, if demanded, must be shown, *id.*
- refusal will render service irregular, *id.*
- what deemed personal service, *id.* 268.
- instances enumerated, 267 to 271.
- 7. indorsement of day of service, 244, 271.
- form of indorsement, 244.
- rule of Mich. T. 3 W. 4, respecting, 271.
- omission an irregularity, *id.*
- 8. indorsement of *non est inventus*, *id.*
- when essential, 271, 272.
- form of, 272.
- 9. proceeding on default, appearance, *id.*
- 10. of disputed service of, *id.*
- when Court will interfere, *id.* 273.
- requisite of affidavit denying personal service, *id.*
- of attorney's undertaking to appear, 273.
- forms of, *id.*
- enforcing same, *id.*
- II. Proceedings by defendant on service of, 274.
- 1. of demanding inspection of original writ, *id.*
- must be immediately, *id.*
- or within reasonable time, *id.*
- search for and examination of, *id.*
- 2. of demanding whether plaintiff's attorney had authority to sue, 275.
- proceedings on compliance or refusal, *id.*
- 3. of obtaining particulars of plaintiff's demand, *id.*
- 4. tender of debt without costs, *id.*
- when advisable, *id.*
- 5. discovery of irregularities, and taking advantage of same, *id.* See *Irregularities*.
- must be taken forthwith, *id.*
- what deemed a reasonable time, *id.* 276.
- reasons for not objecting to, 276.
- how to be taken advantage of, *id.* 277.
- requisite of affidavit to set aside proceedings for, 278, 279.
- forms of affidavits, 279.
- hearing rule, *id.*
- when Court will not interfere, *id.*
- when will impose terms, 280.
- making rule absolute, *id.*
- discharging rule, *id.*
- costs of application, *id.*
- 6. payment of the indorsed debt and costs, *id.*
- within what time must be made, *id.*
- 7. consequence of an offer to pay a sufficient sum and costs, and refusal of offer, 281
- course to be pursued in case of refusal, *id.*
- 8. time of appearance, 282.
- how enforced, 150.
- must be within eight days, 282.
- time how calculated, *id.*
- 9. mode of entering appearance by defendant or attorney, *id.* See *Appearance*.
- prescribed forms of, 283.
- by defendant in person, *id.*
- by his attorney, *id.*
- by plaintiff's attorney, *id.*
- requisites to be observed in these cases, *id.* to 285.

**SUMMONS, WRIT OF—***(continued.)*

proposed new form of appearance by defendant in person, 285.  
 the like, not stating residence of defendant, *id.*  
 like by attorney, &c. for two defendants, *id.*  
 what plea or act of defendant before appearance a nullity, *id.*  
 practical proceedings on entering, 286.  
 former proceedings on filing warrant to defend, *id.*  
 form of, as formerly filed, *id.*

**SUMMONS.** (See Index, Part III.)

offices to enter appearances, 286.  
 fees on appearance, 287.  
 consequences, *id.*  
 must correspond with process, *id.*  
 appearance for an infant, 288.  
 must be by guardian,  
   form of, 288, note.  
 proceedings to enable plaintiff to enter appearance  
   sec. stat. 288, 289.  
 necessary affidavit of service of process, 289.  
 forms of affidavits, 289 to 291. See *Forms.*  
 when should be sworn, 291.  
 before whom, *id.* 292.  
 swearing of, how enforced, 292.  
 affidavit of *personal* service essential, 291.  
 of requisites of affidavit, *id.*  
 how to enter appearance for defendant by plaintiff, 292.  
 consequences of mistake in entry of, 293.  
 time of entering, *id.*  
 course of practice on entering, 294, 296.  
 appearance entered by plaintiff must correspond  
   with process in names, &c. 295.  
   consequences of deviation, *id.*  
 of declaring on a writ of summons, 296.  
   cannot declare *de bene esse*, *id.*  
   prescribed form of, by Reg. Gen. Mich. T. 3  
     W. 4, r. 1, 296, 297, 454.  
 must precede writ of *distringas*, 299. See *Distringas.*  
 enforcing appearance to, by *distringas*, 150, 301  
   to 321. See *Distringas.*

**SUNDAY,**

execution of writ on, void, 75.  
 considered dies non, 104.  
 process non returnable on, *id.*  
 performance of act on, *id.*  
 when bill falls due on, *id.*  
 or notice of dishonor received on, *id.*  
 enactment of 20 Car. 2, c. 7, respecting, *id.*  
 service of process on, void, 75, 105.  
 when included in notices or rules, 105.  
 when time expires on, 110.  
 provision of 2 W. 4, c. 39, s. 11, respecting,  
   152.

**SUPERIOR COURT.** See *Court, In Banc.*

what so termed, 2.  
 acts to be transacted before, 5 to 7.  
 proceedings of, when valid, 6.  
 number of judges essential, *id.*

**SUPERSTITIOUS USES.** (See Index, Part IV.)**SUPPLEMENTARY AFFIDAVITS,**

not allowed on rule nisi without leave of Court,  
 36, 550.  
 this rarely given, 36.  
 reference to master, *id.* 37.

**SUPPRESSIO VERI.** (See Index, Part II.)**SURETIES.** (See Index, Parts I. III. IV.)

to bail-bond when released, 365.  
 duties of, on executing bail-bond, *id.*  
 must see that defendant puts in bail, *id.*

**SURETY BOND,**

form of particulars of demand in action on, 616.

**SURETY OF PEACE.** (See Index, Parts I. II.)**SURNAME,**

statement of, in writ, 165.  
 consequences of mistakes in, 165, 353, 3 Dowl.  
 678.  
 affidavit to account for, 166.

**SURPLUSAGE.** (See Index, Part III.)**SURREBUTTER,** 746.**SURREJOINDER,** *id.***SURRENDER.** (See Index, Parts I. II.)**SURVEYOR.** (See Index, Part II.)**SWEARING AFFIDAVIT.** See *Affidavit.*

before whom, 545.  
 general regulations respecting, *id.*  
 jurisdiction of judges concurrent, *id.*  
 power of commissioners when suspended, *id.*  
 reswearing of, when necessary, 549.  
 time of swearing, 553.

**TAIL.** (See Index, Part I.)**TAKING.** (See Index, Part II.)

**TAKING SHORT NOTICE OF TRIAL,** 708.  
 what notice deemed sufficient, 708, 709.

**TAXES.** (See Index, Parts II. IV.)**TAXING COSTS,**

notice and appointment for, 602.

**TECHNICAL OBJECTION.** See *Irregularities.*

when or not second motion for permitted, 574.  
 amendment of rule nisi for, when allowed, 583.  
 costs, how allowed if motion fails on, 600.  
 when or not proper to take, 510 to 512.

**TEMPERAMENT OF WITNESS.** See *Witnesses.*  
 propriety of ascertaining, 843.**TENANCY.** (See Index, Parts I. II.)**TENANCY IN COMMON.** (See Index, Part I.)**TENANT.** (See Index, Parts III. IV.)**TENANTS FOR LIFE.** (See Index, Part I.)**TENANTS FOR YEARS.** (See Ind. Pts. I. II.)**TENANTS FROM YEAR TO YEAR.** (See Index, Parts I. II.)

**TENDER.** (See Index, Parts II. III.)

- of rent, precise hour of making, when essential, 110, 111.
- of debt, without costs, when writ irregular, 275, 281.
- of expenses to witness, 832.

**TENDER OF AMENDS.** (See Index, Pt. III.)**TENEMENTS.** (See Index, Part I.)**TENURES.** (See Index, Part I.)**TERM.** (See Index, Part I.)**TERMS,**

- when imposed by Court on motions, &c. 601.
- how altered and affected by recent statutes, 89 to 113.
- distinction between, and vacation, 89.
- formerly of more importance, *id.*
- process formerly returnable in, *id.*
- enactments affecting, 90, 91.
- are now fixed, 90.
- prescribed commencement of each term, 91.
- essoign days of, *id.*
- provision respecting Easter Term, *id.*
- sittings at Nisi Prius after, *id.*
- return days of, 92.
- how affected by modern rules, 100, 101.
- what acts still to be transacted in term, 102.

**TESTAMENT.** (See Index, Parts I. II.)**TESTAMENTARY CAUSES.** (See Index, Pt. IV.)**TESTATOR.** (See Index, Part I.)**TESTE OF WRIT,**

- enactment of 2 W. 4, c. 39, s. 12, respecting, 152.
- form of requisites of, 202.
- of writ of distringas, 310.

**TESTIMONY.** (See Index, Part II.)**TESTIMONY OF WITNESSES.** See *Evidence.*

- Witnesses.*
- ascertaining of, 839.

**THEREWITH USED.** (See Index, Part I.)**THIRD PERSONS,**

- relief under interpleader act to claims by, 620 to 627.
- claims by, when barred, 625.

**THREATS.** (See Index, Part I.)**TIME.** (See Index, Parts I. II. III. IV.)

- of service of process, 143, 241, 264.
- how calculated, 107 to 113.
- judge cannot give, to pay debt, 11.
- obtaining, to put in bail, 372. See *Bail.*
- statement of, in declaration, 470.
- mistake in, aided after verdict, *id.*
- demurring to, when inconsistent, 463, 470.
- in respect to taking advantage of irregularities, 512. See *Irregularities.*
- of serving rules, &c. 100, 561 to 564, 583, 586.
- of applying to change venue, 650, 655. See *Venue.*

**TIME—(continued.)**

- giving time to pay debt, 663.
- of entering issue, 771, 772.

**TIME OF DECLARING.** (See *Declaration.*)

1. how soon formerly and at present plaintiff may declare, 436.
2. of declaring on serviceable process, 438.
3. on bailable process, 439.
4. of preparing to declare, unless debt, &c. paid within four days, 440.
5. of declaring *de bene esse* when not admissible, 441.
6. when declaration *de bene esse* absolute, 442.
7. form of proceeding, where delivered or filed *de bene esse*, *id.*
8. cannot declare between 10 Aug. and 24 Oct. *id.*
9. when declaration may be delivered, 443.
10. when plaintiff must declare, *id.*
11. time, how calculated, 444.
12. if no judgment of nonpros, plaintiff may declare within a year, 445.
13. obtaining further time to declare, 446; form of rule, 447.

**TIME FOR PLEADING.** See *Notice to Plead. Plea.*

- statement of, in notice, 499 to 502, 700.
- if no notice given, defendant need not plead, 499.
- if too little given, notice void, 500.
- of entering rule to plead, 503.
- form of entry, 504.
- of obtaining further time to plead in abatement, 703.
- the like in bar, 704.
- time, how calculated, 704, 710.
- order for, how obtained, 704.
- forms of summons and order for, 705.

**TIME OF ENJOYMENT.** (See Index, Pts. I. II.)**TITHES.** (See Index, Pts. I. IV.)**TITLE.** (See Index, Parts I. II.)**TITLE DEEDS.** (See Index, Part I.)**TITLE, DEFECT OF.** (See Index, Part III.)**TITLES TO PERSONALTY.** (See Index, Pt. I.)**TITLES TO REALTY.** (See Index, Part I.)**TITLE OF CAUSE,**

- statement of, in affidavit, 538.
- in a plea, 716.
- in replication, 743.

**TITLE OF COURT,**

- statement of, in affidavit, 537.
- must be stated accurately, *id.*
- in declarations, 454, 460, 463.
- in a plea, 716.

**TITLE OF DECLARATION.** See *Declaration.*

- in what Court, 454, 460, 463.
- of day of filing or delivering, 454, 460, 463.
- of a plea, 717.

**TOLLS.** (See Index, Part I.)

- TOLL-HOUSES, TURNPIKE-GATES, AND WEIGHING ENGINES.** (See Index, Part I.)
- TOMBSTONES AND MONUMENTS.** (See Index, Part I.)
- TORTS.** (See Index, Parts I. II. IV.)  
liability of executors for, 126.  
enactments respecting actions for, 40, 91.  
paying money into Court in certain actions for, 686.
- TRADE.** (See Index, Parts I. II.)
- TRADESMAN'S BILL,**  
stating proofs in action for, 858. See *Brief*.
- TRANSFER.** (See Index, Part I.)
- TRANSITU.** (See Index, Part II.)
- TRAVERSES,**  
when special, to conclude to the country, 743.
- TREATIES.** (See Index, Part IV.)
- TREES.** (See Index, Part III.)
- TREES AND SHRUBS.** (See Index, Parts I. II.)
- TRESPASS.** (See Index, Part I.)  
declarations in *quare clausum frangit*, 460, 470, 1.  
statement of abutments in, 428, 429, 460, 470.  
reg. gen. H. T. 4 W. 4, respecting, 471.  
object of rule, *id.*  
pleas in, 728, 729.  
general regulations respecting, *id.*
- TRESPASSERS.** (See Index Parts I. II.)
- TRIAL.** See *Preparing for Trial.*  
*at bar,*  
enactment respecting, 40, 91.  
preparing for, 838 to 865. See *Preparing for Trial.*  
examination of witnesses before, 839 to 845.  
See *Witnesses.*  
delivery of brief before, 847 to 864. See *Brief.*  
consultation before, 864, 865. See *Consultation.*  
discovery of fresh evidence before, 865. See *Evidence.*  
withdrawing record before, 870, 871.  
of the trial and its incidents, 866.  
1. general observations respecting, 866, 867.  
2. principal attorney's attendance requisite, 869.  
should attend early with witnesses, *id.*  
should secure attendance of junior counsel, *id.*  
should not try cause out of order, 870.  
when proper to withdraw record, 870, 871.  
of postponing trial, 871.  
3. object and utility of opening speeches, and advantage of a reply, 871, 872.  
practical rules on the subject, 872.  
4. of the right to begin, *id.*  
in general, counsel who has to prove the affirmative of the issue begins, 872, 873.  
exceptions in actions for personal injury, 874.  
limit of these exceptions, 875.
- TRIAL—(concluded.)**  
in actions of replevin, 876.  
of ejectment, 877.  
of defences under statute giving the general issue, *id.*  
when defendant offers to make admissions on trial, *id.*  
incorrect ruling of judge no ground for new trial, *id.*  
5. of the junior's opening the pleadings, *id.*  
duty of, as connected with the trial, 878.  
taking notes by, 879.  
the like by attorney, *id.*  
6. of the leading counsel's opening speech, 880.  
1. general considerations respecting same, *id.*  
2. the several parts of such speech, 881.  
1. the plaintiff's claims, 881 to 884.  
consequence of omitting part of same, *id.*  
2. statement of plaintiff's expected evidence, 884.  
3. anticipating points of law, 885.  
4. of expected defence, 886.  
observations thereon, *id.*  
5. counsel's privilege of speech, 887.  
how qualified, *id.*  
6. duty of junior counsel to attend to opening speech, 888.  
the like of attorney, *id.*  
giving hints, if any omission, *id.*  
7. of the plaintiff's counsel giving evidence, &c. *id.*  
usual course of adducing same, 888, 889.  
8. of defendant's counsel examining witness on the voir dire, 889.  
objecting to competency of same, *id.*  
or mode of examination, *id.*  
mode of objecting, 889, 890.  
course if admissibility of evidence doubtful, 890.  
9. examination of witnesses in chief, *id.*  
1. usual course of, *id.*  
2. right of leader to take examination of witness out of hands of junior, 891.  
3. modes of examining in chief, 892.  
what questions may be put, *id.*  
must be pertinent to issue, *id.*  
must not be too leading, 892, 893.  
leading questions when permitted, 893, 899.  
exceptions thereto, 894, 895.  
4. order of proof, 895.  
5. whether counsel can discredit his own witness, and how, 896.  
10. of the cross-examination of witnesses, 897.  
1. of the right to cross-examine, *id.*  
2. what disparaging questions may be put, 899.  
3. mode of cross-examination, *id.*  
what leading questions may be put, 893, 899.  
11. of the re-examination of witnesses, 901.  
12. of calling back a witness, *id.*  
13. of acquittal of one of several defendants at the close of defendant's case, 902.

## TRIAL—(continued.)

14. the speech of defendant's counsel, 903.
  1. in general, *id.*
  2. of calling evidence in support of a defence *id.*
  3. when no statement of new facts in favour of a defendant to be made, 905.
15. of several defendants defending separately, 907.
  - several counsel for each, *id.*
  - separate speeches to the jury for each, *id.*
16. of examining witnesses in direct contradiction of the evidence in chief, 908.
17. of giving evidence in reply, 909.
  - speeches and proceedings thereon, *id.*
18. of the reply or concluding speech to the jury, *id.*
19. of the judge's summing up, 911.
20. his direction to the jury respecting costs, 913.
21. of objecting to summing up of judge, time of objecting, 914.
22. misdirection of judge, when or not a ground of motion for new trial, 915.
23. of the jury withdrawing, 916.
  - of discharging jury, 917.
  - of withdrawing a juror, *id.*
24. of the verdict. See *Verdict*.

TRIAL, notice of, 773 to 784. See *Notice of Trial*.

## TRINITY TERM,

commencement and duration of, 91.

## TROVER. (See Index, Part II.)

staying proceedings in, where goods are restored, 281, 691 to 693.

## TRUCKS. (See Index, Part I.)

## TRUSTEES. (See Index, Parts II. IV.)

## TRUSTS. (See Index, Parts I. II. IV.)

## TURNPIKE GATES. (See Index, Part I.)

## TURNPIKE ROADS. (See Index, Part I.)

## TWENTY POUNDS,

jurisdiction of sheriff when debt under, 47

## TWENTY YEARS. (See Index, Part I.)

## UMPIRE. (See Index, Part III.)

## UNCERTAINTY. (See Index, Part II.)

UNDERSHERIFF. See *Sheriff*.

sheriff must appoint, 47, 48.  
 with office within one mile of Inner Temple Hall, 47.  
 liability and functions of, 47, 48.  
 delivery of writ of *feri facias* to, 47.  
 usually an attorney of experience, 48.  
 may preside on trials of writs of inquiry, &c., 47, 48.  
 should have good legal knowledge, 48.

## UNDERTAKING,

of defendant's attorney to appear to writ, 240, 273, 367.  
 forms of, 240, 273, 368. See *Forms*.  
 should be in writing, 273, 367.  
 enforcement of, by attachment, 367, 368.

## UNDERWOOD. (See Index, Part I.)

## UNINFORMED MIND,

objection to witness on account of, 810,

## UNNATURAL OFFENCES. (See Index, Pt. I.)

## UNNECESSARY MATTER,

jurisdiction of court to strike out, 473, 474.

## UNQUALIFIED PERSON. (See Ind., Pt. III.)

## USAGE,

practice of Courts, how regulated by, 55.

## USEFUL SCIENCES. (See Index, Part III.)

## USES AND TRUSTS. (See Index, Parts I. II.)

## USUAL TERMS,

meaning of those words, 705.

## USURY. (See Index, Parts I. III.)

## VACATION,

judges formerly sat in banc in, 8.  
 though judgment delivered in term, 8, 9.  
 when single judge may stay judgment in, 20.  
 or compel sheriff to return process, 20, 46, 61.  
 delivery of declaration in, when irregular, 21.  
 writ of habeas corpus in, 23.  
 when single judge may bail in, *id.*  
 could not quash demurrer in, *id.*  
 aliter now, 756.  
 when he cannot act in, 24, 66.  
 when business of term transferred to judge in vacation, 27.  
 when writ expires in, 46.  
 how affected by recent statutes and rules, 89 to 113.  
 formerly few proceedings in, 89.  
 sittings at *nisi prius* in, 91, 98.  
 proviso for trial at bar in, 91.  
 judgment on indictments in, 92.  
 justification of bail in, *id.*  
 trial of ejectment in, and immediate execution, 92, 94, 984.  
 the like as to writ of inquiry, 93, 99.  
 return to writs of inquiry in, 93, 674.  
 execution after verdict in, 93, 984.  
 alteration of, by 2 W. 4, c. 39, . . . 95, 924.  
 when plaintiff may issue writ and proceed to judgment in, *id.*  
 appearance or bail above in, 96.  
 exception as to proceedings between 10th. August and 24th October, 96 to 98.  
 time for transacting business during circuits, 98.  
 jury process and writs of inquiry may be tested in, 99.  
 and made returnable immediately, *id.*  
 judge's order for return to process in, *id.*  
 how altered and affected by modern rules, 100 to 103.  
 distinction between, and term, 101.  
 form of notice of putting in bail in vacation, 380.

staying proceedings, 557. See *Staying Proceedings*.

**VAGRANT ACT.** (See Index, Part II.)

**VALUATION.** (See Index, Part II.)

**VARIANCES.** See *Irregularities*.

amendments of, should be liberally allowed, 63, 261, 480, 481, 923.

in copy of writ when it vitiates, 75, 229, 304, 311.

**VEGETABLES.** (See Index, Part I.)

**VENDOR AND PURCHASER.** (See Index, Part I. II.)

**VENIRE FACIAS JURATORES,**

form of writ of, 797.

to whom to be directed, 798.

**VENUE.** See *Declaration*.

rule avoiding repetition of, 64.

statement of, by reg. gen. Hil. T. 2 W. 4, 453.

variance in, not a waiver of bail, *id.*

statement of, in margin, when sufficient, 459, 460, 464, 470.

in actions of trespass, 460.

time for pleading, how affected by, 500.

applications to change the venue, 646.

when application is of course or not, 646 to 648.

when must be special, 648.

requisite of affidavit, 648, 652.

in local actions under 3 & 4 W. 4, c. 42, s. 22, . . . 649.

difference between ordinary and special application, 650.

time of application in ordinary cases, 650, 1.

practice in ordinary cases, 651.

requisites of affidavit in these cases, 652.

by whom affidavit to be sworn, *id.*

form of affidavit, *id.*

discharging order or rule, if improperly obtained, 653.

of plaintiff's undertaking to give material evidence in original county, 654.

what a compliance with such undertaking, *id.*

what deemed material evidence, 655.

form of rule to change venue in term time, 654.

of judge's order in vacation, 655.

to retain venue on usual undertaking, *id.*

time of applying on special grounds, *id.*

cannot be until after plea, 656.

requisite affidavit in support of application, 657.

special rule nisi or summons, *id.*

costs, when to be paid, 658.

**VERBAL ADMISSIONS.** (See Index, Part II.)

**VERBAL SLANDER,**

statement of, in brief, 849. See *Brief*.

**VERDICT,**

immediate execution after, when granted, 93.

at nisi prius, 924. See *Trial*.

by what consideration to be governed, 908, 909.

of jury stating reason for verdict, *id.*

counsel not allowed to question jury as to, *id.*

of the right to know what precise issue the jury find, 921.

of compelling plaintiff to enter verdict on one count, *id.*

of applications to correct verdict, 922.

other incidents, 922, 923.

of executions immediately after verdict, 924 to 926.

**VERMIN.** (See Index, Part II.)

**VICARAGE.** (See Index, Part I.)

**VICE CHANCELLOR,** Court of. (See Index, Pt. IV.)

**VIVA VOCE.** See *Evidence*.

examination of witness, 810, 816.

when master may examine parties, 7.

**VIEW,**

when proper, 803.

what writ for, should contain, *id.*

costs of, when allowed, *id.*

how obtained, *id.*

**VOID,**

distinction between, and irregular, 75.

**VOIR DIRE,**

examining witnesses, 889. See *Trial*.

**VOLUNTARY ADJUSTMENTS.** (See Index, Part I.)

of an action, how enforced, 662.

rule of Court to enforce same, *id.*

attachment thereon, 663.

caution to be observed in giving time, *id.*

**VOLUNTARY BOND.** (See Index, Part I.)

**VOLUNTARY CONVEYANCES.** (See Index, Part I.)

**VOTING, RIGHTS TO.** (See Index, Part I.)

**WAGES.** (See Index, Parts I. IV.)

**WAGGON WAY. ROADS.** (See Index, Part I.)

**WAIVER OF FORFEITURE.** (See Index, Parts I. II.)

**WAIVER OF IRREGULARITIES.** See *Irregularities*.

**WAIVING PLEA.** See *Plea*.

leave of Court necessary, 722.

**WALLS.** (See Index, Part I.)

**WANT OF FORM.** (See Index, Part III.)

**WARD.** (See Index, Parts I. II.)

**WARNINGS,**

form of, to defendant in writ, 155, 200, 206.

on each side pending action, 422.

**WARRANT.** (See Index, Parts II. IV.)

- WARRANTS OF ATTORNEY.** (See Index, Parts II. III. IV.)  
 to prosecute or defend, 117.  
 when must be filed, *id.*  
*cognovit* when preferable to, 664.  
 rules and decisions respecting, 669.  
 requisites of, 669 to 671.
- WARRANT OF JUSTICES.** (See Index, Part III.)
- WARRANT TO ARREST.** See *Arrest. Capias.*  
 where obtained, 350.  
 proceedings thereon, 350, 351.  
 form of, 351.  
 delivery of, to officer, 352.  
 his duty thereon, 353.  
 of arrest and incident, 353 to 359. See *Arrest. Capias.*  
 production of, to defendant, 358.  
 indorsement of arrest on, 150, 160, 243, 244, 359.
- WARRANTS TO DEFEND,**  
 former proceedings as to filing, 286.  
 form of, *id.*
- WARRENS.** (See Index, Parts I. II.)
- WASHHOUSE.** (See Index, Part I.)
- WASTE.** (See Index, Parts I. II.)
- WASTES.** (See Index, Part II.)
- WATCHING BRIEF,**  
 when to be given, 863.
- WATER.** (See Index, Part I.)
- WATERCOURSES.** (See Index, Part I.)
- WAYLEAVES.** (See Index, Part I.)
- WAYS.** (See Index, Part I.)
- WEAKNESS OF INTELLECT.** (See Index, Part II.) and see *Witness.*
- WEAPON, DANGEROUS.** (See Index, Part II.)
- WEIGHING ENGINES.** (See Index, Part I.)
- WEIGHTS AND MEASURES.** (See Index, Part II.)
- WHARFS.** (See Index, Part I.)
- WIFE.** (See Index, Parts I. II.)  
 action by, in name of a husband, 129.  
 his indemnity from costs, *id.*  
 service of declaration in ejectment on, 263.  
 service of process on, when husband abroad void, *id.*  
 cannot be witness for husband, 810.
- WILL OR TESTAMENT.** (See Index, Parts I. II. IV.)
- WILL, TENANCIES AT.** (See Index, Part I.)
- WINDOWS.** (See Index, Parts I. II.)
- WITHDRAWING RECORD,**  
 when proper to do so, 870, 871.
- WITHDRAWING DEMURRER, 761.**
- WITNESSES.** (See Index, Parts I. II. III.)  
 See *Evidence. Trial.*  
 expenses of bringing from abroad discretely in master, 37.  
 inquiry into evidence of, 807, 808.  
 rules respecting, 808.  
 examination of, 810, 821, 822.  
 1. *viva voce*, 810.  
 2. by interrogatories, 810, 816.  
 3. incompetency of, 810.  
 enumeration of persons incompetent, 810, 811.  
 objection to, on account of interest, 811, 812.  
 statutory exceptions as to, 814 to 816.  
 decisions thereon, 816, 817.  
 professional conduct towards witnesses before trial, 821.  
 who to examine, 822.  
 mode of examination, *id.*  
 Scotch law of recognition of, 823.  
 improving education of, when practicable, 823.  
 releasing witness when necessary, 827, 842.  
 requisite number of witnesses, 827.  
 compelling appearance of, 828.  
 of subpoenaing witnesses, 829.  
 form of subpoena, *id.*  
 time of serving subpoena, 831.  
 tender of expenses to, 832.  
 instructing witness as to time and place of trial, *id.*  
 when privileged from arrest, 330.  
 final examination of, before trial, 839.  
 how to be examined, *id.*  
 consequent utility of examination, 839 to 842.  
 releasing or removing interest of, 842.  
 consideration of character, &c. of each witness, 843.  
 apprising counsel thereof, *id.*  
 propriety of instructing or directing witness, 843 to 845.  
 conduct of, before trial, 845.  
 the like pending or after trial, *id.*  
 stating evidence of, in brief, 847. See *Brief.*  
 consultation on evidence of, 864, 865. See *Consultation.*  
 examination of, on trial, 869 to 893. See *Trial.*  
 when plaintiff can discredit his own witness, 896.  
 cross examination of, 897.  
 re-examination of, 901.
- WOMAN.** (See Index, Parts I. II.)
- WOODS AND UNDERWOOD.** (See Index, Part I.)
- WORDS.** (See Index, Part I.)
- WORK AND MATERIALS,**  
 form of notice disputing sufficiency of, 837.
- WORKS.** (See Index, Part II.)
- WOUNDS.** (See Index, Part II.)
- WOUNDING AND MAYHEM.** (See Index, Part I.)
- WRECK.** (See Index, Parts I. II. IV.)



**WRITS.** See *Memo Process*.

return to, in vacation how enforced, 20, 46, 61, 62.

ancient forms of, considered, 145.

five several writs substituted by 2 W. 4, c. 39, 147.

outline of regulations respecting, 148.

object of legislature respecting, 149.

uniformity of process act, 150 to 156.

prescribed forms of, 154 to 156.

operation of 2 W. 4, c. 39, as to, 156, 162.

enumeration and consideration of, 158.

now considered commencement of action, 159.

rules of Court respecting, 159.

examination of parts and requisites of, considered, 75, 163 to 152.

irregularity in indorsement of, 73 to 75.

when void, and consequence, 75, 237.

return days of, how altered by recent statutes, 89 to 95, 192.

when to be tested in term, 102.

forms and requisites of, 163 to 252. See *Memo Process*.

irregularities in, 227, 237, 276, 368, 369, 517. See *Irregularities*.

time of objecting to same, 517, 518.

**WRIT OF CAPIAS.** See *Capias*.

form of, 155.

memoranda to be subscribed, 155.

warning to defendant, *id*.

indorsements on, *id*.

commencement of declaration on, 454.

**WRIT OF DETAINER.** 156. See *Detainer*.

commencement of declaration on, 454.

form of writ, 156.

**WRIT OF DISTRINGAS.** See *Distringas*.

form of, 154.

notice to be subscribed thereto, *id*.

**WRIT OF INQUIRY,**

execution of, before sheriff, 46.

his certificate for new inquiry, 93, 94.

objection to, when or not waived, 521.

recent enactments respecting, 674 to 676.

may be returnable in vacation, 93, 94, 674.

when immediate judgment and execution may be had, *id*.

ascertaining truth of breaches on, 675.

assessing damages thereon, *id*.

return to writ of, *id*.

power of sheriff on executing writ, 676.

of issuing writ of, 678.

of summoning a good jury, *id*.

notice of inquiry, *id*.

continuance thereof, *id*.

countermand thereof, *id*. 679.

execution of writ, 679.

**WRIT OF INQUIRY—(continued.)**

attendance of counsel, 679.

recent decisions respecting, *id*.

**WRIT OF SUMMONS.** See *Summons*.

form of, 154.

memoranda on, *id*.

indorsement before service, *id*.

the like after service, *id*.

appearance to, *id*.

commencement of declaration on, 454.

irregularities in objecting to same, 227, 237, 276, 368, 369, 517. See *Irregularities*.

**WRITER OR CLERK.** (See Index, Part III.)**WRITTEN CONTRACT.** (See Index, Part I.)**WRITTEN DOCUMENTS,**

admission of, in evidence, 63, 817.

proceedings requiring admissions of, 818.

costs of refusal, *id*. to 821.

form of notice requesting admission of, 818.

subpoena duces tecum to produce, 829.

enforcing inspection of, 433 to 435, 619, 620.

statement of, in brief, 851. See *Brief*.

**WRITTEN EVIDENCE.** 810. See *Brief. Evidence. Interrogatories*.

power of judges to make regulations respecting admission of, 817.

**WRITTEN RETAINER.** 115. See *Retainer*. (See also Index, Part III.)**WRONGFUL POSSESSION.** (See Index, Part III.)**WRONG NAME,**

suing defendant by, 165, 166.

form of affidavit accounting for, 166.

deed signed in, 167.

consequences of arresting defendant by, 353.

See *Arrest. Capias*.

**WRONG PERSON,**

consequences of serving process on, 264.

of arresting, and consequences, 353. See *Arrest*.

*Capias*. 3 Dowl. 678.

**YARDS AND COURTS.** (See Index, Part I.)**YEAR.** (See also Index, Part I.)

how construed, 107, 108.

how computed, before judgment of non pros can be signed, 443.

**YEAR AND A DAY,**

how construed, 107.

**YEAR TO YEAR.** (See Index, Part I.)

THE END.

LONDON :

C. ROWORTH AND SONS, BELL-YARD,

TEMPLE-BAR.

## MR. CHITTY'S OTHER WORKS.

---

**A TREATISE on the PRACTICE of the LAW**  
IN ALL ITS DEPARTMENTS; with New Forms, &c. &c. Parts  
I. II. III. IV. and V.

N.B. The *Third Part*, price 16s., which is particularly adapted for the use of *Magistrates*, as regards Proceedings by *Information* and *Conviction*, &c. may be purchased separately.

The *Fifth* and *Sixth Parts*, containing all the recent Alterations in the *Practice* of the Courts of King's Bench, Common Pleas, and Exchequer, may also be purchased separately.

**A CONCISE VIEW of the PRINCIPLES, OBJECT, and UTILITY of PLEADINGS**, and the New Rules of Pleading; intended for the use of Students, as the first or preliminary Essay on the Subject: with the Practice as to Amendments of *Variances* upon Trials at Nisi Prius and before Sheriffs. Price 5s.

**A PRACTICAL TREATISE on MEDICAL JURISPRUDENCE**, with so much of Anatomy, Physiology, and Pathology, and especially as regards the several Senses and Intellectual Faculties, as is essential to be known by all Lawyers: with Explanatory Plates. Price One Guinea.

*Preparing for Press,*

**The SIXTH EDITION of CHITTY'S TREATISE**  
on PLEADING, altered and adapted to the recent Alterations and Improvements, and with a great Number of New Precedents, Declarations, Pleas, and Replications.

**BURN'S JUSTICE**, by MR. CHITTY, Senior, and MR. THOMAS CHITTY, greatly enlarged and improved: with New Heads, and a great Increase of Precedents.



